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THE  
FEDERAL REPORTER.

VOLUME 67.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

MAY—JULY, 1895.

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FEDERAL REPORTER, VOLUME 67.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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FIRST CIRCUIT.

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 HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.  
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 HON. AMOS M. THAYER, CIRCUIT JUDGE.  
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 HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.  
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 HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.  
 HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.  
 HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.  
 HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.  
 HON. ELMER B. ADAMS, DISTRICT JUDGE, E. D. MISSOURI.<sup>4</sup>  
 HON. HENRY S. PRIEST, DISTRICT JUDGE, E. D. MISSOURI.<sup>5</sup>  
 HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.  
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 HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.  
 HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.  
 HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

<sup>1</sup>Commissioned January 21, 1895.

<sup>3</sup>Commissioned March 1, 1895.

<sup>2</sup>Resigned January 21, 1895.

<sup>4</sup>Commissioned May 17, 1895.

<sup>5</sup>Resigned May 17, 1895.

## NINTH CIRCUIT

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HON. JOSEPH MCKENNA, CIRCUIT JUDGE.

HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.

HON. ERSKINE M. ROSS, CIRCUIT JUDGE.<sup>6</sup>

HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.

HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.<sup>6</sup>

HON. OLIN WELLBORN, DISTRICT JUDGE, S. D. CALIFORNIA.<sup>7</sup>

HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.

HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.

HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.

HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.

HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

<sup>6</sup>Commissioned Circuit Judge February 22, 1895.

<sup>7</sup>Commissioned March 1, 1895.

## ORDER OF COURT.

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### UNITED STATES CIRCUIT COURT OF APPEALS

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#### Fifth Circuit.

The Honorable JAMES W. LOCKE, Senior District Judge, not being able to attend, it is ordered by the court that the Honorable JOHN BRUCE, Judge of the District Court of the United States for the Northern and Middle Districts of Alabama, is designated and assigned to sit in this court as a member thereof during the present session.

November 19, 1894.

"Ordered that for the next term commencing on the third Monday in November, 1895, the Honorable ALECK BOARMAN, Judge of the Western District of Louisiana, be, and he is hereby, designated to sit during the months of November, December, January, and February, and the Honorable EMORY SPEER, Judge of the Southern District of Georgia, be, and he is hereby, designated to sit during the months of March, April, May, and June, whenever, by reason of the absence of the circuit justice or either of the circuit judges, the presence of a district judge shall be necessary to constitute a full bench."

June 20, 1895.



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# CASES

## ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

---

OLDS WAGON WORKS et al. v. BENEDICT.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1895.)

No. 518.

**1. REMOVAL OF CAUSES—RIGHT OF INTERVENER TO REMOVE.**

An intervener who introduces himself into a pending action in a state court, solely to assist in its defense and to protect himself against a liability for indemnifying the original defendant, can confer no jurisdiction on the federal court that the original defendant could not confer.

**2. SAME.**

One J., a citizen of Nebraska, executed a bond to one D., also a citizen of Nebraska, to pay him the damages he might sustain by reason of the attachment of his property in a suit brought against D. by the O. Co., an Indiana corporation. The attachment having been dissolved, D. sued J. on the bond in a court of the state of Nebraska. The O. Co. filed an intervening petition, asking to be made a party, on the ground that it was primarily liable for the damage by the attachment. This petition having been granted, the O. Co. applied for the removal of the cause to the federal court, on the ground of local prejudice, and it was accordingly removed to that court, where a judgment was afterwards rendered for the plaintiff. *Held*, that the cause was improperly removed, since the obligee in the bond was entitled to pursue his remedy in the state courts, and the O. Co., intervening voluntarily, came into the state court subject to the disabilities of the defendant.

**3. FEDERAL COURTS—JURISDICTION—STIPULATION.**

Two other bonds were afterwards given to D., upon appeals taken in the same case, in one of which the O. Co. was principal and four citizens of Nebraska were sureties, and in the other the O. Co. was principal and three other citizens of Nebraska were sureties. Actions on both bonds were afterwards brought by D., and the action on the first bond was removed by the O. Co. to the federal court, on the ground of local prejudice, but no motion was made to remove the second action. While the actions on the attachment bond and the two appeal bonds were pending, the parties stipulated that they should be consolidated and tried as one action, in the federal court, where judgments were afterwards entered for the plaintiff in the first and third actions. *Held*, that the federal court was without jurisdiction to render any judgment in the action on the second appeal bond, in which no motion to remove had been made, the stipulation of the parties being incapable of conferring such jurisdiction.

In Error to the Circuit Court of the United States for the District of Nebraska.

These were three actions by D. M. Benedict against J. C. Benedict, the Olds Wagon Works, E. T. Huff, C. T. Boggs, Frank P. Lawrence, J. M. Burks, C. W. Mosher, and A. T. King, on three bonds executed, respectively, by the defendants or some of them, which actions were consolidated by stipulation and heard as one. The plaintiff recovered judgment on two of the bonds in the circuit court. Defendants bring error.

G. M. Lambertson, for plaintiffs in error.

J. W. Deweese (F. M. Hall, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**SANBORN**, Circuit Judge. The plaintiffs in error bring this writ to reverse a judgment against them in the circuit court, which was the result of a trial to a jury as one, of three actions which had been consolidated by a stipulation of the parties before the trial. At the outset they challenge the jurisdiction of the circuit court to try either of these actions or to render the judgment of which they complain. The actions arose and proceeded as follows: On November 5, 1887, the plaintiff in error J. C. Benedict, a citizen of the state of Nebraska, executed a bond to the defendant in error, D. M. Benedict, who was also a citizen of the state of Nebraska, conditioned to pay him the damages, not exceeding \$2,800, which he might sustain by reason of the attachment of his property in an action brought against him on that day in the district court of Hitchcock county, Neb., by the Olds Wagon Works, a corporation of the state of Indiana. On March 7, 1892, D. M. Benedict brought an action upon this bond in the district court of Hitchcock county against the obligor, J. C. Benedict. On April 11, 1892, J. C. Benedict filed his answer, and the Olds Wagon Works filed an intervening petition to the effect that it was primarily liable for all damages that resulted from the attachment, and asked to be made a party defendant in that action. On June 2, 1892, this petition was granted, and the wagon works was made a party defendant. On October 13, 1892, the wagon works filed a petition and affidavit for the removal of this action to the circuit court on the ground of prejudice and local influence, and the court made an order of removal. On November 22, 1892, D. M. Benedict, the plaintiff in that action, moved to remand it to the district court of Hitchcock county. On December 21, 1887, the district court of Hitchcock county dissolved the attachment. Thereupon the Olds Wagon Works sued out of the supreme court of the state of Nebraska a writ of error, and on January 17, 1888, the Olds Wagon Works, J. M. Burks, Frank P. Lawrence, C. W. Mosher, and A. T. King executed a bond to the defendant in error, D. M. Benedict, conditioned to pay all damages, not exceeding \$28,000, which he might sustain by the prosecution of said writ of error in the event that the said attachment should be finally discharged by the supreme court. On the hearing in the supreme court the order dissolving the at-

tachment was not sustained, and the attachment proceedings were remanded to the district court for further proceedings. 41 N. W. 254, 43 N. W. 108. On March 7, 1892, D. M. Benedict brought an action upon the bond last mentioned against the obligors named therein. On April 11, 1892, A. T. King filed his answer to the petition in that case, but none of the other defendants answered. All the defendants in that suit except the Olds Wagon Works were citizens of the state of Nebraska. On April 29, 1892, the Olds Wagon Works filed a petition and affidavit for the removal of this action to the circuit court on the ground of prejudice and local influence, and that court granted an order of removal. On May 10, 1892, D. M. Benedict, the plaintiff in that action, made a motion to remand the same to the state court, and on December 3, 1892, that motion was denied. On October 21, 1889, the district court of Hitchcock county again dissolved the attachment, and the Olds Wagon Works sued out another writ of error from the supreme court of Nebraska to the district court, and the wagon works, E. T. Huff, Frank P. Lawrence, and C. T. Boggs made a bond to the defendant in error, D. M. Benedict, dated December 7, 1889, conditioned to pay all damages, not exceeding \$16,000, sustained by him in consequence of the prosecution of such writ of error, in the event that the order of attachment should be finally discharged by the supreme court as unlawfully obtained. D. M. Benedict brought an action in the district court of Hitchcock county on this bond against the obligors in it above named. All these obligors except the wagon works were citizens of the state of Nebraska. No application to remove or order for the removal of this action to the circuit court was ever made.

On January 15, 1893, all the parties to these three actions stipulated that they should be consolidated into one action and tried as such in the circuit court for the district of Nebraska. Thereupon D. M. Benedict filed an amended petition in that court, in which he set forth the three bonds on which the three actions above mentioned were founded, alleged a breach of the conditions of each of them, and demanded judgment for \$10,000. All the obligors in the various bonds joined in a single answer. On these pleadings the case was tried to a jury, which found a verdict for \$2,800 against J. C. Benedict, the obligor in the first bond, in favor of the obligors in the second bond, and against the Olds Wagon Works, E. T. Huff, Frank P. Lawrence, and C. T. Boggs, the obligors in the third bond, for \$7,271.14. On a motion for a new trial the court required the defendant in error to remit a portion of this verdict, and rendered judgment against the obligors in the third bond for \$6,127, and against the obligor in the first bond for \$2,800.

One result of these proceedings is that a controversy over a bond between two citizens of the same state has been tried and determined in a federal court on the suggestion of a corporation of another state, that was not a party to the obligation nor a necessary party to the action, that it was primarily liable for the damages the obligor had agreed to pay, and that there was prejudice and local influence against it in the county where the obligee had elected



to sue the obligor on his bond. Another result is that a controversy over a bond between the obligee therein, a citizen of Nebraska, on one side, and the joint obligors therein, a citizen of Indiana and four citizens of Nebraska, on the other side, has, by agreement of the parties, been tried and adjudicated by a federal court when there was no ground for the exercise of its jurisdiction stated or alleged by any party in any part of the record.

To state these facts is to dispose of this case. Take the first action upon the attachment bond. The Code of Civil Procedure of the state of Nebraska required, as a condition precedent to the issue of the order of attachment, that a resident of that state, who was worth double the sum to be secured, should execute an undertaking to the defendant in error here, to pay him all damages which he might sustain from the attachment if the order was wrongfully obtained. Consol. St. Neb. 1891, §§ 4710, 5365. Pursuant to these provisions of this Code, J. C. Benedict alone made the bond. When there was a breach of the condition, the defendant in error sued him on this bond in the state court. Both the parties to this action were citizens of Nebraska, and there was no ground on which the federal court could acquire jurisdiction of it. It was not material that the Olds Wagon Works was primarily liable for the same damages secured by the bond, nor that it had indemnified the obligor against loss. The defendant in error was not bound to pursue the wagon works, and was not suing it. The statute gave him the security of the bond of the citizen of his state, and the law gave him the right to enforce that security in the courts of that state. He proceeded to do so. If the wagon works saw fit to intervene to defend this obligor upon the bond and to protect itself, it came into the state court, where it asked to intervene, in the right of, and subject to the disabilities of, the defendant. It had no greater right to remove the action to the federal court than had the obligor in the bond it had provided for the defendant in error, and that was no right whatever.

An intervener who introduces himself into a pending action in a state court solely to assist in its defense, and to protect himself against a liability for indemnifying the original defendant, can confer no jurisdiction on the federal court that the original defendant could not confer. *Burnham v. Bank*, 3 C. C. A. 486, 489, 53 Fed. 163, 10 U. S. App. 485, and cases cited; *Railway Co. v. Twitchell*, 8 C. C. A. 237, 59 Fed. 729, 730; *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472; *Cable v. Ellis*, 110 U. S. 389, 396, 4 Sup. Ct. 85; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265.

Take the third cause of action upon which the judgment for \$6,127 was rendered below. On January 15, 1893, an action was pending in the district court of Hitchcock county, Neb., upon this cause of action, in which the plaintiff, the obligee in the bond, was a citizen of the state of Nebraska, and four of the five defendants, who were joint obligors on this bond, were citizens of the same state. That action is still pending in the state court of Nebraska. It could not be removed on the ground that there was a controversy wholly between citizens of different states, because there was but

one indivisible controversy between the plaintiff and defendants in that case, and four of the defendants were citizens of the same state with the plaintiff. *Blake v. McKim*, 103 U. S. 336; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726; *Bellaire v. Railroad Co.*, 146 U. S. 117, 13 Sup. Ct. 16; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367.

It is said that this action might have been removed to the federal court by the Olds Wagon Works, a citizen of the state of Indiana, on the ground of prejudice and local influence. That may or may not be true. If it is true, such removal could have been effected only by spreading upon the record proof of such prejudice and local influence satisfactory to the circuit court as required by the act of congress. 25 Stat. p. 433, c. 866, § 2; Supp. Rev. St. p. 612; *P. Schwenk & Co. v. Strang*, 8 C. C. A. 92, 59 Fed. 209. Nothing of this character was done. No attempt was made to spread upon the record any showing of prejudice or local influence in this case. The stipulation of June 2, 1893, that this action should be consolidated and tried with others in the federal court, recited no ground for its removal, and neither stipulated nor admitted the existence of the facts essential to give that court jurisdiction. "An action pending in a state court cannot be removed to the circuit court, by a written stipulation, where there is nothing in the latter or in the record to show that, by reason of the subject-matter, or the character of the parties, the latter court can take cognizance of it." *Bank v. Calhoun*, 102 U. S. 256. The stipulation was therefore entirely futile. It took nothing from the state court and conferred nothing upon the federal court. The courts of the United States are courts of limited jurisdiction. Their jurisdiction depends upon the existence of certain essential facts, such as a controversy between citizens of different states in which the matter in dispute exceeds \$2,000, or an action arising under the constitution of the United States, or an action between citizens of the same state claiming lands under grants of different states. In order to give one of these courts jurisdiction, the essential facts must not only exist, but they must affirmatively appear upon the record of the case. In every case in which they do not appear, it is the duty of the trial court and of the appellate courts to see that the action is dismissed or remanded to the proper state court as soon as this condition of the record is called to their attention. No consent, agreement, or estoppel can confer jurisdiction upon a federal court to hear or determine any case in which the essential jurisdictional facts do not appear from the record. These rules are fundamental. They are settled by repeated adjudications of the supreme court, and they are fatal to the judgment in this case. *Railway Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510; *Hancock v. Holbrook*, 112 U. S. 229, 232, 5 Sup. Ct. 115; *Carnegie, Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10, 10 U. S. App. 454.

The jurisdiction of the court below was invoked by the plaintiff in error the Olds Wagon Works, and for that reason the defendant in error is entitled to recover his costs in this court and in

the court below. The judgment below must be reversed, with costs against the plaintiffs in error for want of jurisdiction in the circuit court, and the case must be remanded to the circuit court, with directions to that court to remand the action upon the attachment bond to the state court, and to enter a judgment against the plaintiffs in error for the costs in the circuit court; and it is so ordered.

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CITY OF YSLETA v. CANDA et al.

(Circuit Court, W. D. Texas, El Paso Division. April 16, 1895.)

No. 190.

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—HOW SHOWN.

It is not necessary, in order to give a right to remove a cause from a state to a federal court on the ground of diverse citizenship, that the diversity of citizenship should appear upon the face of the plaintiff's pleading, but it is sufficient if it is made to appear by the petition for removal. *Chappell v. Waterworth*, 15 Sup. Ct. 34, 155 U. S. 102, and *Postal Tel. Cable Co. v. Alabama*, 15 Sup. Ct. 192, 155 U. S. 482, distinguished.

2. SAME—CITIZENSHIP OF MUNICIPAL CORPORATION.

A municipal corporation is a citizen of the state creating it, for the purposes of removal of causes to the federal courts.

This was an action by the city of Ysleta, Tex., against Charles J. Canda, William Strauss, and Simeon J. Drake, brought in the district court of El Paso county, Tex. The defendants removed the cause to the United States circuit court. Plaintiff moved to remand.

Ernest Dale Owen and Z. B. Clardy, for plaintiff.

Davis, Beall & Kemp, for defendants.

MAXEY, District Judge. This is a suit of trespass to try title, brought by the plaintiff against the defendants, in the district court of El Paso county, Tex., to recover a tract of land situated in said county. It is alleged in the original petition filed by the plaintiff in the state court that it, the city of Ysleta, is a municipal corporation in the county of El Paso and state of Texas, duly organized and incorporated under the laws of said state. The defendants seasonably and in proper form filed a petition and bond in the state court for removal of the cause to this court, the petition for removal alleging that the plaintiff is a citizen of the state of Texas, and that the defendants are residents and citizens of the state of New York. In other words, the petition for removal, upon its face, shows that at the time the original petition of the plaintiff was filed in the state court, and at the date of the filing of the petition and bond for removal, the plaintiff was a citizen of the state of Texas, and the defendants citizens of the state of New York. The record was in due time filed by the defendants in this court. The plaintiff now makes a motion to remand the cause to the state court, on the following grounds, to wit:

"(1) That the plaintiff and defendants are not citizens of different states.

"(2) For the reason that the plaintiff is not a citizen of any state.

"(3) That the plaintiff's petition filed in the said district court of El Paso county does not on its face show any cause for the removal of said suit to the federal court, there having been no other pleadings filed in said cause, and there being nothing in the record, as being made before the removal of said cause, to show any valid reason for removing the same.

"(4) That the petition of defendants filed in the district court of El Paso county does not show cause sufficient for removal of said cause from said district court to this court."

The questions arising upon the first and second grounds of the motion are neither novel nor difficult. In the case of *Zambrino v. Railway Co.*, 38 Fed. 451, it was said by this court that:

"Whatever doubts may have been formerly expressed by the courts touching the citizenship of corporations for jurisdictional purposes (*Strawbridge v. Curtiss*, 3 Cranch, 267; *Bank v. Deveaux*, 5 Cranch, 61 et seq.), the question has been effectually set at rest by later cases, and is no longer open to controversy. The present doctrine, as settled by the supreme court, is 'that, where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.' *Steamship Co. v. Tugman*, 106 U. S. 120, 121, 1 Sup. Ct. 53; *Railroad Co. v. Kooontz*, 104 U. S. 12; *Railroad Co. v. Harris*, 12 Wall. 81, 82; *Paul v. Virginia*, 8 Wall. 178; *Muller v. Dows*, 94 U. S. 445; *Cowles v. Mercer Co.*, 7 Wall. 121; *Railroad Co. v. Wheeler*, 1 Black, 296, 297; *Marshall v. Railroad Co.*, 16 How. 314 et seq.; *Railroad Co. v. Letson*, 2 How. 497 et seq."

But the plaintiff insists that the rule above announced is only applicable to private corporations, and has no reference to corporations organized under state laws for municipal purposes. The case of *Cowles v. Mercer Co.*, supra, is decisive against the contention of the plaintiff. In that case, *Cowles*, who was a citizen of the state of New York, brought suit in the circuit court of the United States for the Northern district of Illinois against the supervisors of Mercer county, Ill. Mr. Goudy, representing Mercer county, in the supreme court, claimed in his brief that, although a private corporation might be deemed a citizen for jurisdictional purposes, yet the same rule would not apply to a municipal corporation. The court, speaking through Mr. Chief Justice Chase, disposed of the question in the following language:

"It has never been doubted that a corporation, all the members of which reside in the state creating it, is liable to suit upon its contracts by the citizens of other states; but it was for many years much controverted whether an allegation in a declaration that a corporation defendant was incorporated by a state other than that of the plaintiff, and established within its limits, was a sufficient averment of jurisdiction. And in all cases prior to 1844 it was held necessary to aver the requisite citizenship of the corporators. Then the whole question underwent a thorough re-examination in the case of *Railroad Co. v. Letson*; and it was held that a corporation created by the laws of a state, and having its place of business within that state, must, for the purposes of suit, be regarded as a 'citizen,' within the meaning of the constitution, giving jurisdiction founded upon citizenship. This decision has been since reaffirmed, and must now be taken as the settled construction of the constitution."

The concluding words of the chief justice, that "this decision \* \* \* must now be taken as the settled construction of the constitution," conclusively settles the point as to the citizenship of a municipal corporation. Why, then, pursue the discussion of a question which no controversy can reopen, in view of *Cowles v. Mercer Co.* and the large number of cases subsequently decided by the supreme court, arising between individuals and municipal corporations, in which the only possible ground of jurisdiction was that of diverse citizenship?

Counsel for plaintiff insists, under the third ground of the motion, that the suit is not removable unless the plaintiff, in its own statement of its cause of action, sets forth facts sufficient to confer jurisdiction upon the court, and that no deficiency in the plaintiff's statement in that respect can be supplied by the defendants in their petition for removal or any subsequent pleadings filed in the cause. This view is predicated upon a misapprehension of the real question decided by the supreme court in *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, and *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192. In the two cases last cited, removal of the causes was attempted on the ground that the suits arose under the constitution or laws of the United States, that fact first appearing in the petitions for removal; and in those cases it was held that the causes were not removable, for the reason that the original petitions of the plaintiffs, filed in the state court, failed to show, upon their face, that the suits arose under the federal constitution or laws. As before stated, diverse citizenship is the ground relied upon by the defendants to remove the case now before the court; and this class of cases is not embraced within the ruling of the supreme court above mentioned. Thus, it is said by Mr. Justice Gray in *Chappell v. Waterworth*, 155 U. S. 107, 15 Sup. Ct. 34, that:

"The question of removal is governed by the decision of this court in the last term, in *Tennessee v. Bank of Commerce*, 152 U. S. 454, 14 Sup. Ct. 654, by which, upon full consideration, it was adjudged that under the acts of March 3, 1887, c. 373 (24 Stat. 552), and August 13, 1888, c. 866 (25 Stat. 433), a case not depending upon the citizenship of the parties, nor otherwise specially provided for, cannot be removed from a state court into the circuit court of the United States, as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in the subsequent pleadings."

It thus appears that, where removal of a cause is sought on the ground solely of diverse citizenship, it is not necessary that the original petition filed by the plaintiff in the state court should, upon its face, show the jurisdictional facts; it being sufficient in such case that diverse citizenship be made to appear by distinct and proper averments in the petition filed for removal of the cause.

There being no other ground of objection urged by the plaintiff against the removal of this suit, it follows that the motion to remand should be overruled; and it is so ordered.

**CAPLES v. TEXAS & P. RY. CO. HOLLAND v. SAME. CRUZ v. SAME.**  
**(Circuit Court, W. D. Texas, El Paso Division. April 10, 1895.)**

Nos. 175, 178, and 187.

**1. REMOVAL OF CAUSES—COMPLAINT NOT SHOWING FEDERAL QUESTION.**

Under Act Aug. 13, 1888 (25 Stat. 433, § 2), a cause cannot be removed from a state to a federal court on the ground that it is one arising under the constitution, laws, or treaties of the United States, unless the fact so appears by the plaintiff's statement of his own claim.

**2. SAME—AMENDMENT OF PLEADING AFTER REMOVAL.**

Where the plaintiff's original pleading shows no ground for removal, the deficiency is not cured by an amended pleading, filed after the defendant has removed the cause.

**3. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.**

Whether the circuit court of the United States would have jurisdiction of a suit in which the plaintiff's complaint claims no right under the constitution or any law of the United States, and gives no intimation that any federal question will arise, merely because the defendant is a corporation organized under the laws of the United States,—quaere.

These were three actions brought against the Texas & Pacific Railway Company by William Caples, J. R. Holland, and Juan Cruz, respectively. They were originally brought in the district court of El Paso county, Tex., and were removed to the United States circuit court by the defendant. Plaintiffs moved to remand.

The three above-entitled suits were originally instituted in the district court of El Paso county, Tex. The first case was a suit brought by the plaintiff to recover damages of the defendant for wrongfully using and obstructing, by its trains, the public street, in El Paso, passing immediately in front of the plaintiff's residence property. Damages are laid at the sum of \$7,500. In the second case suit is brought to recover \$2,500 as damages sustained by the plaintiff on account of the negligence of the defendant in transporting certain cattle from the station of Pecos City to Midland, Tex.; it being alleged that 75 head of the cattle were killed in transit, and the remainder bruised and seriously injured. The third case is a personal damage suit to recover \$7,000, because of personal injuries inflicted upon the wife of plaintiff through the negligence of defendant's agents and servants in the management and operation of one of its trains in the city of El Paso. The original petitions filed in the three cases contain similar allegations as to the residence of the respective plaintiffs, and the incorporation of the defendant, which are substantially as follows: That each plaintiff is a resident of the state of Texas, and that the defendant is a corporation duly incorporated by law, and owns and operates a railroad within the county of El Paso, Tex. Neither one of the original petitions, directly or inferentially, alleges that the defendant is a corporation organized under an act of congress; nor will there be found in either one of them any mention of the constitution, or any law of the United States, or any mention of a claim of right asserted under either the federal constitution or a federal statute. The defendant seasonably and in proper form filed a petition and bond in each suit for the removal of the causes to this court. The petition for removal in each case shows upon its face that the amount in controversy is sufficient to confer jurisdiction upon the circuit courts. The ground upon which the defendant predicates its right of removal is that the suit in each case is one arising under the laws of the United States, and to show that fact the following allegations are made in the respective petitions: "That the Texas and Pacific Railway Company was and is a corporation duly organized and existing under and by virtue of the laws of the United States, to wit, 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other

purposes,' approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style, and title of said Texas Pacific Railroad Company was changed to the Texas and Pacific Railway Company. \* \* \* That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States constituting the charter of this defendant, and under which it was incorporated; that is to say, the said act of congress of the United States approved March 3, 1871, entitled, 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' and acts amendatory thereof and supplemental thereto, approved, respectively, on May 2, 1872, March 3, 1873, and June 22, 1874. That the above-entitled action is a civil suit arising under the laws of the United States of which the circuit court of the United States of the Western district of Texas is given original jurisdiction by act of congress, approved March 3, 1887, to wit, an act entitled 'An act to amend the act of congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes,"' and the act of congress approved August 13, 1888, entitled 'An act to correct the enrollment of an act approved March 3, 1887, entitled "An act to amend sections 1, 2, 3 and 10 of an act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes,"' approved March 3, 1875." In accordance with the prayer of the respective petitions, the state court ordered the removal of the suits to this court, in which the records were in due time filed by the defendant. Since the filing of the records in this court, amended petitions, in the first and third cases, and stipulations as to the taking of testimony in the second case, have been filed by the parties. But it is unnecessary to consider any of these, except the amended original petition filed by the plaintiff in the third case. In that case—Cruz against the defendant—the plaintiff made the following amendment in reference to the incorporation of the defendant, and his own citizenship: "That plaintiff resides in the city and county of El Paso, Texas, and is a citizen of the state of Texas, and was such citizen at the time of the institution of this suit and the removal of the same; that the defendant, the Texas and Pacific Railway Company, is a corporation duly incorporated by and under the laws of the congress of the United States, and that the said defendant owns and operates a line of railway in said El Paso county, and in the Western district of Texas aforesaid." In each case a motion to remand has been made on the ground that the "plaintiff's original petition in no way alleges or shows that this suit arises under the laws of the United States, and fails to allege any facts showing that this court has jurisdiction herein or that defendant had any right or authority in law to remove said cause to this court."

W. M. Coldwell, Falvey & Davis, A. G. Wilcox, and Leigh Clark,  
for plaintiffs.

Peyton F. Edwards, for defendant.

MAXEY, District Judge (after stating the case) delivered the following opinion:

As the defendant is a corporation owing its legal existence to acts of congress, removal of these causes is sought on the ground that they are suits arising under the laws of the United States. It is said by Mr. Chief Justice Fuller, speaking for the court, in *Railroad Co. v. Cox*, 145 U. S. 601, 12 Sup. Ct. 905, that:

"The Texas and Pacific Railway Company is a corporation deriving its corporate powers from acts of congress, and was held in *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, to be entitled, under the act of March 3, 1875, to have suits brought against it in the state courts removed to the circuit courts of the United States on the ground that they were suits

arising under the laws of the United States. The reasoning was that this must be so, since the company derived its powers, functions, and duties from those acts, and suits against it necessarily involved the exercise of those powers, functions, and duties as an original ingredient."

Under the act of March 3, 1875, § 2 (18 Stat. 470), either party to the suit, plaintiff or defendant, was entitled to remove a suit from a state court to the circuit court of the United States on the ground that the suit was one arising under the constitution or laws of the United States; and under that act it was held sufficient to justify a removal by the defendant that the record at the time of the removal showed that either party claimed a right under the constitution or laws of the United States (*Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 14 Sup. Ct. 654, citing authorities), whether the federal question, upon which the right of removal was made to depend was raised for the first time in the suit by the answer or plea of the defendant. *Metcalf v. Watertown*, 128 U. S. 589, 9 Sup. Ct. 173, citing *Railroad Co. v. Mississippi*, 102 U. S. 135, and other authorities. Under the act of August 13, 1888, § 2 (25 Stat. 433) the right to remove a suit from the state court to the circuit courts, on the ground that it is one arising under the federal constitution or laws, is limited to the defendant, and also to that class of suits of which the circuit courts are given original jurisdiction by the first section of the act. Thus it is said by Mr. Justice Gray, as the organ of the court, in *Tennessee v. Union & Planters' Bank*, 152 U. S. 461, 462, 14 Sup. Ct. 654, referring to the act of August 13, 1888:

"But the corresponding clause in section 2 allows removals from a state court to be made only by defendants, and of suits of which the circuit courts of the United States are given original jurisdiction by the preceding section; thus limiting the jurisdiction of a circuit court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that court by the plaintiff under the first section." "And by the settled law of this court," further says Mr. Justice Gray, at page 464, 152 U. S., and page 654, 14 Sup. Ct., "as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws."

In these three suits as filed by the plaintiffs in the state court no right is claimed under the constitution or any law of the United States, nor is there the slightest intimation that any federal question arises in them, nor in either one of them is any mention made of the constitution or laws of the United States. They are suits based upon the right of the plaintiffs to recover damages of the defendant by virtue of the negligence of its agents and servants, and under the general and familiar principles of the common law. Whether, therefore, this court would have original jurisdiction of these suits, admits, to say the least, of serious doubt, particularly in view of the case of *Tennessee v. Union & Planters' Bank*, *supra*. The decision of that question, however, not being absolutely necessary to the proper disposition of the motions to remand, its determination for the present will be reserved. These suits must be remanded to the state court on another ground. As already said, the original petitions of the plaintiffs suggest no federal question,



and the first averment or intimation that the suits arise under the constitution or laws of the United States is found in the petition for removal filed by the defendant in the state court. It appears from the authorities cited above that the suits could have been removed under the act of March 3, 1875, as that act, according to the construction placed upon it by the supreme court, authorized removal by the defendant, as has already been shown, although the federal question was raised for the first time in the suit by his plea or answer or in his petition for removal. A different rule, however, obtains under the act of August 13, 1888, which forbids the removal of a suit by the defendant, unless the fact that it is one arising under the constitution or laws of the United States appears by the plaintiff's statement of his own claim. Says Mr. Justice Gray, in *Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192:

"It is equally well settled that under the provisions above referred to of the existing act of congress no suit can be removed by a defendant from a state court into the circuit court of the United States as one arising under the constitution, laws, or treaties of the United States, unless the fact that it so arises appears by the plaintiff's statement of his own claim; and that a deficiency in his statement in this respect cannot be supplied by allegations in the petition for removal, or in subsequent pleadings in the case." *Tennessee v. Union & Planters' Bank*, supra; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Land Co. v. Brown*, 155 U. S. 489, 15 Sup. Ct. 357.

It therefore clearly appears that the defendant was not entitled to remove the first and second of these suits, but it is suggested by counsel that the third cause—*Juan Cruz* against the company—should be retained here, because the plaintiff has cured any deficiency appearing in his original petition, as to the existence of a federal question, by alleging, in his amended petition, filed in this court, that the defendant is a corporation deriving its existence and corporate powers and functions from the laws of the United States. The language of the court in *Cable Co. v. Alabama*, supra, furnishes a conclusive answer to this suggestion. "A deficiency in his statement, in this respect, cannot be supplied by allegations in the petition for removal, or in subsequent pleadings in the case." And that such deficiency in the plaintiff's original statement cannot be so amended in this court as to confer upon the court jurisdiction of a cause which was not properly removable when the petition and bond for removal were filed by the defendant in the state court, appears also clear by reference to the following authorities: *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9. For the reasons stated, the motions to remand these suits should be sustained, and the causes remanded to the state court at the cost of the defendant; and it is so ordered.

## BUSEY v. SMITH et al.

(Circuit Court, D. Indiana. March 27, 1895.)

No. 8,812.

## UNITED STATES COURTS—JURISDICTION—AMOUNT IN DISPUTE.

A statute of Indiana (Rev. St. Ind. 1881, § 2442; Rev. St. 1894, § 2597) provides that "the heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid." *Held*, that the liability of two or more heirs, devisees, or distributees of a decedent under this statute is several, and not joint, and, although another statute provides that they may be jointly sued, the United States circuit court has no jurisdiction of a suit against them unless the liability of each exceeds \$2,000.

This was a petition by Mary E. Busey against Hannah Smith, Eliza A. McCarty, Mansford Smith, and Samuel Smith, seeking to subject their shares of the estate of William Smith, deceased, to the payment of a debt claimed to be due the petitioner from said William Smith. Defendants moved to dismiss for want of jurisdiction.

Butler, Snow & Butler, for complainant.

Gould & Eldridge and Elliott & Elliott, for respondents.

BAKER, District Judge. Motion to dismiss for want of jurisdiction. The complainant alleges that she is, and for more than five years last past has been, a citizen of the state of Illinois, and that the defendants are citizens of the state of Indiana; that the defendant Hannah Smith is a widow and heir at law of William Smith, deceased, and that the defendants Eliza A. McCarty, formerly Eliza A. Smith, Mansford Smith, and Samuel Smith are the children and heirs at law of said decedent; that William Smith died in Carroll county, in the state of Indiana, in the month of March, 1889; that Samuel Smith and Franklin C. McCarty were duly appointed and qualified as administrators of the estate of the decedent; that as such administrators, under the orders of the circuit court of Carroll county, they sold all of the real estate of which William Smith died seised, and collected and converted all of the decedent's personal estate into money, and paid all the debts and liabilities of said estate; that the administration of the estate was finally settled by the order of said court on January 27, 1891; that, upon such final settlement, there remained in the hands of said administrators, properly applicable to the payment of the debts of the decedent, the sum of \$3,099.55, which sum, by the order of said court, was distributed among the defendants, as heirs at law of the decedent; that complainant is the owner of seven notes, copied into the bill, amounting, exclusive of interest, to the sum of \$2,446.55, executed by the decedent to Abner H. Bowen, and indorsed to her, which are due and unpaid; that the sum of money so distributed to the heirs of the decedent was and is justly and legally applicable to the payment of the indebtedness due to her upon said notes; that, by an act of the legislature of Indiana, the

heirs, devisees, and distributees of any decedent are liable to the extent of any money received by them from his estate to any creditor whose claim remains unpaid, and who six months prior to the final settlement of the estate was out of the state, provided that suit upon the claim is brought within two years after such final settlement; that complainant was out of the state during said period of time, and has been a nonresident of the state for five years last past, and that she brings this suit within two years after such final settlement; that section 2443, Rev. St. Ind. 1881 (section 2598, Rev. St. 1894), provides that suit upon such claim shall be brought by way of petition, and section 2449, Rev. St. Ind. 1881 (section 2604, Rev. St. 1894), provides that the heirs, devisees, and distributees having received the property may be jointly sued. Prayer that an accounting may be had, and that each of the defendants be decreed to pay into court such part of said sum of \$3,099.55 as was received by each of said heirs and distributees separately and severally, to be applied to the payment of the amount found due upon said notes. The defendants severally move the court to dismiss the bill, for the reason that the liability of each, as disclosed therein, is for a less sum than \$2,000, exclusive of interest and costs.

The liability of the defendants for the debts of the decedent is purely statutory. By the common law the heir is not liable for the debts of the ancestor. *Fisher v. Tuller*, 122 Ind. 31, 23 N. E. 523. The obligation upon which the suit against the heirs of William Smith is founded is based, not on the notes made by him, but upon the fact that they have, as his heirs at law, received money from his estate properly applicable to the payment of the debts of the decedent. This is evident from the following section of Rev. St. Ind. 1881 (Rev. St. 1894, § 2597):

"Sec. 2442. The heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant or out of the state; but such suit must be brought within one year after the disability is removed: provided, that suit upon the claim of any creditor out of the state may be brought within two years after such final settlement."

The liability of the defendants, as appears upon the face of the bill, read, as it must be, in connection with the foregoing statutory provision, is several, and not joint. There is no joint liability, for the reason that each heir is liable only to the extent of the money or property received by him from the decedent's estate. If one of the heirs should become insolvent, no one of the others can, in any event, be charged beyond the value of the property received by him for the debt of the ancestor.

The section creating the liability just quoted expressly provides:

"The heirs, devisees and distributees of a decedent shall be liable to the extent of the property received by them from the decedent's estate."

And the next section declares:

"And the costs of such suit shall be apportioned among the defendants according to the amount recovered of each of them."

If any doubt existed as to the meaning of the section just referred to, section 2447, Rev. St. Ind. 1881 (section 2602, Rev. St. 1894), is so clear and explicit that it leaves no room for construction or doubt. It reads:

"No more shall be recovered against any such defendant than his just proportion of any such debt, whether he has become liable therefor on account of real estate or any interest therein, or on account of personal assets, unless the others are beyond the reach of process, or unless, after due diligence, the amount cannot be recovered from the others who are liable with him; in which case he shall be liable therefor to the extent of the real and personal assets received by him."

The heir can in no event be held liable to any greater extent than the amount of real or personal property received by him from the ancestor; nor can he be charged to a greater extent than his pro rata share of the ancestral debt, unless one or more of the other heirs are insolvent or beyond the reach of process.

It is insisted, however, because a suit may be brought jointly against all the heirs, that the complainant may recover a joint and several judgment against all the defendants, and, as the aggregate amount recoverable from them exceeds \$2,000, the present bill is within the jurisdiction of the court. This contention seems to be unfounded. It is necessary to join all the heirs in order to obtain a decree fixing the several liability of each, but this does not vary or enlarge the extent of their several liability. The obligation of each still remains several, and not joint. Pothier, in his treatise on Obligations (Evans' Translation, London, 1806, p. 145, par. 261), says:

"An obligation is contracted in solido on the part of the debtors when each of them is obliged for the whole, but so that a payment by one liberates them all."

Clearly, each of the heirs in this case is not liable for the whole debt, and therefore their liability cannot be joint in whatever form the suit may be brought.

The complainant, in her prayer for relief, expressly recognizes that her cause of action against each is several, for she asks that each be decreed to pay the amount received by him. It is settled that neither codefendants nor coplaintiffs can unite their separate and distinct liabilities for the purpose of making up the amount necessary to give this court jurisdiction. *Henderson v. Wadsworth*, 115 U. S. 264, 276, 6 Sup. Ct. 40, and the cases there cited; *Rinard v. West*, 48 Ind. 159, 162; *State v. Pohl*, 30 Mo. App. 321; *McAllister v. Williams*, 23 Mo. App. 286; *Tennant v. Neal*, 20 Ill. App. 571; *Kellogg v. Olmstead*, 6 How. Pr. 487, 488; *Walker v. Deaver*, 79 Mo. 664, 679.

In *Walter v. Railroad Co.*, 147 U. S. 370, 373, 13 Sup. Ct. 348, it is said:

"It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that, when two or more defendants are sued by the same plaintiff in one suit, the test of jurisdiction is the joint or several character of the liability to the plaintiff. This

was the distinct ruling of this court in *Seaver v. Bigelow*, 5 Wall. 208; *Russell v. Stansell*, 105 U. S. 303; *Trust Co. v. Waterman*, 108 U. S. 265, 1 Sup. Ct. 131; *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. 846; *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419."

The liability of the heirs, as disclosed by the bill, is several, and not joint, by the express terms of the statute on which the right of action is based; and, as the liability of each is less than \$2,000, it follows that the court is without jurisdiction. The bill of complaint is therefore dismissed for want of jurisdiction, at the costs of the complainant.

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### NATIONAL STEAMSHIP CO. v. TUGMAN.

(Circuit Court, E. D. New York. March 19, 1895.)

#### REMOVAL OF CAUSES—JUDGMENT FOR COSTS IN STATE COURT—SET-OFF.

A state court, having denied a petition for removal, proceeded to judgment, and the case was taken on error to the supreme court of the United States. The latter court reversed the judgment, and remanded the cause with directions to accept the bond for removal and proceed no further. The state court then, in form, itself reversed the judgment, and entered judgment for costs. The case then proceeded in the federal court, and, after going to the supreme court of the United States, a judgment was finally entered, pursuant to its mandate. Afterwards a suit was brought in the federal court to have set off, against the judgment therein rendered, the judgment for costs so rendered by the state court. *Held* that, under the judiciary act of 1875 (18 Stat. 470), the state court had no authority to render an enforceable judgment for the costs therein incurred, but that the matter of taxation of costs accompanied the case into the federal court; and hence that the set-off could not be allowed.

This was a suit in equity by the National Steamship Company against Charles H. Tugman to have set off, against a judgment previously rendered in this court, the amounts of two judgments recovered in the courts of New York.

John Chetwood, for plaintiff.

Delos McCurdy, for defendant.

WHEELER, District Judge. This suit is brought to have set off against a judgment of this court, under a mandate from the supreme court of the United States in 1892, for \$7,549.59, a judgment of the superior court of New York in 1869 for \$126.86, and a judgment of the supreme court of New York in the case remanded from the supreme court of the United States, upon removal of it to this court, for costs, while pending there where it was brought, after petition for removal and before actual removal. The bill alleges residence without the state for three years since the judgment of the superior court, which the answer does not deny, and which seems, under the statute of the state, to avoid the presumptive bar of 20 years set up against that judgment. Code, N. Y. § 401.

The suit was removed from the state court under the act of 1875 (18 Stat. 470), which provided that all injunctions, orders, and other proceedings had in such suit prior to its removal should remain

in full force and effect until dissolved or modified by the court to which such suit should be removed; and "that the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." The proceedings in the supreme court of the state, after the petition for removal, had resulted in that judgment, which was reversed by the supreme court of the United States, and the cause was remanded, with directions to accept the bond for removal, and proceed no further with the case. A taxation of the costs in that court at \$108.34 accompanied the mandate. *Steamship Co. v. Tugman*, 106 U. S. 118, 123, 1 Sup. Ct. 58. The state court thereupon, in form, itself reversed the judgment, and rendered this judgment for costs, with an award of execution. By these provisions of the statute of the United States, these proceedings of the state court came with the case into this court to have given them the same effect as if they had taken place in this court. There was but one case. This taxation of or judgment for costs came with it into this court. In it there could be but one final judgment, which would be that in this court; and into that all the previous proceedings in all the courts in which the case had been pending, including all taxations of costs in each court, would be drawn and merged. These costs in the state court would stand like those in the supreme court of the United States, to be taxed, and, if taxable, allowed, or, if not, disallowed. Whether they were taxable or not is not now material, for they cannot now be passed upon here. No relief can be granted here in respect to them unless the taxation became an enforceable judgment of the state court as a separate thing, which it could not be, and also follow the case, as it had to, into this court. No reason is seen why the judgment in the superior court should not be set off against that in this court, nor why the set-off should not be decreed here, but without costs, because, without the other judgment, this court would have no jurisdiction, and in such case costs are not allowed. Rev. St. U. S. § 968.

Decree for plaintiff for set-off of the superior court judgment, without costs.

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**CAMFIELD et al. v. UNITED STATES.**

(Circuit Court of Appeals, Eighth Circuit. March 18, 1895.)

No. 517.

**APPEAL—REHEARINGS BY CIRCUIT COURT OF APPEALS.**

The fact that a case decided by the circuit court of appeals is one of great importance is not sufficient ground for granting a rehearing, when there is no suggestion that any consideration or authority entitled to weight has been overlooked; and this is especially true in cases arising under the constitution and laws of the United States, as to which the decisions of that court are not made final by section 6 of the judiciary act of March 3, 1891 (26 Stat. 826).

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a proceeding brought by the United States against Daniel A. Camfield and William Drury, under the act of February 25, 1885 (23 Stat. 321), to compel the removal of an inclosure of public lands. In the circuit court an exception to the answer was sustained, and, defendants having failed to plead further, a decree was entered against them. 59 Fed. 562. Defendants thereupon appealed to this court, and upon February 20, 1895, the decree was affirmed. 66 Fed. 101. Defendants have now moved for a rehearing.

James W. McCreery, A. C. Patton, H. E. Churchill, and Charles W. Bates, for appellants.

Henry V. Johnson, U. S. Atty., for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A motion for a rehearing has been filed in this case, based on two grounds: First, that this court has no jurisdiction of the case on appeal, because the case involved the constitutionality of an act of congress; and, second, because the case is one of great importance. With reference to the first point, it may be said that the record lodged in this court did not disclose any constitutional question. In the circuit court the government excepted to the sufficiency of a certain defense which was pleaded in the answer. The exception was sustained, whereupon, for failure on the part of the defendants to plead further, a decree was entered in favor of the United States. The defendants then prayed an appeal to this court, and assigned for error that the circuit court erred in sustaining the exceptions to the answer. The validity of the act of congress of February 25, 1885 (23 Stat. 321 c. 149), was not challenged by the assignments of error, nor by counsel for the appellants, either in their oral or written argument. With reference to the second point of the motion, it will suffice to say that while the case may be, and doubtless is, one of much importance to the appellants, yet it is not suggested that the court has overlooked any consideration or authority which should have had weight in the decision of the cause. Inasmuch as the case arises under the constitution and laws of the United States, and the decision thereof by this court is not made final by section 6 of the act of March 3, 1891 (26 Stat. 826, c. 517), no reason is perceived why a rehearing should be granted, and the motion in that behalf is therefore denied.

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LUCKER v. PHOENIX ASSUR. CO. OF LONDON.

(Circuit Court, D. South Carolina. April 6, 1895.)

PRACTICE IN CIVIL CASES—PRODUCTION OF BOOKS AND PAPERS.

The right given by Rev. St. § 724, to compel the production of books and papers in action at law, is not limited to requiring their production at the trial, but the court may, in its discretion, grant an order for inspection, with permission to copy, prior to the date of the trial.

This was an action by Minnie Lucker against the Phoenix Assurance Company of London, a corporation under the laws of Great Britain. The case was removed to this court from a court of the state of South Carolina, and a motion to remand was heretofore denied. 66 Fed. 161. The case is now heard upon a rule obtained by plaintiff to require defendant to produce certain papers for inspection, with permission to copy the same.

Bryan & Bryan, for motion.

Trenholm, Rhett & Miller, contra.

SIMONTON, Circuit Judge. A suit at law is pending in this court between the parties named in the caption. The case being on the docket, and the day of trial approaching, the plaintiff, on affidavit, states that there were in the hands of defendant certain writings, which contain evidence pertinent to the issue in the cause; obtained a rule on it to show cause why they should not be produced and lodged with the clerk of this court, or allow plaintiff to inspect and take copies of them. The defendant has made return to the rule, expressing its full consent and readiness to produce the writings in question at the trial, but not before. The motion is made under section 724, Rev. St., which reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of non-suit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section controls the practice, notwithstanding any state practice in the premises. *Gregory v. Railroad Co.*, 10 Fed. 529. There is conflict of opinion on this question among the circuit courts, and no authoritative decision by the supreme court, or any of the circuit courts of appeals. Judge Curtis in *Iasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993, granted an order in such a case for production of the papers at the trial. "This is the whole extent of the law. It does not enable parties to compel the production of papers before trial." The circuit court (Clifford and Lowell, JJ.), in *Merchants' Nat. Bank v. State Nat. Bank*, Fed. Cas. No. 9,448, say, "Perhaps the order must be that the books and papers must be produced at the trial." In *Triplett v. Bank*, 3 Cranch, C. C. 646,<sup>1</sup> a party was not allowed to examine books before trial to see if they contained pertinent evidence. On the other hand, in *Central Bank v. Tayloe*, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548, the court ordered the papers to be produced before trial. And in *New York* the court pursued the same course. *Jacques v. Collins*, 2 Blatchf. 25, Fed. Cas. No. 7,167. In *Gregory v. Railroad Co.*, 3 McCrary, 374, 10 Fed. 529, the order was made for inspec-

<sup>1</sup> Fed. Cas. No. 14,178.



tion of books before the trial. The practice cannot be said to be settled. The language of the section, strictly construed, may not seem to contemplate production before trial. And the imposition of the penalty of a nonsuit in one case, and judgment by default in the other, for the nonproduction of papers,—a penalty which cannot be incurred or be enforced until the coming on of the trial,—would seem to confirm this conclusion. But undoubtedly the power conferred on the court is a discretionary power. And the court, in the exercise of it, may direct production before trial. *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. 201, Fed. Cas. No. 9,448. It seems, however, to be a narrow construction of section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery, and to secure at law the purposes which such a bill would subserve. All the cases recognize this. On a bill for discovery, necessarily, the facts sought would be discovered before trial. Besides this, the section says that this order for the production of papers can be made "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The proceedings in chancery require the deposit of the papers called for with the clerk, who, upon notice, produces them in court, or before the examiner. 2 Daniell, Ch. Prac. 1388, 1389.

There is another point of view of this matter. The object of a motion of this character is to enable a party, in advance of the submission of the issue, to ascertain the strength or weakness of his case. An inspection of the papers may end the case. It is better to reach this result in this short way than in the middle of a trial.

Having regard to the special circumstances of this case, it seems best to grant the order in question. All the papers whose inspection is sought are part of the case of the plaintiff, pertinent to the issue, and essential in sustaining her complaint. They are documents furnished by her to the defendant to secure her loss under a policy of insurance. They were prepared and submitted before the counsel now managing the case were retained. The inspection desired may have a material bearing on the future of the cause.

It is ordered that the defendant, at the mutual convenience of the counsel in this cause, submit to the counsel for the plaintiff for inspection, without parting with the possession of them, and with the privilege to plaintiff's counsel of copying them, or any of them, as he may be advised, the following papers, to wit: Proofs of the loss of Minnie Lucker, dated March 7, 1894, and also dated May 4, 1894, and also affidavits of Minnie Lucker, dated 1894; certificates of loss by Elias Venning, trial justice, J. W. Polite, notary public, and P. M. Pepper, notary public; plans and specifications of the buildings insured, by Simons & Holmes, architects; written examination by Minnie Lucker, 6th July, 1894; letters from Minnie Lucker, J. C. Mehrtens, and C. W. Lucker, from the 3d of February, 1894, to the 1st of June, 1894, to L. R. Warren and F. M. Butt, agents of the defendant insurance company.

## PORTER et al. v. JAMES et al.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1895.)

No. 251.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—FRAUD.**

Where an assignment purports to convey all the debtor's property to be equally distributed among all his creditors, and the same is accepted by the assignee and by a majority in number, if not in amount, of all the creditors, it cannot be held fraudulent on its face, although it contains provisions which might be objectionable if the assignment were one granting preferences; nor can such assignment be set aside because of the fraudulent intent of the assignor, not shown to have been participated in by the assignee and the accepting creditors.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a suit by D. T. Porter and G. W. Macrae, partners under the firm name of Porter & Macrae, against I. L. James and J. E. Penney, to cancel an assignment for benefit of creditors, and procure the application of certain moneys to a judgment obtained by complainants against defendants. The circuit court entered a decree dismissing the cause, and complainants appealed.

I. L. James was doing a mercantile business at Hillsboro, Ala., and Porter & Macrae, of Memphis, Tenn., were his commission merchants. As such they furnished him money and goods; and on the 1st of December, 1891, he owed them something over \$8,000. At this juncture, W. J. Booker, agent for Porter & Macrae, visited James, to get a settlement or security for the debt. James proposed to sell certain property to Booker in payment of the debt, but, his authority being limited, he asked time to go to Memphis, and lay the matter before his firm, and answer, and was to telegraph to James on the 2d of December, and return and close the matter if acceptable to the firm. While Booker was on this mission, on the said 2d of December, 1891, and after he had sent the telegram, James made an assignment purporting to convey all of his property; at least, pretended to assign it all. J. E. Penney was named as assignee, and on Booker's return he learned of what had happened. Attachment was afterwards sued out and levied on all the property, and the personalty was sold under attachment, and the realty was being advertised by the assignee when this bill was filed. The appellants claim that the assignment is void upon its face, because its provisions impress it as fraudulent in law; also, that it was fraudulent in fact, as shown by the facts proven at the trial. The facts relied upon to support the latter contention were, among others, that while the assignment purported to convey all the property and assets of the assignor, particularly set out and described in the schedule annexed thereto, yet, in fact, it did not convey all of the debtor's property, and that various items of real estate, personal property, and credits were not included therein, and that this property constituted so large a proportion of his assets as to preclude any assumption that the omission was unintentional; that, after the attachment was served, the assignor, with the consent of the assignee, took from the property, presumably in the possession of the assignee, \$1,000 worth of property, the same not having been theretofore selected and set apart from the other property as exempt, contrary to the law of Alabama; that the assignee is peremptorily directed in the deed to pay the creditors the amounts stated in the schedule, while the proofs show that \$692.60 of this amount was fictitious and not due, for which reason this direction would operate to divert this much property from the creditors; that over \$3,000 of creditors was wholly omitted from the schedule; and that the claims of creditors who were named were cut down to the extent of nearly \$2,500 less than was actually due them. It was further contended that the proofs showed that

the assignor prepared for an assignment for some time before making the same, and intended to do so at no distant day, and that his proposition to sell a portion of his property to pay the complainants' debt was not made in good faith, but to deceive them, until he could make his assignment, and place his property out of their reach.

The provisions of the deed of assignment which were alleged to show that it was fraudulent and void upon its face were: That it directed the assignee, if in his judgment such a course was deemed advisable, to carry on the mercantile business for a reasonable time in the assignee's store, until the stock of goods then in the said store were sold and disposed of. This provision, it was claimed, placed it in the discretion of the assignee to continue the business for an indefinite time, which might be extended for a long period by him for the purpose of continuing his own compensation; further, directed the assignee to pay to certain creditors the sums therein set down, and reserve the overplus to the grantor, notwithstanding that nearly \$2,500 was cut out of the amounts due to the creditors named; operated as a reservation by the debtor of some control over the property conveyed, whereby the deed was prevented from being such an absolute and unconditional assignment as the law required. Also, that the deed expressly provided that no part of the real estate, which constituted the most valuable part of the property assigned, should be sold or disposed of until after all the personal assets had been exhausted, which provision it was claimed would require the prosecution of suits upon notes and accounts to judgment and collection, or return of nulla bona; thus leading to indefinite delay, amounting to a hindrance and delay of the sale of the real estate, such as would make the instrument fraudulent and void.

The deed of assignment was as follows:

"The State of Alabama, Lawrence County. This indenture, made the second day of December, 1891, between I. L. James, of Hillsboro, Ala., of the first part, and J. E. Penney, of Hillsboro, Ala., of the second part, witnesseth: That whereas, the said party of the first part is indebted to divers persons in divers sums of money, which, by reason of sundry losses and misfortunes, he has become unable fully to pay, and is desirous to provide for the payment thereof as far as possible by an assignment of all his property and effects: Now, in consideration of the premises, and of the sum of one dollar to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, the said party of the first part hath granted, bargained, sold, assigned, transferred, and set over unto the parties of the second part all and singular the lands, tenements, hereditaments, and appurtenances, goods, chattels, stocks, promissory notes, debts, choses in action, claims, demands, property, and effects of every description belonging to the said party of the first part, or in which he has any right or interest whatever, the same being more fully and particularly enumerated and described in a schedule thereof hereunto annexed, marked 'Schedule A'; to have and to hold the same, and every part and parcel thereof, with the appurtenances, unto the parties of the second part, in trust, nevertheless, and to and for the uses, interests, and purposes following, that is to say: First. To take possession of the said property hereby assigned, both real and personal, and to sell and dispose of the personal property herein mentioned with all convenient diligence, either at public or private sale, and to collect all such debts and demands as may be collectible; and if, in their judgment and discretion, he may deem it best and advisable to effectuate the purposes of this trust, to carry on the mercantile business for a reasonable time in my storehouse in the town of Hillsboro until the stock of goods now in my store are sold and disposed of, they are hereby authorized and empowered to do so; and if the personal property and assets herein conveyed shall prove ineffectual to pay all my debts and liabilities hereinafter to be mentioned and provided for, together with the costs of executing this trust, he is authorized and empowered to sell so much of the real estate herein conveyed as will be sufficient to pay said debts and liabilities and expenses of the trust, in full, with the interest thereon that may have accrued, after giving thirty days' notice of the time, place, and terms of sale in some newspaper published in Lawrence county. Secondly. To

pay and discharge all the just and reasonable expenses, costs, and charges of executing this assignment, and of carrying into effect the trust herein created, together with a reasonable commission or compensation to the said party of the second part for his services in executing this said trust, and out of the residue of the proceeds of said sales and collections. Thirdly. To pay and discharge in full, if there be sufficient for that purpose, all the debts and liabilities now due or to become due from the party of the first part, and which are particularly enumerated and described in the schedule thereof hereto annexed, marked 'Schedule B,' together with all the interest due thereon and to grow due thereon; and, if there be not sufficient of said proceeds to pay the said debts and liabilities in full, then to apply the same pro rata, so far as they will extend, to the payment of said debts and liabilities, according to their respective amounts; and if, after paying all the costs, charges, and expenses attending the execution of the said trust and the payment and discharge in full of all the lawful debts owing by the said party of the first part of any and every description, there should be a surplus of the said proceeds remaining in the hands of the said party of the second part, then, lastly, to pay over and return the same to the party of the first part, his executor, administrator, or assigns. And for the better and more effectual execution of these presents, and of the trusts herein created and reposed, the said party of the first part doth hereby make, constitute, and appoint the said parties of the second part his true and lawful attorney, with full power and authority to do, transact, and perform all acts, deeds, matters, and things which may be necessary in the premises and to the full execution of said trust; and, for the purposes of said trust, to ask, demand, recover, and receive of and from all and every person and persons all the property, debts, and demands belonging and owing to the said party of the first part, and to give acquittances and discharges for the same, and to sue, prosecute, and defend and implead for the same, and to execute, acknowledge, and deliver all necessary deeds and instruments of conveyance; and also for the purpose aforesaid, or any part thereof, to appoint one or more attorneys under him, and at their pleasure revoke the same, hereby ratifying and confirming whatever the said parties of the second part or their substitutes shall lawfully do in the premises. And the said parties of the second part do hereby accept the trust created, and in him reposed by these presents, and do for themselves, their heirs, executors, and administrators, hereby covenant and agree to and with the said party of the first part, his executors, administrators, and assigns, that they, the said parties of the second part, will honestly and faithfully, and without necessary delay, execute the same according to the best of their skill, knowledge, and ability. In the event the name of any creditor of the party of the first part having been by mistake omitted, in the Schedule B, such creditor or creditors shall, nevertheless, be entitled to the benefit of this assignment, upon equal terms with the creditors whose names are included in said Schedule B.

"I, D. J. James, wife of I. L. James, for the purpose of relinquishing my dower in all the real estate conveyed to Neely and Penney, assignees in the above deed of trust, and in consideration of the premises, do hereby become a party to this conveyance, jointly with my said husband, and do hereby convey all my interest and rights of dower in and to said property to the said assignees, for the purposes and upon the considerations mentioned and set forth in this the above deed of trust.

"In witness whereof, the parties of the these presents have hereunto set their hands and seals, the day and year above first written.

"I. L. James. [Seal.]  
 "D. J. James. [Seal.]  
 "J. E. Penney. [Seal.]

"Witnesses:

"O. H. Porter.  
 "W. F. Berry."

W. V. Sullivan, for appellants.

David D. Shelby, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

**PER CURIAM.** As the assignment in question was made by an insolvent debtor, and purports to convey all his property to be distributed equally among all his creditors, and the same has been accepted by the assignee and a majority in number, if not in amount, of all the creditors, the deed of assignment cannot be held to be fraudulent on its face, although the assignment might otherwise be open to objection by reason of some of the provisions contained therein, if the assignment were one granting preferences; nor can such assignment be set aside in a court of equity because of the fraudulent intention of the assignor, where it is not shown that the assignee and the accepting creditors participated in the fraud. The decree appealed from is affirmed.

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**OLMSTEAD et al. v. DISTILLING & CATTLE FEEDING CO.**

(Circuit Court, N. D. Illinois. February 4, 1895.)

**1. RECEIVERS—SELECTION—OFFICER OF CORPORATION—SPECULATION IN STOCK.**

While an officer of a corporation, whose misfortunes have made a receivership necessary, is not ineligible to employment as receiver, yet, where the corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, an officer should not be appointed without careful scrutiny of his official and personal antecedents, and one who is or has been a speculator in the stock of the corporation should never be appointed.

**2. SAME.**

Certain stockholders of the D. Co. filed a bill against the company, averring that it was insolvent; that its assets were scattered, and in danger of being consumed by attachment and other proceedings; and that a receivership was necessary to protect the interests of stockholders. Upon this bill, with the consent of the company, receivers were appointed, one of whom was the president of the company. Certain other stockholders intervened, and asked the removal of the receivers, and substitution of others. It appeared that neither the complaining stockholders nor the president or directors had any substantial interest in the stock, and that the action of the complainants was taken at the instance of the president. It also appeared that the president, at the time of the receivership, was under contract to deliver 15,000 shares of the company's stock on the New York Stock Exchange, and was not the owner of any such shares. *Held*, that the acceptance of the receivership by the president, under these circumstances, was an imposition on the court, and that he would be removed, and a person entirely disinterested appointed as principal receiver, together with one person nominated by the intervening stockholders and the other receiver originally appointed on the nomination of the directors.

**3. SAME—PRACTICE—SECRECY.**

*Held*, further, that there was nothing unusual or improper in the fact that the original motion for the appointment of receivers was made without notice, and that it and the proceedings thereon and the appointment of receivers were kept secret until the papers were filed in the clerk's office.

This was a suit by one Olmstead and others against the Distilling & Cattle Feeding Company for the appointment of receivers and administration of its assets. Upon an *ex parte* application Messrs.

Greenhut and Lawrence were appointed receivers. Certain stockholders filed an intervening petition, and now move for the removal of such receivers.

Runnells & Burry, for the stockholders.

John S. Stevens, for the company.

Moran, Kraus & Mayer and Nathan Bijur, for interveners.

GROSSCUP, District Judge. This is an application to remove the receivers appointed January 28th. The bill, in effect, avers that the defendant company is insolvent; that its assets are scattered throughout the United States; that large amounts of liabilities are becoming due, upon which attachment proceedings and local receiverships are threatened; and that the nature of the property and the general situation of the company are such that, unless a court of equity, with power to administer upon the whole estate through original and ancillary receiverships, as if the property and parties were all within its own jurisdiction, is successfully appealed to, the estate will be wasted by a multitude of attachment and other proceedings, and the interests of the stockholders and the creditors thus irreparably damaged. The bill was filed by stockholders, and the appointment of the receivers consented to by the company. Thus, practically, the company surrendered to the court the custody and administration of its estate. The interveners moving for the removal of the receivers practically admit this condition of things by asking the court, not to vacate the receivership, but to change merely the personnel of the receivers. The case is thus divested of serious and perplexing questions that would otherwise arise.

It is very clearly shown that the proceedings under which the receivers were appointed were not adverse. The complainants held and represented a very small proportion of the stock. I am convinced that the steps taken by them were at the instance of the president of the company, and were not a contest, but merely the execution of the legal formula necessary to give the court, upon the face of the record, the requisite jurisdiction. The admissions of counsel upon the hearing disclosed that but a small proportion of the 350,000 shares of the stock is held for investment purposes. The counsel for the directors could recall less than 10,000 shares, and counsel for the committee named but 64,000 shares of this character. There are probably some more, but the fact remains that the vastly larger proportion of the stock is in the hands of New York brokers for speculative purposes, and thus subject to such rapid mutation of ownership that the stockholders' list of to-day furnishes no guide, and but little suggestion, of what it may be to-morrow. This vast issue of certificates, instead of representing substantial ownership of the property of the company, is only the chessboard upon which has been played the game of speculative finance. It is probably necessary that such a game should have a fair and impartial umpirage, but its appeal, I confess, does not excite my sympathy, as would that of men and women whose real

investments were tied up in the property. My chief solicitude on this hearing is not for those whose sole interest in the stock is for a point or two in its market quotations, but for those who have invested their means in these certificates as a source of constant and lasting income.

There was nothing in the appointment of these receivers, or the secrecy that attended the proceedings, until the papers reached the clerk's office at Peoria, that was either unusual or improper. The application was necessarily made out of court, and without notice; otherwise its presumably legitimate purpose might have been defeated by bringing on the adverse attacks which the proceedings were intended to forestall. It was not only the right, but the duty, of the clerk to keep the proceedings veiled until they had reached their destination in Peoria. But this does not relieve the case of the considerations, to some of which I have already adverted, and of others of which I shall now speak. It is shown that, not only were the complaining stockholders without any considerable interest in the property (and that only of a temporary character), but neither had the consenting president nor directors any substantial interest. The practical effect of the proceedings, therefore, was the bringing into the custody of the court, and away from the control of its owners, a vast property, without invoking upon full inquiry the independent judgment of the court as to the necessity of such a step, and at the instance of those who had only a small fraction of interest therein. I feel at liberty, therefore, to look upon the case now as if it were an original application for the appointment of receivers, and the stockholders were in court urging their several preferences. I have never felt that an officer of a corporation, whose misfortunes necessitated a receivership, should be ineligible to employment by the court, but this case convinces me that where a corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, a stockholder's appointment to a receivership should be preceded by a most careful and thorough scrutiny into his official and personal antecedents and interests. The admissions in this case disclose that Mr. Greenhut, at the time of his appointment, was under an agreement upon the New York Stock Exchange to deliver upon demand 15,000 shares of stock of the company, and was not the possessor of any of them. In such a situation he could have but one personal interest. Every appreciation of the stock amounted to a large cut in his personal fortune. As a receiver, his duty would be to conserve the property, and enhance its value. As a private individual, his interest was to depreciate its value. Under such circumstances, his acceptance of the receivership was simply an imposition upon the court. Indeed, I will knowingly accept no man as a receiver for any corporation who is, or who has been, a speculator in its stocks. The private interest of the man is very apt to color, if not overcome, the duty of the official. The need of the day in corporate affairs is for managers who have an eye single to the interests of their trust. Such men will

never be found as long as stockholders permit them to gamble upon their securities. Especially is it the need of the day that officials who only come in contact with these affairs by virtue of their office should keep clean of any personal intermeddling that might, even remotely, tend to affect their official conduct. The only safe rule is to touch not with private fingers that which is intended only for the official hand. For these reasons I shall remove Mr. Greenhut.

I am determined, as far as possible, to have a searching inquiry into the affairs of the company, and in the interest of the conserving and rounding up of its assets, and for that purpose shall name a man who has no interest with any official or faction in the company, and who has, by his experience in like situations, proved himself both trustworthy and efficient. He will be the representative of the court, upon whose judgment the court will largely rely. I shall associate with him one of the nominees of the petitioners, because of their large interest in the assets, and also on account of their proposal to finance them out of their present difficulties, if given an opportunity. I think also the unanimous wish of the directors should be recognized. They are the parties in power, and would naturally continue in power until the 1st of April next, and they are especially intimate with the practical workings of the distillery business. I shall therefore associate with the principal receiver a man whose appointment will be agreeable to them, and whose experience as a distiller will aid in the administration of the trust. An order may be entered removing Mr. Greenhut, and appointing General John McNulta and John J. Mitchell to act along with Mr. Lawrence as receivers. General McNulta will be regarded as the principal receiver.

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BOONE COUNTY NAT. BANK v. LATIMER et al.

(Circuit Court, W. D. Missouri, C. D. March 21, 1895.)

BANKS AND BANKING—INSOLVENCY OF COLLECTING BANK—TRUST FUNDS.

A bank received a note for collection and remittance, but, instead of remitting as directed, credited its correspondent with the proceeds, and shortly thereafter failed. At the time of failure the cash on hand was less than the amount of the collection, but the receiver realized from the assets sufficient to pay all preferred claims. There was no proof that the proceeds of the note formed part of the assets converted into money by the receiver. *Held*, that the lien on the assets of the bank for the trust funds converted was limited to the amount of cash on hand at the time of the failure, the presumption of law being it was the residuum of the trust money.

Bill in equity brought by the Boone County National Bank against W. A. Latimer, receiver of the First National Bank of Sedalia, and the First National Bank of Sedalia.

This is a bill in equity to have claims of the complainant bank against the respondent bank declared a trust fund, and for preference in the distribution of the assets in the hands of the receiver. The case is submitted upon an agreed statement of facts, which is substantially as follows: (1)



The complainant, on March 30, 1894, sent to the First National Bank of Sedalia, Mo., for collection and remittance, a note it held against Jenney Bros. for \$1,000 due April 8, 1894. Jenney Bros. paid on this note, on the 2d day of April, \$787.69, which the First National Bank placed to the credit of the complainant, instead of remitting, as it was instructed to do. (2) The complainant in like manner sent to the First National Bank for collection a note it held for the sum of \$1,500 against Henry Mueller and others, which was due January 2, 1894, and it was so sent for collection on the 29th day of December, 1893. On the 1st day of May, 1894, and three days before the bank failed, Mueller paid on this note the sum of \$700, which the defendant bank placed to the credit of the complainant on its books, instead of remitting, as it had been directed. (3) That both of these notes were sent to the First National Bank, with instructions to collect the same, and remit to the complainant at Columbia, Mo. (4) When the said collections were made, the moneys received therefor were placed with other funds, constituting the cash assets of the bank, and to the extent thereof went to increase the volume of its assets and went into its business operations. (5) That when the receiver took possession of the said First National Bank he came into possession of \$495.29 in money, and between the dates of the payments to it for complainant as aforesaid and the said 4th day of May, 1894, the day the bank closed, other large sums of money, besides these mentioned, had been paid into said bank, and distributed by it in the usual and ordinary course of its business operations, and that since the receiver had taken possession of the assets of the bank he has realized therefrom a large sum of money, and more than amply sufficient to pay all preferred claims against the bank. (6) Neither of the sums so collected by the defendant bank, or any part thereof, has been paid to the complainant.

Johnson & Montgomery, for complainant.

William S. Shirk, for defendant.

PHILIPS, District Judge (after stating the facts). It is not deemed important, even if the time were at my command, to enter into a review of the multitude of authorities bearing upon the vexed question discussed by counsel, as to the right of preference in the complainant. By the agreed statement of facts, the Sedalia bank was constituted by the Boone county bank its agent solely for the collection of the notes, and to remit the proceeds when collected to the principal. No authority was given to the agent to place such proceeds in its bank to the credit of the principal, so as to establish between them the relation of depositor and depository, or that of creditor and debtor. The thing done by the Sedalia bank was a clear breach of trust,—a diversion of a trust fund,—whereby it became a trustee *ex maleficio*. The question to be decided is, does the fact that the precise fund thus diverted cannot be traced in kind and seized physically, or the fact that the precise fund cannot be traced into some other particular species of property into which it has been absorbed, destroy the right of the cestui que trust to a preference over the general creditors to have its claim first paid out of the general assets of the insolvent estate, when it appears, as in this case, that the trust fund has gone to swell the amount of such assets, and there are ample funds remaining to satisfy this trust demand? The essential principle involved was grasped by Judge Story in this text:

"An agent is bound to keep the property of the principal separate from his own. If he mixes it up with his own, the whole will be taken, both at law and in equity, to be the property of the principal, until the agent puts

the subject-matter under such circumstances that it may be distinguished as satisfactorily as it might have been before the unauthorized mixture on his part. In other words, the agent is put to the necessity of showing clearly what part of the property belongs to him; and, so far as he is unable to do this, it is treated as the property of the principal. Courts of equity do not in these cases proceed upon the notion that strict justice is done between the parties, but upon the ground that it is the only justice that can be done, and that it would be inequitable to suffer the fraud or negligence of the agent to prejudice the rights of the principal." 1 Story, Eq. Jur. § 468.

Mr. Justice Bradley, in *Frelinghuysen v. Nugent*, 36 Fed. 239, with succinctness, displayed in a single sentence the successive steps in the development of equity in this relation:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried."

This exposition is approved by the supreme court in *Peters v. Bain*, 133 U. S. 693, 10 Sup. Ct. 354. The pertinent part of the text is that "the better doctrine" is that the confusion of the trust fund with the mass of the possessor's other property does not destroy the equity in favor of the person wronged, but extends to the whole mass, so as to give to him "a priority of right over the other creditors of the possessor." The difficulty in sustaining the complainant's claim is that the agreed statement of facts does not show that the sum of \$1,500, collected by the Sedalia bank for the complainant bank, stood mingled with other moneys of the insolvent bank on hand at the time the bank passed into possession of the receiver. On the contrary, the statement is that between the time of the collection of the money by the bank and the succession of the receiver the bank had collected various other sums of money, and distributed the whole sums collected by it, with the exception of \$495.29. So that neither the whole sum collected by it for the complainant was on hand in kind, nor other moneys of the bank to that amount with which it had been mingled. That was precisely the reason given by the courts in the two cases above cited for refusing the relief asked. It did not appear "that the goods claimed were either in whole or in part the proceeds of any money unlawfully abstracted from the bank," and because the property against which it was sought to enforce the lien was bought from other creditors. While the agreed statement of facts recites that since the receiver took possession he has realized large sums of money from the assets of the bank, no inference is permissible that such assets were the product, in whole or in part, of the money collected for the Boone county bank. It is true that the general assets of the bank were

augmented to the extent of the absorption of the \$1,500 diverted from the rightful owner, but in the absence of proof that the trust fund constituted a part of the remaining assets, so converted into money by the receiver after his succession, I feel constrained by the limit to the equity rule established by the federal supreme court not to extend the lien to the general estate. But in respect of the \$495.29 in money, on hand when the receiver took charge, a different rule applies. The money collected by the Sedalia bank for the Boone county bank went into the cash account of the Sedalia bank just a few days prior to the placing of the bank in the hands of a receiver. As that was a trust fund, which the bank, in conscience and honesty, had no right to appropriate to its own use, the presumption of law is that in disbursing moneys it used its own funds, and that the residue of money left in its vaults was the trust fund, as there can be no indulgence of a presumption that a party has acted fraudulently, because of the maxim that, where the act of a party may be referred indifferently to one of two motives, the law prefers to refer it to that which is honest, rather than that which is dishonest. In *National Bank v. Insurance Co.*, 104 U. S. 68, Mr. Justice Matthews clearly recognized this as equitable; for in referring to the ruling in *Re Hallett's Estate* (*Knatchbull v. Hallett*) 13 Ch. Div. 696, the Justice says:

"It was also held that the rule in *Clayton's Case*, 1 Mer. 572, attributing the first drawings out to the first payments in, does not apply; and that the drawer must be taken to have drawn out his own money in preference to the trust money; and in that particular *Pennell v. Deffell* [4 De Gex, M. & G. 372] was not followed."

To this extent I hold the equity rule should go, as its direct tendency is to enforce with rigor, where it can be done without prejudice to the just rights of third innocent parties, a recognition of the fiduciary obligations of agents. As said by Mr. Justice Matthews (page 70):

"This doctrine of equity is modern only in the sense of its being a consistent and logical extension of a principle originating in the very idea of trusts, for they can only be preserved by a strict enforcement of the rule that forbids one holding a trust relation from making private use of trust property."

No general creditor of the bank has any right to complain that the court seizes upon this fund found in the bank, within three or four days after the collection of complainant's notes, as presumptively the residue thereof, as no credit given by him to the defaulting bank was predicable of the existence of such assets, any more than if the bank at the time had stolen the amount of money from the Boone county bank. Decree will go enforcing the equitable lien of complainant to the extent of said \$495.29, as a preferred creditor, and allowing the claim for the residue against the general assets of the bank as a general creditor.

## COOSAW MIN. CO. v. FARMERS' MIN. CO. et al.

(Circuit Court, D. South Carolina. April 10, 1895.)

**EQUITY — REFERENCE TO MASTER — TIME FOR TAKING TESTIMONY — EQUITY RULE 69.**

Equity rule 69, requiring all testimony to be taken within three months after a cause is at issue, unless the time is enlarged by the court, has no application to a reference ordered by the court to a master to take testimony as to the damages on an injunction bond, and a lapse of nearly three years without any action by either party is no objection to proceeding under the reference.

**In Equity.**

Bill for an injunction filed by the Coosaw Mining Company against Farmers' Mining Company and others. A preliminary injunction was dissolved, and the court ordered a reference to ascertain the damages on the bond. An objection to proceeding with the reference was made, and the master applies for instructions.

Smythe & Lee and McCradys & Bacot, for complainant.  
Mitchell & Smith, for defendants.

SIMONTON, Circuit Judge. This case comes up on a question certified by the special master. The complainant filed a bill against the defendants, praying an injunction. An injunction bond was required, and was executed. A temporary injunction having been granted, it was dissolved on 5th April, 1892. Thereupon the defendants prayed that the injunction bond be delivered to their solicitor, so that the same could be put in suit. This prayer was refused, the court holding that it was the proper judge of the question whether any damage was sustained, and, if so, its amount. An order was filed directing "that the defendants produce before the master such evidence of damage as they may claim, with leave to complainants to reply thereto if they be so advised, and that the testimony so taken be reported to the court; that J. E. Hagood be appointed special master in this behalf." This order was dated and filed 17th June, 1892. The defendants took no action under this order until April 1, 1895. Nor were any steps taken by complainant, who, indeed, was only required to reply to evidence of the defendants. A reference having been called at the instance of the defendants for this last-named day, counsel for complainant objected to going on with the reference, as the three months allowed under equity rule 69 had long since expired, and no further time can be allowed without an order of the court. The special master asks instructions as to the validity of this objection. The counsel for complainant now press their objection, and say further that it would be inequitable to indulge the defendants by extending the time for taking testimony. Great stress is laid upon the provisions of rule 69, in which, in the absence of special direction, three months, and no more, are allowed within which all testimony must be taken; and on the cases under that rule,—*Ingle v. Jones*, 9 Wall. 486; *Fischer v. Hayes*, 6

Fed. 76; *Wooster v. Clark*, 9 Fed. 854; *Coon v. Abbott*, 37 Fed. 98; *Wenham v. Switzer*, 48 Fed. 612; *Grant v. Insurance Co.*, 121 U. S. 115, 7 Sup. Ct. 841. Some stress, more by way of analogy, is laid also on the practice in South Carolina in equity before the adoption of the New York Code. Under that practice all proceedings were out of court in which no action was taken within a year and a day. The precise question is obscure. No case in point can be found. At least, if any case does exist, it has escaped the laborious and careful search of learned counsel, and cannot be found by the court. Can the provisions of rule 69 be extended to the investigation of every matter in which testimony is required during the progress of a cause in equity? It certainly cannot mean that, after a cause is at issue, three months, and no more, are allowed for taking all the testimony which may be needed in it up to the final decree. It must relate primarily to the testimony taken upon the matters put in issue by bill, answer, and replication. The preceding rules show that, after replication filed, the cause shall be "deemed to all intents and purposes at issue." Then comes this rule 69, fixing a limit to the time for taking testimony to be read in evidence at the hearing,—evidently the hearing of the issue so joined. The most critical examination of the rules cannot discover any reference to testimony taken under any other circumstances, or for any other purpose, than for use at this hearing. The rule is not unusual application, for in rule 67, providing for taking testimony orally before an examiner, provision is made for assignment in turn to each party, within which evidence for the moving party, then for the respondent, and then in reply can be offered in this order. 144 U. S. Append. 689, 12 Sup. Ct. iii. If this rule 69 stood alone, there would be much difficulty in answering the question stated above. There is also rule 74, upon the special subject of references to a master, and a special provision is made therefor. Do these rules relate to the same subject, and must they be construed in *pari materia*? Under the practice in the English chancery, no testimony was ever taken in open court before the chancellor. Witnesses were examined before one of the masters in chancery. Their testimony, reduced to writing, was read at the hearing. In this country, under the act of 1789 (1 Stat. 88), oral testimony and examination of witnesses in open court was required to be the same in cases in equity as in actions at common law. This provision of the act was modified in some respects by subsequent legislation, but was not finally repealed until the adoption of section 862, Rev. St. U. S., which left the mode of proof in causes in equity and admiralty to such rules as the supreme court had then prescribed or may thereafter prescribe. At that time the supreme court had, by an amendment to rule 67, provided for the appointment of an examiner, and for the taking of oral testimony before him, to be reduced to writing, and submitted to the court. 1 Black, 6. The ruling in *Blease v. Garlington*, 92 U. S. 1, requires that all testimony upon which the supreme court should pass must be in writing before

the court. This clearly indicates a preference for written depositions taken before an examiner, for no provision has been made by law for the reduction into writing of oral testimony taken in open court, although this mode of testimony is not absolutely forbidden. Keeping this in mind, we can see the reason for rule 69. When a cause is at issue,—which happens frequently during vacation,—the parties need not wait for any action on the part of the court, but either can go straightway before an examiner, and produce all such testimony as they may desire. This testimony, reduced to writing, is used at the hearing. But, as the rule was intended to expedite the cause, and all directions of the court are absent, provision is made that all testimony under this rule must be in within three months, unless the court enlarge the time; and full provision is made for this in the last clause of rule 67. But when the cause, so being at issue,—that is, on bill, answer, and replication,—comes up for a hearing, then, on the pleadings and evidence, the court makes its decree. If the court has everything before it which it desires, the decree is final. If not, then it makes a preliminary decree, "which provides for the investigation of questions which are material either in determining on subsequent steps or in deciding the issue between the parties." Adams, Eq. 375. The causes which create a necessity for a preliminary decree are four in number. The fourth is when there are matters to be investigated which, although under the province of the court, are such as the presiding judge cannot, at the hearing, effectually deal with. This necessity is met by a reference to a master to acquire and impart the necessary information. To provide machinery for this, rule 74 was adopted:

Rule 74: Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

This rule differs materially from rule 69. It compels immediate action on the behalf of the moving party, fixes the next rule day as the time within which he must begin, and declares the method of taking advantage of the laches by his adversary.

Two points may be noted here. The reference in the case at bar was by the court suo motu for the purpose of enabling it to decide upon the merits of an application before it. That decision is in abeyance. No opinion was expressed upon it, and none could be until the information sought could be obtained. The decision is still pending. The need for the information exists. Again, the rule makes it the duty of the party at whose instance and for whose benefit the reference is made to move in the matter. In the case at bar the court, acting for both parties, and in order to protect and secure the right of each, ordered the reference. But, assuming that it was the duty of the defendant to move, must he be deprived of all opportunity of making his case, or is not the

true equitable course that pursued in *Hagood v. Riley*, 21 S. C. 143, confirming and following *Harper, Ch.*, in *Jeannerett v. Radford*, Rich. Eq. Cas. 470? There was a provision of the statute law of South Carolina (7 St. at Large S. C. 209) requiring all equity cases to be finally decided in one year. Discussing a case under that statute, the court says:

"Under that act, a party defendant might have had the bill dismissed for want of prosecution, unless for satisfactory cause shown to the contrary; or it would have been in the power of the court, of its own motion, and after the cause was docketed, if the parties delayed their proceeding, to strike off the cause, or make such order as would be a final decision; or it might refuse to proceed further against the defendant, or might set aside a decree improvidently entered against him. But these directions of the act should be, and have been always, construed to subserve the purposes of justice, and not to take advantage of inadvertence or misapprehension. As is remarked by Chancellor Harper, if such motion be not made by the party defendant, being in court, this may be held evidence of consent on his part; and it may be added that, if no order be entered by the court, it may be inferred that the court thought that the delay was reasonable."

If the analogy of equity practice be examined, it will be seen how chary the court is in suppressing or defeating testimony. 1 Daniell, Ch. Prac. p. 807, shows that bills may be dismissed for want of prosecution, and parties turned out of court. But in bills to perpetuate testimony a different and more lenient practice prevails. The bill is not dismissed, and further time is always given the complainant within which he is peremptorily required to complete his examination. He cites *Beavan v. Carpenter*, 11 Sim. 22, in which no replication was filed, and a motion was made to dismiss the bill. Motion refused, and leave granted to file replication, and for further time to take testimony. So in *Wright v. Tatham*, 2 Sim. 459, the vice chancellor says: "A motion to dismiss a bill to perpetuate testimony for want of prosecution is irregular. The proper application is that plaintiff may proceed within a given time, or may pay the defendant his costs." That course was adopted in *Bonham v. Longman*, quoted in a note to the case.

It would seem that the peremptory requirements of rule 69 do not apply to rule 74. The former relates to the actions of the parties, and controls their attitude before the court. The latter is intended for the information of the court itself, to enable it to carry out its conclusion already reached upon the equities of the case, and to do complete and substantial justice. The South Carolina practice is controlled by a state statute, and cannot affect this court. The case is sent back to the special master, with instructions to go on with the references, but with leave to the complainant, in case the delay has operated in any way to injure it or change its relations, to produce testimony to that effect.

BUTCHERS' & DROVERS' STOCK-YARDS CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 253.

1. FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

A bill, seeking a mandatory injunction to compel a defendant railway company to give complainant equal facilities with others for receiving and shipping cattle, alleged that the damage done by the refusal of such equal facilities was irreparable, and largely exceeded \$2,000. *Held* that, in the absence of a plea to the jurisdiction, this allegation was sufficient, though denied by the answer, and not sustained by any proof.

2. EQUITY—PRACTICE—TENDER BEFORE SUIT.

It seems that, where such a bill contains a tender of the expense of providing the facilities sought, and the answer denied the right of the complainant to such facilities on any terms, the objection that there was no demand for such facilities or tender of the cost, before suit, is one that might be obviated by a provision as to costs, and is not a ground on which the court should rest its decision.

3. SAME—ENGAGING IN SUPERVISION OF BUSINESS.

The rule that a court of equity will not make an order requiring it to supervise the details of business transactions is one the application of which rests very largely in the sound, legal discretion of the court; but it will not prevent the court, in a proper case, from requiring a defendant to furnish facilities for the loading and unloading of live stock. *Stock-Yards Co. v. Keith*, 11 Sup. Ct. 461, 139 U. S. 136, followed.

4. GRANT UPON CONDITION—BY WHOM ENFORCED.

Where land has been granted to a city for the purpose of a public landing, and such city gives a license for a railroad to construct a track over such land to receive and deliver freight, the railroad cannot, while no objection is made by the grantor of the land, use the terms of the grant as an excuse for failing to construct and use such track, when required to do so.

5. RAILROADS—UNJUST DISCRIMINATION.

Where a complainant seeks to compel a railroad company to afford it facilities equal to those given to a favored rival, it is no defense that the railroad company has the right at any time to withdraw the facilities furnished to the favored person.

6. SAME.

The L. R. R. Co. constructed a spur track in a city street, over which it received and delivered freight from and to persons owning land abutting on the street, and engaged in business there. The freight so received and delivered was all of the class known as "dead freight," and could all be handled at the convenience of the railroad company. The grade and curve at the point where the spur left the main track were such that only three loaded cars could be drawn up at a time. The B. Co., which was engaged in shipping and receiving live stock, requested the L. R. R. Co. to construct a siding from the spur track to its stock yards for the purpose of receiving and delivering cars of live stock. The B. Co.'s yards were at a distance of 40 feet from the street on which the spur track was laid. It would be necessary for the railroad company to receive and deliver cars of live stock without delay at any time to meet its convenience in handling the cars, and to employ extra men in order to care for the traffic. *Held*, that the difference in the business of the B. Co. and that of the abutters upon the spur track was so great that a refusal by the railroad company to afford equal facilities to the B. Co. did not constitute unjust discrimination.

7. SAME.

The L. R. R. Co. made a contract with the U. Stock-Yards Co. by which it agreed to make the U. Stock-Yards its sole stock depot in the city of



N., and to deliver there all stock consigned to persons in said city. No charge was made, in addition to the usual transportation charges, for loading or unloading stock at the U. Yards, but, if live stock unloaded there was not removed by the consignee within two or three hours, a charge was made for keeping it. The B. Co., having a stock yard in the city of N., demanded that the L. R. R. Co. furnish it facilities for receiving and shipping stock at such yards. *Held*, that so long as the railroad company furnished a sufficient depot, either of its own or under contract with another company, for receiving and shipping stock, without extra charge, it was not unjust discrimination to refuse to furnish similar facilities to the B. Co. at its yards. *Stock-Yards Co. v. Keith*, 11 Sup. Ct. 461, 139 U. S. 128, distinguished.

**'Appeal from the Circuit Court of the United States for the Middle District of Tennessee.**

This was a suit by the Butchers' & Drovers' Stock-Yards Company against the Louisville & Nashville Railroad Company, to compel it to build a spur track connecting with complainant's yards. The circuit court dismissed the bill. Complainant appeals.

This is an action in equity by a stock-yards company for a mandatory injunction to compel a railroad company to build, or to allow to be built, a side track connecting a spur track of the railroad company with the stock yards of the complainant, and there to deliver and receive all cattle consigned to and shipped by the complainant. The defendant answered, and the cause was heard on pleadings and evidence, and resulted in a dismissal of the bill. The complainant appeals. The facts are substantially as follows: The complainant, the Butchers' & Drovers' Stock-Yards Company, was organized under the laws of Tennessee, and entered upon its business in 1889. It has a stock yard within the city limits of the city of Nashville, and near to the business center thereof. The Louisville & Nashville Railroad Company is a corporation of Kentucky, whose line of railroad extends to and through Nashville from Louisville. In 1890 the city council of the city of Nashville passed an ordinance permitting the defendant company to lay a spur track from its main track along Front street in said city. The ordinance contained a provision requiring defendant to furnish persons, whose warehouses abutted on Front street, just and equal facilities for shipping and receiving freight in car-load lots. The defendant company, because of this provision, declined to accept the privileges conferred by the ordinance. Thereupon another ordinance was passed, granting the defendant the right to lay down in Front street a single track from its main track on Market street, with all necessary switches and turnouts. It provided that no part of said spur track should at any time be used by the railroad company, its patrons or others, as a storage place for loaded or empty cars, and that it should only be used for promptly delivering and receiving freight along the line thereof; and the switching of cars not directly connected with or used for this purpose was expressly prohibited. It was further provided that the defendant company should transfer freight received from other roads to parties on the spur track upon payment of an amount not exceeding 1 cent per 100 pounds in car-load lots. W. G. Bush and others, engaged in the manufacturing business along Front street, in order to induce the railroad company to lay the track permitted in the ordinance, entered into a contract with the railroad company by which they agreed to pay not exceeding \$6,000 to defray the expenses of laying the spur track, which was about one mile in length. Sidings were laid by the defendant from the spur track to the property of W. G. Bush & Co., Jacob Shaffer, Levi Langham, and the Capitol Electric Company, and others, under contracts made by the railroad company with these parties, in each of which the defendant retained the right to disconnect the siding from the spur track at any time without notice to the other party. The persons or firms with whom these contracts were made were manufacturing firms or coal dealers. They all owned land abutting on Front street. Complainant is engaged in receiving, feeding, weighing, selling, and shipping live stock for the general public. Its yards

are a block away from the defendant's main line. They do not abut immediately on Front street. Between them and that street there is a strip of land 40 feet wide, belonging to the city, which was granted to the city to be used as a public landing, under the direction and control of its mayor and aldermen, and to be held to the only proper use and benefit and behoof of said mayor, aldermen, and their successors in office, forever. At the time of making the demand hereinafter stated, neither the complainant nor the defendant had any right to construct a siding upon this 40-foot strip. After the demand was made, however, on October 3, 1892, and before the filing of the bill, the council of the city of Nashville gave a license to complainant to construct a side track to Front street across this strip. In 1891, after the spur track and the sidings already alluded to had been constructed, the complainant requested the defendant that a siding be so constructed in front of complainant's property as to allow the transportation of live stock to and from its establishment in car-load lots, and that the same facilities for transportation be afforded to it as were enjoyed by Bush & Co. and the others who then had sidings. One of the vice presidents of the defendant gave complainant reason to believe that the request would be acted upon favorably, but subsequently wrote that he had no authority whatever in the matter. In February, 1892, complainant requested from the defendant a statement of the conditions upon which defendant would consent to the construction of the switch. In March following, the complainant made a contract with Bush & Co., in which it was agreed that, if the complainant would pay Bush & Co. a ratable share of the original cost for constructing the same, the complainant might use the spur track. Shortly after, defendant's attorney answered complainant's request, and stated that, inasmuch as the siding proposed appeared to be desired solely for the purpose of receiving and delivering live stock at defendant's yards, and the railroad company had provided a station for this purpose at Nashville, the establishment of another was declined.

The stock-yards station referred to was that of the Union Stock-Yards Company. In 1880, the Louisville & Nashville Railroad Company, the Nashville, Chattanooga & St. Louis Railroad Company, and the Union Stock-Yards Company had entered into the following contract: "This article of agreement, made and entered into this twenty-fifth day of March, one thousand eight hundred and eighty, between the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway Company, [for the establishment of] a first-class stock yard, including chutes of sufficient capacity and suitable accommodations for the carrying out of the contract; said stock yards always to be kept properly equipped with suitable fencing, feeding means, shelter, and other conveniences usual and customary in the best class of stock yards in the country for the proper management of said stock yard. The party of the second part further agrees to keep at hand a sufficient number of skilled workmen to perform the operation herein agreed to be done by said party of the second part, and generally to do such work and labor as is usually provided by the managers of stock yards of the best class, and especially that they shall be skilled and well qualified to load and unload any and all live stock which may be received or delivered by said parties of the first part to said stock yards to be loaded or unloaded. And said party of the second part further agrees and promises to load and unload and take proper care of all live stock, at risk of damage of said party of the second part, that may require such loading or unloading on or from cars at said stock yards, and to charge therefor no more than is charged for similar services at the time when rendered by the operators of other stock yards in neighboring cities, or no more than may be agreed on hereafter between the parties to this contract, and in no event to charge more than sixty cents per car load for loading or unloading, and to make no charge for loading or unloading less than car loads. The party of the second part further agrees that all charges for keeping, feeding, or caring for live stock coming to said party of the second part under this contract, direct or indirect, shall be reasonable, and not greater than the charge for similar work, caring, feeding, etc., by other first-class stock yards in neighboring cities. And for all charges upon stock delivered by the said parties

of the first part to said party of the second part the party of the second part shall be responsible, and shall pay said charges promptly to the parties of the first part, in such manner and at such times as may be directed by the proper officers of the parties of the first part. In all matters relating to the shipment and delivery of stock at said yard, unless exception shall be made hereafter, the party of the second part is to act as agent of the shipper or consignee, respectively, and to answer for and be responsible to him for the proper conduct and management of the shipment of the same, it being distinctly understood that the liability of the parties of the first part shall cease upon the delivery of the cars containing the live stock as hereinafter specified, and shall not commence until cars are properly loaded, and that in loading and unloading said stock to and from the cars of the parties of the first part the party of the second part is acting as agent of the shippers or consignees. It is further agreed by the party of the second part that the management of the stock yard shall always be entirely acceptable to the management of the parties of the first part. The parties of the first part agree to pay to the party of the second part the sum of sixty cents per car load as above for each car load of stock loaded or unloaded at said yard, from or for the roads of the parties of the first part. And they further agree to maintain and keep in good order and repair the necessary tracks, switches, sidings, and all other necessary means for loading and unloading, and other suitable and proper conveniences and appurtenances usually and customarily furnished by railroads to stock yards. And the parties of the first part further agree that they will not lease or rent any of their grounds in the city of Nashville for the establishment of a stock yard or other stock yards in the city of Nashville, and that they will establish no other stock depot in the said city of Nashville, and that they will deliver and cause to be delivered to said party of the second part all the live stock shipped over the roads of the parties of the first part, and consigned to the city of Nashville; and, further, that, should stock be shipped to any other party or parties in the city of Nashville, the parties of the first part hereby agree to make this stock yard of the party of the second part their stock depot for said city, and will not deliver at any other point or points of the city, and agree to deliver all live stock shipped to said city of Nashville at the yards of the party of the second part; and, furthermore, that they will give to the party of the second part the right and privilege to bed all cars for live stock which they may desire to have bedded, or of the bedding of which they may have control. It is mutually agreed between the parties to this agreement that the delivery of stock upon switches or sidings provided for this purpose shall be deemed a delivery to the party of the second part, and thenceforward said party of the second part will be responsible therefor to the owner or consignee or shipper. This contract shall be binding and in full force for the space of ten years from this date."

The contract was continued in force, and the parties were still acting under it at the time of this controversy. The stock yards referred to in the agreement were without the city limits of the city of Nashville, and about a mile and a half from the stock yards of the complainant. The evidence in the record, some of which was admitted and some of which was excluded by the court below, shows that no charge beyond the ordinary charge for transportation is made for the loading and unloading of cattle at the stock yards to the shipper or consignee; that after the cattle have been unloaded, and have not been taken away by the consignee from the yard for two or three hours, they are then turned into the pens of the stock yards, where a charge of two dollars per car for a day or part of a day is made by the stock-yards company for keeping them, until the consignee takes them away. When cattle arrive at night, the usual result is that they are turned into the pens, because the consignee cannot drive them through the streets at night. There was evidence also of a charge of five or ten cents per head by the stock-yards company if, after the cattle have been priced in the Union Yards, they are removed without sale to another stock yard.

The Front street spur track leaves the defendant's main track between Market and Front, and the curve from the main track in to Front street is so sharp and the grade is so steep that, with the engines used by the de-

fendant, but three loaded cars can be drawn up at a time. If live stock freight were to be carried over the spur track, the defendant would be compelled to employ extra shipping crews to care properly for the same, because of the frequent trips required, and the freight would have to be handled at night on the spur track, while at present it is only handled in the daytime. The class of freight which complainant proposes to ship and receive consists of live stock, while the freight of Bush and all the others along the spur track is lumber, logs, coal, and brick, and what is known as "dead freight." The latter can be handled to suit the defendant's convenience. It may be received and taken away at such times as are convenient to the defendant. Delays of a few hours cause neither loss nor trouble. Live stock, because of its perishable nature, cannot be loaded on the cars until the train is about to leave, and then the cars must be removed at once. The exigencies for the carriage of live stock are imperative. It cannot be delayed without danger of loss to the shipper or consignee; and, for shipment to other states, it is subject to the regulation of the federal statute imposing a penalty for confining the stock in cars without unloading for rest, food, and water every 28 hours. Rev. St. §§ 4386-4388. Complainant's stock which is to be shipped or received by rail from Nashville, over the defendant's line, must be driven through the streets of Nashville a mile and a half, between the yards of the complainant and the Union Stock Yards. The complainant did not tender the cost of the construction of the siding to the defendant before the filing of the bill, but it makes a formal tender in the bill.

The bill charges, concerning the Union Stock Yards, as follows: "That there is a stock yard known as the 'Union Stock Yard,' outside the city limits, and on the line of the Nashville, Chattanooga & St. Louis Railway, and which was established by the defendant; and, while it is a stock company, it is in the hands of and under the control of the defendant, and is operated by it, its agents or stockholders, and is conducted in the interests of the defendant. That, in having control of the Union Stock Yard, it discriminates against the complainant, the Butchers' & Drovers' Stock-Yards Company, by charging it a fee amounting to about six dollars on the car load of stock, for stock transferred from the Union Stock Yard (and which means driven out of the Union Stock Yards for the Butchers' & Drovers' Stock-Yards), which is not charged when driven out and shipped on the defendant's railroad. That, while this is a charge made by the Union Stock-Yard Company, it is done at the instance and for the benefit of the defendant, and is intended to cripple the complainant, the Butchers' & Drovers' Stock-Yards Company. That said defendant has no stock yards or station for removing and shipping stock on the line of its road in or about Nashville, nor is there any such yard kept by others on the line of said road, in or about Nashville." The averment as to the jurisdictional amount in the bill is as follows: "The complainant corporation further states, as hereinbefore stated, that the transportation of live stock over said spur track, to and from its establishment, is essential and necessary to the profitable management of its business; that the injury and damage done to its business by the refusal of said railroad company to afford to it such transportation and shipping facilities is irreparable, and largely exceeds the amount of the sum of \$2,000; and that the complainant, the Butchers' & Drovers' Stock-Yards Company, is entitled to have the defendant railroad company restrained and enjoined from making such discrimination in transportation against complainant, and, further, to have said railroad company restrained and enjoined from refusing to afford to the complainant corporation full and equal transportation over said spur track, as said defendant railroad company is bound to do, by its construction and operation of said spur track, under said acceptance and as a common carrier." The answer is quite full, but it is sufficient, for the purpose of the case, to say that it denies the charge of discrimination against the complainant; avers that the Union Stock Yards, which it has the right to reach over the tracks of the Nashville & Chattanooga Railroad Company, furnish ample facilities as a station for the delivery and receipt of live stock; denies that the railroad controls the stock-yards company; and denies that it has done anything to

cripple complainant. It also denies that the damage suffered by complainant from defendant's refusal to furnish a siding exceeds \$2,000.

A. S. Colyar, for appellant.

J. M. Dickinson, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The appellee seeks to sustain the dismissal of the bill on certain preliminary grounds, which must first be considered. It is contended that the jurisdictional amount in controversy is not sufficiently alleged in the bill, and, even if alleged, that it is denied by the answer, and no proof offered to sustain it. The amount in controversy in the action is the value of complainant's alleged right to have a siding built, and to have live stock in car-load lots received and delivered by the railroad company at its stock yards. The averment of the bill is that the injury and damage done to its business by the refusal of the railroad company to afford to it such transportation and shipping facilities is irreparable, and largely exceeds the amount of the sum of \$2,000. The damage done by the refusal is to be estimated by the value of the right denied, and therefore the allegation that the damage largely exceeds \$2,000 is inferentially a statement that the value of the right denied is largely in excess of \$2,000. Even if this averment refers, as claimed by counsel, to damages sustained by complainant before the filing of the bill, it gives rise to the necessary implication that the subsequent permanent injury, unless enjoined, will exceed in pecuniary amount that already suffered, because the past damages only covered a period between the demand and the filing of the bill. We think a liberal construction of the bill must be given to sustain the jurisdiction of the court at this time, in view of the fact that no plea to the jurisdiction was made below, and no question of the jurisdiction seems there to have been raised. But it is said that the averment to the jurisdictional amount is denied by the answer, and is not sustained by any proof. It was decided in *Wickliffe v. Owings*, 17 How. 47, that where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court, and that the answer is not a proper place for it, under the thirty-third equity rule governing the practice in the federal courts. By pleading to the merits, the defendant admits the averments in the bill which state facts sufficient to establish the jurisdiction of the court. *Sheppard v. Graves*, 14 How. 505; *De Sobry v. Nicholson*, 3 Wall. 420. The objection to the jurisdiction of the circuit court, therefore, is not sustained.

The second objection is that the suit is prematurely brought, because there was no offer to pay the cost of building the side track before the filing of the bill, and there was no demand for the building of the side track after complainant had obtained license from

the city to build across the 40-foot strip and before the filing of the bill. As the cost of the siding is tendered in the bill, as the answer denies the right of complainant, by tender or otherwise, to have the siding, and as, in any decree which might be rendered against the defendant, payment by the complainant of the necessary amount could be made a condition precedent to any relief, we think this is rather a technical objection, which could be obviated by a provision as to costs, and is one upon which we would not place our decision.

Next, it is said that the court of equity will not attempt to enforce the remedy here sought, because it will involve a continuous supervision by the court of transactions between the complainant and the defendant, which would tax the court with the details of superintendence beyond anything a court of equity will undertake; and a number of cases are cited to the point. We think the objection cannot be sustained. The rule relied upon by the defendant is one which it is very difficult accurately to state. No clear line has been drawn between cases where a court of equity will act and will decline to act. The conclusion depends very largely upon a sound, legal discretion of the court exercised with reference to the peculiar circumstances of each application for its aid. It is sufficient for the purposes of this case to say that in *Stock-Yards Co. v. Keith*, 139 U. S. 136, 11 Sup. Ct. 461, the supreme court sustained an order of the circuit court by which a railroad company was required either to furnish facilities for the unloading or loading of live stock without charge at the stock yards where it was then receiving and discharging live stock, or to permit the complainant in that case to erect on the railway line chutes and yards for the proper loading and unloading of cattle under reasonable regulations of the railroad company. If such an order might be made and enforced by a court of equity, we know no reason why the relief here prayed for, if the complainant is entitled to it on the principles of equity, may not also be granted.

Next, it is objected that the court will not compel the defendant to be a trespasser, and that it would be a trespasser if it laid a track across the 40-foot strip which separates complainant's land from Front street. The contention is that the license granted by the city to the complainant to lay such a track was beyond the power of the city, because the 40-foot strip was limited in its use by the grant to public landing purposes. Until this objection is made by the grantor, and while those in possession and enjoyment of this strip permit the occupation contemplated, we do not think that the defendant can use the terms of the grant as any excuse for refusing to discharge a plain duty. It is very questionable whether the use of the strip for shipping purposes by side tracks is such a departure from the use enjoined as to be the subject of complaint by the grantor, and certainly, until he attempts to enforce a forfeiture, it does not lie with the railroad company to raise the objection.

Next, it is insisted that the court will not establish a right that may be dissolved at the will of the defendant. The railroad company

reserves the right in its contract with Bush to take up the spur track at any time, and therefore it is said that it cannot be compelled to do that for the complainant which it might at once cease to do by taking up the track. This objection is untenable. The gravamen of the charge in the bill is that the railroad company is discriminating against the complainant, and in favor of those to whom sidings from the spur track are permitted, and that it should be granted equal facilities with such persons. The prayer is in form for an injunction against the discrimination. If the spur track is taken up, then all who enjoy it will be placed on an equal footing and at an equal disadvantage. But complainant's claim is that, while others enjoy the spur track, it also should have the same facilities. It is clearly no defense to a charge of discrimination that the facilities furnished the favored person may be withdrawn at the will of the one who grants them.

We are therefore brought to the issue whether or not there is any discrimination between those who have side-track connections on Front street and the complainant. This depends on two questions: First. Is it a discrimination which can be controlled or restrained by the courts for a railroad company to furnish a side track to one of its customers, and to refuse such accommodation to another similarly situated? Second. Conceding an affirmative answer to the first question, is there such a difference between the facilities demanded by the complainant and those extended to its neighbors on Front street, in respect of the comparative burdens which must be assumed by the railway company in granting them, as to justify the latter in making the distinction it insists upon?

The first question is one full of difficulty, both at common law, upon the principles of which this case must be decided, and also under the interstate commerce act. Because we are able to satisfactorily dispose of the case on the second question, we reserve consideration of the first until the case arises which requires it. We are clearly of opinion that, however unjust and unlawful it may be for a railroad company having furnished a side track to one shipper to refuse it to another similarly situated, the difference in this case between the business of the complainant and that of the other abutters upon the spur track is so great as to make the refusal of the railroad company to grant the side track to the complainant entirely reasonable. The difference between the duties of a common carrier in the transportation of live stock and of dead freight has been remarked upon more than once by the supreme court of the United States. *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727-734, 8 Sup. Ct. 266; *Stock-Yards Co. v. Keith*, 139 U. S. 128-133, 11 Sup. Ct. 461. The evidence clearly shows that the delivery of car-load lots of dead freight and the receipt of them by side tracks is much less onerous, and involves much less care and responsibility for the railroad company, than would the receipt of live stock from a private yard by side track. One of the chief reasons why deliveries and shipments of railroad car-load lots by side track are possible and consistent with the conduct of the business of a large trunk line is that the loaded car may stand upon

a side track for hours, or even a day, until the railroad company finds it convenient to back its engine down and take it. Such delays are utterly impossible in the proper transportation of car loads of live stock. When they are loaded, they must be moved. The evidence shows that in other respects the supervision of the switching of cattle cars would be much more expensive and troublesome to the railway company than dead freight. Indeed, it hardly needs expert evidence to establish it. There is no ground, therefore, for any charge of unjust discrimination against the defendant railway company as between complainant and the Front street shippers.

We come now to the charge of discrimination as between the Butchers' & Drovers' Stock-Yards Company and the Union Stock-Yards Company. In the case of Stock-Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, the proprietors of a live-stock yard filed a petition in a railroad foreclosure suit in which a receiver had been appointed, who was operating the railroad under an order of the court, to compel the receiver to permit the erection of cattle chutes and yards along the line of the road for the receipt and delivery of the live stock of the petitioner. It appeared that all the live stock shipped on the railroad was delivered by the receiver through the stock yards of an incorporated company, at a short distance from petitioner's yards, under a contract made by the railway company with the stock-yards company, and that the latter charged the petitioner and other shippers and consignees a yardage fee for all stock loaded and unloaded by the railroad company. The circuit court held that it was the duty of the railroad company, as a carrier of live stock, to provide reasonable facilities for the loading and unloading of stock transported by it; that such facilities necessarily included chutes and yards, where the cattle might be kept until called for by the owner; and that it could not, in addition to the customary and legitimate charges for transportation, itself make, or allow any agent it employed to make, a special charge for merely receiving and merely delivering such stock in and through yards provided for that purpose. The circuit court, therefore, made the order, already referred to, by which the receiver operating the railroad was required either to file in court the written consent of the stock-yards company that the cattle shipped on the railroad might be delivered and received through its yards without a yardage charge, or that the receiver should permit the petitioner to erect chutes and yards adjacent to the line of the railroad for the convenient delivery and receipt of cattle under such reasonable regulations as the receiver or the succeeding railroad company might impose. This order was affirmed by the supreme court, and the ruling was explained by Mr. Justice Harlan, who delivered the opinion for the supreme court, in the following language:

"We must not be understood as holding that the railroad company in this case was under any legal obligation to furnish, or cause to be furnished, suitable and convenient appliances for receiving and delivering live stock at every point on its line in the city of Covington where persons engaged in buying, selling, or shipping live stock chose to establish stock yards. In respect to the mere loading and unloading of live stock, it is only required by the nature of its employment to furnish such facilities as are reasonably suf-



ficient for the business at that city. So far as the record discloses, the yards maintained by the appellants are, for the purposes just stated, equal to all the needs, at that city, of shippers and consignees of live stock; and, if the appellee had been permitted to use them without extra charge for more 'yardage,' they would have been without just ground of complaint in that regard, for it did not concern them whether the railroad company itself maintained stock yards, or employed another company or corporation to supply the facilities for receiving and delivering live stock it was under obligation to the public to furnish. But as the appellant did not accord to appellees the privileges they were entitled to from its principal, the carrier, and as the carrier did not offer to establish a stock yard of its own for shippers and consignees, the court below did not err in requiring the railroad company and the receiver to receive and deliver live stock from and to the appellees at their own stock yards in the immediate vicinity of appellant's yards, when the former were put in proper condition to be used for that purpose, under such reasonable regulations as the railroad company might establish. It was not within the power of the railroad company, by such an agreement as that of November 19, 1881, or by agreement in any form, to burden the appellees with charges for services it was bound to render without any other compensation than the customary charges for transportation."

In view of the principles laid down in this case, the complainant has no ground for objection to the arrangement between the Union Stock-Yards Company and the Louisville & Nashville Railroad Company. The latter uses the chutes and yards of the Union Stock-Yards Company to deliver and receive cattle at that point as its station without any yardage charge or fee for the proper loading and unloading of cattle. The evidence wholly fails to support the charge of the bill that the facilities afforded by the Union Stock Yards are not ample for the business of Nashville. The evidence establishes that no charge is made by the Union Stock-Yards Company for two hours after the cattle are delivered from the cars. There is no evidence to show that it would be unreasonable in the railroad company, were it the owner of the stock yards, to impose a charge for delay of the consignee in taking his cattle beyond two hours after unloading; and, in the absence of such showing, we cannot say that it is unreasonable for the railroad company to permit its agent, the stock-yards company, to make a charge of two dollars per car for turning the cattle into the pens and keeping them there after such a delay. The discrimination averred and sought to be proven by evidence that, after the cattle have been priced in the pen, they cannot be taken to another yard without paying a fee, concerns the business of the stock-yards company, and not that of the railroad company, whose responsibility ends after the cattle are properly delivered or tendered to the consignee. Of course, the railroad company in delivering the cattle to the stock-yards company, to keep until the appearance of the consignee, can incur only a reasonable charge for the keeping of the cattle. More than this, the consignee is not obliged to pay the stock-yards company. If, however, he thereafter chooses to deal with the stock yards company as a factor or sales agent, and to put a price upon his cattle for sale, the charges then imposed by the regulations of the stock-yards company, in case of a withdrawal of the cattle to another stock yard for sale, are wholly outside the question of discrimination by the railroad company as a common carrier. The contract between the defendants and the Union Company requires

rates charged by the latter to be reasonable. There is no attempt in the record to show that the charge for the simple keep of the cattle in the pens is unreasonable or any higher than the railway company itself might charge for such service.

The decree of the court below is affirmed, with costs.

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WINCHESTER et al. v. DAVIS PYRITES CO.

(Circuit Court of Appeals, Third Circuit. March 22, 1895.)

No. 5.

1. **CONDITIONAL SALE—ASSIGNABILITY—RECEIVERS—EQUITY.**

By a written contract, there was sold "the sulphur contents in about 5,000 tons \* \* \* of Small's Pyrites"; the ore to be burned by the purchaser, and the cinder remaining after extraction of the sulphur to be the property of the seller. The purchasing company failed, and receivers were appointed, who operated the works for some time, but ceased finally to do so, leaving some of the ore on hand still unburnt. *Held*, that the contract was not assignable, that the receivers had no right to sell the unburnt ore for the benefit of their trust, and that equity could only be done by returning the same to the sellers. 64 Fed. 664, affirmed.

2. **SAME—CLAIMS BY STRANGERS—PROCEDURE.**

Where property in the hands of receivers is claimed by persons not parties to the suit in which they were appointed, the proper procedure is to file a petition asking the court for an order on the receivers for delivery of the property. 64 Fed. 664, affirmed.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a petition of intervention filed by the Davis Pyrites Company against James P. Winchester and Francis N. Buck, receivers of the Walton & Whann Company, asking the delivery to it of certain property held by said receivers. The circuit court granted the petition, and accordingly entered an order directing the receivers to comply therewith. See 64 Fed. 664, where the opinion delivered by Wales, District Judge, will be found reported at length. The receivers appealed.

Lewis C. Vandegrift, for appellants.

Arthur W. Spruance and W. C. Spruance, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFINGTON, District Judge.

DALLAS, Circuit Judge. The action of the court below was clearly right. The opinion filed by the learned judge of that court fully states the case, and also relieves us from discussion of the questions of law which he considered. Briefly stated, the material facts are these: The appellee sold to the Walton & Whann Company "the sulphur contents in about 5,000 tons \* \* \* of Small's pyrites." The ore was to be burned by the purchaser of the sulphur, and the cinder remaining after the extraction of the sulphur was to be the property of the seller. Such, among others,

are the terms of the written agreement, the indubitable effect of which, as a whole, was, in our opinion, to require that all ore delivered should be burned, and that no part of it should be otherwise disposed of. The custody of the property of the Walton & Whann Company was taken by the court below, and passed into the hands of receivers of its appointment, who are the present appellants. The receivers found at the works of that company a considerable quantity of the unburnt ore which had been accepted by it under the contract which has been mentioned. Continuing for a short time to operate the then existing plant, the receivers burned some of this ore, and with respect to the part so burned there is no controversy. There remained, however, about 1,300 tons of unburnt ore, which it was admitted the receivers did not intend to—in fact, could not—burn, but which they proposed to sell for the benefit of their trust. This state of affairs was properly brought to the attention of the court by petition of the appellee for return of the unburnt ore to it, and we are at a loss to conceive upon what ground a court of equity could, under the circumstances, have refused compliance with this request. Retention of the ore could not have been rightfully persisted in, and the obligation to burn it be repudiated. Performance of that condition being precluded by controlling circumstances, equity could be done only by relinquishing the property to which it related. In no other way was it possible to discharge the debt of justice incurred by the court upon its assumption of the possession. The decree of the circuit court is affirmed.

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KILBURN et al. v. INGERSOLL.

(Circuit Court, D. Minnesota, Third Division. April 17, 1895.)

WORLD'S COLUMBIAN EXPOSITION—POWER TO GRANT EXCLUSIVE PRIVILEGES—PRELIMINARY INJUNCTION.

The corporation known as the World's Columbian Exposition, organized in Illinois to hold an international exposition, pursuant to the act of congress providing therefor, which received from the city of Chicago authority to inclose and control a park for the purposes of such exposition, sold to complainants the exclusive privilege of taking stereoscopic negatives of objects within such exposition, and making and selling pictures therefrom. The corporation also prescribed a rule that no person except complainants should bring within the grounds of such exposition a camera larger than 4x5 inches, and that all persons bringing such cameras within the grounds should agree, in writing, not to make stereoscopic views from the negatives taken on such 4x5-inch cameras. Complainants, upon a bill and affidavits alleging these facts, and that defendant, surreptitiously, and without the authority of the corporation, had obtained negatives, and manufactured and sold stereoscopic views, in violation of complainants' rights, applied for a preliminary injunction to restrain defendant from making or selling any stereoscopic views of objects within the exposition, and from copyrighting the same. Defendant denied that he had ever signed, or been asked to sign, any agreement not to make or sell such views, or that his negatives or views were unlawfully or surreptitiously obtained. *Held*, that a preliminary injunction should not be granted; the existence of the exclusive right claimed

by complainants and the power of the World's Columbian Exposition to grant it being matters of grave doubt, and the signature by defendant to the agreement not to make stereoscopic views not being established.

This was a suit by Benjamin W. Kilburn and James M. Davis against Truman W. Ingersoll to restrain defendant from making or selling stereoscopic views of the World's Fair. Complainants move for a preliminary injunction. Denied.

Flandrau, Squires & Cutcheon and Charles H. Aldrich, for complainants.

C. D. O'Brien and T. D. O'Brien, for defendant.

NELSON, District Judge. In this case a motion is made for a preliminary injunction on a bill and affidavits of complainants. Upon the hearing defendant files his own affidavit, but does not answer. It is sought to restrain and enjoin the defendant "from in any way manufacturing, or causing to be manufactured, or selling, or causing to be sold, or offering for sale, any stereoscopic negatives, views or pictures therefrom, of any exhibit upon or within the grounds or buildings of the World's Columbian Exposition, or any views of said ground, or any part thereof, or the buildings or exhibits therein, or having any semblance thereto, and from copy-righting any such views or photographs, without the permission and consent first obtained of the complainants herein." The bill alleges the passage of the act of congress of April 25, 1890, providing for the holding of an international exposition at Chicago, Ill.; also the organization under the laws of the state of Illinois, on the 5th of August, 1890, of a corporation known as the World's Columbian Exposition, for the accomplishment and carrying out of the objects of the exposition, and the granting to that corporation, by the city of Chicago, of Jackson Park, a public park of that city, with authority to inclose, build upon, and control the same for the purpose of there holding the exposition; that the exposition corporation took possession of Jackson Park, inclosed it with a high fence, laid out and beautified the grounds, erected buildings, and caused a large number of valuable exhibits to be placed therein, and expended in and about the exposition the sum of about \$17,000,000. The bill then alleges "that it was part of the plan or scheme by which the said World's Columbian Exposition was induced to expend said large sums of money \* \* \* to charge an admission fee therefor, and grant to persons and corporations such reasonable concessions or exclusive privileges as to it might seem just, in order that it might recoup, to some extent, its enormous expenditures"; that it was decided by the management that it would offer its stereoscopic photographic privilege to the highest bidder; that complainants bid therefor the sum of \$17,000, and on payment of that amount obtained from the corporation the exclusive right or privilege to take stereoscopic negatives of objects upon or within the grounds and buildings of the corporation, and to make pictures therefrom, and to sell the same throughout the United States and foreign countries during the period of the exposition, and for 120

days after the close thereof, in accordance with the contract which is set out in the bill; that, to better protect complainants, the corporation prescribed a rule that no person should bring within the grounds a photographic outfit or camera larger than 4x5 inches, and that persons desiring to enter with a hand camera of the size mentioned should, as a preliminary condition thereto, sign an agreement as follows:

"In consideration of the privilege granted to me by the World's Columbian Exposition of taking negatives with a hand camera within the grounds of the said World's Columbian Exposition during this day, I do hereby promise and agree that I will not make, nor permit to be made, from the negatives so taken by me, any stereoscopic negatives or views, and that I will not enlarge, nor permit to be enlarged, any negatives so taken by me, for the purpose of making any such stereoscopic negative or view or semblance of stereoscopic negative or view. In witness whereof, I have signed this instrument, the date above written."

It is then averred that the defendant surreptitiously, dishonestly, and without the authority of the corporation, or any authorized agent, with full knowledge of complainants' rights, and for the purpose of defeating the same, has manufactured and sold certain stereoscopic views of photographs according to a list appended, and continues to manufacture and sell the same, whereby the rights of these complainants are infringed, and great loss is inflicted upon them. These allegations are supported by affidavits of the president and an officer of the corporation as to the making of the contract between the corporation and complainants, also averring that the gatekeepers and guards were instructed to permit no one to take stereoscopic views, or to enter with a photographic outfit, except a hand camera of 4x5 inches, and that all persons with the last-named camera were required to sign the agreement hereinbefore set out; that the negatives from which defendant's views were printed were made surreptitiously, and without the knowledge or consent of the corporation, and were printed from a 5x8 stereoscopic camera, and not from a hand camera of the size permitted to be used. Defendant in his affidavit states that, in common with others, he visited the exposition, and paid the regular admission fee, together with a special charge of \$2 per day for the privilege of using a hand camera; that he never signed, nor was requested to sign, any agreement not to photograph objects or persons within the grounds, or to sell views of them; that he did take several photographs of scenes, incidents, buildings, things, and persons within the grounds; that he also purchased from other persons photographs of like character made by them, and has printed and sold copies from said negatives. He denies that he has copied any photographs taken by the complainants, or sold any copies thereof, or that he conspired or confederated with anybody to, or did, secretly and surreptitiously, take these pictures against the consent of any one, or that the same were unlawfully obtained; and avers that all the views and photographs taken by him at that time were taken with a 4x5 camera, of the kind permitted to licensees; that the camera in question was submitted to the guards at the entrance of the exposition, and found to be in accordance with the rules governing their admission.

Upon a full consideration of the case, I have come to the conclusion that the ends of justice do not require the issuance of this summary writ of injunction, for the following reasons: (1) That the existence of the exclusive right claimed by complainants under the contract is, in my opinion, a matter of grave doubt. It does not appear from the bill that the World's Columbian Exposition, by the terms of its charter from the legislature, or by its articles of incorporation, had the power to grant the exclusive privilege in question. (2) There is no showing made on the hearing that defendant signed the agreement which it is averred all persons with 4x5 cameras were required to sign. It is true the affidavits of complainants state that defendant must have obtained his views in a surreptitious manner, or by bribery, and by the use of a camera exceeding in size that permitted by the rules and regulations; but these are mere conclusions or opinions, unsupported by evidence. On the other hand, we have the positive affidavit of defendant to the contrary, in which he states that he paid the fee demanded for the privilege of using his camera, that it was inspected and passed, that he was not requested to sign or make an agreement to refrain from photographing things or persons within the grounds, and that all the views sold by him were taken with a 4x5, and not with a stereoscopic camera. Again, before a peremptory writ of injunction will issue it should clearly appear to the satisfaction of the court that the complainants' rights are certain and well determined, and that if the same are invaded serious and irreparable injury will follow. To my mind, these conditions are not fulfilled. As a question of law, I have serious doubts as to the authority of the World's Columbian Exposition to grant an exclusive privilege to complainants. As to questions of fact, defendant's affidavit is entitled to due consideration; and, while the bill alleges that great and irreparable injury will result if the injunction be not granted, I do not find proof to substantiate that claim. The motion for injunction is denied.

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FARMERS' LOAN & TRUST CO. et al. v. TOLEDO, A. A. & N. M. RY. CO.  
et al.

(Circuit Court, N. D. Ohio, W. D. April 3, 1895.)

**1. CORPORATIONS—RIGHTS OF STOCKHOLDERS—DEFENDING ON BEHALF OF COMPANY.**

Where a petition by stockholders to be allowed to defend against the foreclosure of a mortgage, after decree taken pro confesso, fails to show that any attempt has been made to induce the board of directors to make the proposed defenses, and the averments as to collusion affect but four of the eleven directors, and it does not affirmatively appear that the other seven would not, if requested, make such defenses, the petition is defective; but if it discloses a valid, equitable defense, which the directors have failed to make, and the foreclosure would probably obliterate all interest of the stockholders, an opportunity will be allowed petitioners to apply to the board of directors, and, on their failure to make the defense, petitioners will be allowed to intervene to make it.

**2. SAME—ESTOPPEL TO DENY CORPORATE EXISTENCE.**

In an action to foreclose a mortgage securing bonds of a consolidated railroad corporation of Ohio and Michigan, where, from the time of the  
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consolidation, it exercised the franchises of a consolidated corporation, without objection from the state, or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a de facto corporation, though there was a failure to give the notice to stockholders, or to file the certificate of consolidation required by Rev. St. Ohio, §§ 3380-3382, and both such de facto corporation and its stockholders are estopped to assert its unauthorized existence as a corporation to avoid the bonds.

**3. SAME—INCREASE OF STOCK—VALIDITY OF BONDS—ESTOPPEL.**

Conceding that Rev. St. Ohio, § 3287, limiting the bonded indebtedness of a railway corporation to the amount of its capital stock, applies to a consolidated corporation of Ohio and Michigan, where the bonds actually issued under a mortgage do not exceed the capital stock as increased at a corporate meeting, both the corporation and the stockholders are estopped to deny the validity of the bonds for failure to give notice of the meeting at which the increase was authorized, and to file the certificate required by Rev. St. Ohio, §§ 3307-3310, regulating the increase of capital stock of railroad companies, the corporation having assumed the character and capacity of a corporation with such increased amount of stock by an almost unanimous vote of the stockholders, and for two years exercised the functions incident thereto without objection from either the state or the stockholders.

**4. SAME—BONDS—RATIFICATION.**

Corporate bonds and mortgages, issued without authority, are ratified by the payment of interest for three years on the indebtedness thus represented.

**5. SAME—VALIDITY OF BONDS—ESTOPPEL.**

Where railway bonds, and the mortgage securing them, limit the amount of bonds to be issued per mile of road, but both the stockholders and the directors know and acquiesce in the issuance of bonds at a greater rate, both the corporation and the stockholders are estopped to urge the limitation of the mortgage to defeat the bonds issued in excess of that limitation.

Bills in equity by the Farmers' Loan & Trust Company and others against the Toledo, Ann Arbor & North Michigan Railway and others to foreclose certain mortgages. The suits were consolidated, and decrees were taken against defendant pro confesso. Subsequently George W. Murray and others, as a committee of the stockholders, petitioned to be made parties defendant, and allowed to file an answer on behalf of the company.

This is a consolidation of suits for the foreclosure of one general and six divisional mortgages on the railroad of the Toledo, Ann Arbor & North Michigan Railway Company. A decree for sale has been entered in accordance with the prayers of the several bills, and advertisement has been begun under the sale. The cause is now brought before the court on a petition of George W. Murray, Thomas A. McIntyre, William H. Male, Joseph Richardson, Edmund O. Stedman, and James B. Clews, averring themselves to be a committee appointed by persons holding a majority of the \$6,500,000 par value of the issued shares of the defendant railway company, to represent them in this suit. They pray to be allowed to be made parties defendant herein, and to file an answer on behalf of the railway company, contesting the validity of the general mortgage and the bonds it purports to secure. The company itself filed no answer, but allowed the decree to be entered by default.

The Toledo, Ann Arbor & North Michigan Railway Company until April, 1893, was operating a railroad extending from Toledo, Ohio, through the state of Michigan, to Frankfort, on the east shore of Lake Michigan, and steam vessels upon Lake Michigan for the transportation of freight cars from Frankfort to the western shore of that lake. The railroad was the result of the consolidation of the roads of six different companies. They were as follows: (1) The road of the Toledo, Ann Arbor & Grand Trunk

Railway Company, extending from Toledo to Ann Arbor, 52 miles, with a branch line from Ann Arbor to Pontiac. (2) The road of the Toledo, Ann Arbor & North Michigan Railway Company, extending from Ann Arbor to St. Louis, in Michigan, a distance of 97 miles. (3) The road of the Toledo, Ann Arbor & Mt. Pleasant Railway Company, extending from St. Louis to Mt. Pleasant, 21 miles. (4) The road of the Toledo, Ann Arbor & Cadillac Railway Company, extending from Mt. Pleasant to Cadillac, a distance of 61 miles. (5) The Toledo, Ann Arbor & Lake Michigan Railway Company, extending from Cadillac to Frankfort, 63 miles. (6) The road of the Frankfort & Southeastern Railway Company, which was embraced within the line operated by the Toledo, Ann Arbor & Lake Michigan Railway Company, extending from Thompsonville to Frankfort, a distance of 22 miles. There was a divisional mortgage on the Grand Trunk division of \$1,260,000, on the North Michigan division of \$2,120,000, on the Mt. Pleasant division of \$400,000, on the Cadillac division of \$1,260,000, on the Lake Michigan division of \$767,000, on the Frankfort & Southeastern division of \$235,000, and the consolidated mortgage covering the entire line was for \$1,443,000. In April, 1893, upon the bill of a judgment creditor, a receiver was appointed to take charge and operate the railroad of the defendant company. In September, 1893, bills were filed in this court, in the circuit court of the United States for the Eastern district of Michigan, and in the circuit court of the United States for the Western district of Michigan, to foreclose the various divisional mortgages, and also to foreclose the consolidated mortgage of the defendant company. The appearance of the defendant company was duly entered in November, 1893, in each court and case. All the foreclosure bills in each court were consolidated. In February, 1894, no answer having been filed, decrees pro confesso were taken against the defendant. Nothing was done in the causes thereafter until January, 1895, when a decree for foreclosure and sale under the consolidated and the divisional mortgages was entered in this court and in the circuit courts for the Eastern and Western districts of Michigan. At the time the decree was entered an application was made on behalf of the petitioners, or some of them, to be made parties, that they might file answers for the corporation, and contest the validity of the bonds issued under the consolidated mortgage, averring that they were informed by rumor that quite a number of the bonds secured by the consolidated mortgage had been diverted to the private uses of the officers of the company before the receivership. It was held by this court at that time that a mere rumor was not sufficient evidence upon which to base such an application, and further, that the petitioners, by their long delay since the decree pro confesso, had waived any right which they might have had, if exercised in due time, to prevent a sale of the property, when such a sale could be stopped by the payment into court of interest upon the outstanding bonds under the order allowing redemption contained in the decree. The default upon which foreclosure is asked in this case is a default in the payment of interest, and not in the payment of the debt. There was inserted in the decree, however, a provision that the decree for sale should not in any way be taken to prejudice the right of any interested party to appear before a decree for distribution of the proceeds of sale was made, to contest the validity of the claim of any bondholder. At the same time an order was made by the court permitting the stockholders to examine the books of the railroad company for the purpose of general investigation. Under this order, petitioners employed an expert, who has been examining the books since the entry of the decree, and the present petition was filed as a result of his investigation. It was filed the day before the advertisement was begun for the sale of the railroad to take place early in April. The petition sets out the various mortgages, and the steps heretofore taken in this cause; alleges that the actions to foreclose the mortgages were begun without the knowledge of the petitioners; avers that at the last stockholders' election, in April, 1894, proxies were secured from owners of stock represented by the petitioners for the purpose of electing George W. Quintard, Amos F. Eno, J. Edward Simmons, and Robert M. Galloway, with seven others, directors; that since the election they have called no meeting to consider the interests of the company or the stockholders, and have taken no means to file answers



to the bills; that the four above-named directors thereafter became the members, and a majority of the members, of a committee, acting solely in the interest of the bondholders for the reorganization of the railway company; that they never laid before the board of directors, as such, their plan of reorganization, and that the other directors have had no opportunity to express views concerning the same; that in their statement as a committee, recommending their plan of reorganization, they have described the common stock of the defendant company as worthless, although the stock did at one time sell as high as \$40 a share; that this plan was formulated on October 25, 1894, and that neither before that time nor after were any steps taken by the directors to protect the interests of the company in this litigation; that the petitioners are informed that the large amount of the consolidated bonds were diverted from the true and lawful purpose of their issue, and that many were used, as petitioners believe, as collateral security for the individual indebtedness of one or more of the former officers of the company; that the plan of reorganization by the Quintard committee treated the stock as worthless, and gave no opportunity to the stockholders to join in the plan of reorganization; that the petitioners, constituting another reorganization committee, devised a more equitable plan, in which the stockholders were given an interest in the new company; that upon the order heretofore made by this court, giving the stockholders an opportunity to examine the books, an expert accountant reports that there were net earnings over and above the operating expenses and the fixed charges for 1889 of \$33,000, for 1890 \$60,000, for 1891 \$2,000, and 1892 \$10,000, excluding the payment of the salaries of the president and vice president, and the deduction for bad debts in 1890 of \$25,000,—showing, as petitioners claim, that the common stock had some value. The petition and the amended petition then state four grounds of defense which the directors should have made for the company, and which they ask to be made parties for the purpose of setting up in an answer. The first defense proposed is that, the Toledo, Ann Arbor & North Michigan Railway Company, which, since April, 1888, down to the time of the receivership, in April, 1893, did business, exercised franchises, and operated a railroad as a consolidated corporation of Michigan and Ohio, never had a legal existence, because the proper steps for consolidation required by the statute of Ohio had never been taken, and therefore that the bonds purporting to be issued by such a pretended corporation, having no legal existence, must be invalid. The second defense proposed is that the defendant company had a capital of \$6,500,000, and under the laws of Ohio had no authority to issue a mortgage to secure an indebtedness exceeding the amount of its capital stock; whereas the indebtedness claimed under the consolidated mortgage would increase its total indebtedness to more than \$7,000,000. Third. The petitioners propose to defend against the payment of the bonds and the foreclosure of the consolidated mortgage, on the ground that the issuance of the mortgage and the bonds was never authorized by the stockholders or directors of the railway company purporting to issue the same in accordance with the laws of Ohio. Fourth. The fourth defense proposed to be made by the petitioners on behalf of the company is that on the face of the bonds and by the terms of the mortgage the issue of bonds thereunder was strictly limited to \$21,000 per mile of line of present railroad and \$18,000 per mile of line thereafter acquired by new construction, purchase, or consolidation, sidings not included, except that, in addition, \$50,000 might be issued for terminal and other specific uses; and that in violation of this provision of the mortgage there were issued of the consolidated bonds in the purchase of the Toledo, Ann Arbor & Lake Michigan Railway and of the Frankfort & Southeastern Railway a sufficient number, taken with the bonds and obligations of those roads, assumed by the defendant company as part of the purchase price thereof, to make the amount paid \$30,000 a mile. The evidence upon which these defenses are claimed by petitioners to be well founded is referred to in the opinion. The prayer of the petition is that the petitioners be made party defendants to the cause in behalf of the stockholders whom they represent and of said company, to answer the bill of complaint, and that an order may be entered granting them leave to answer, and to set up the facts stated in the petition

by way of defense within a reasonable time, and that, pending the hearing of issues made by the answer, the decree for sale may be revoked and annulled, or its execution suspended.

Hoadley, Lauterbach & Johnson and Samuel E. Williamson, for petitioners.

Turner, McClure & Rolston and Brown & Geddes, for Farmers' Loan & Trust Co.

Swayne, Swayne, Hayes & Tyler, for Central Trust Co.

Doyle, Scott & Lewis, for bondholders' committee.

Before TAFT, Circuit Judge, and SEVERENS and RICKS, District Judges.

TAFT, Circuit Judge (after stating the facts). The petition is undoubtedly defective in this: that it does not show that any attempt has been made to procure the board of directors to make the defenses for the company which the petitioners ask to be allowed to make. The averments of the petition with reference to collusion affect but four of the eleven directors, and it does not appear affirmatively that the other seven directors would not, if requested, make the defenses which the petitioners propose to set up. But, if there is a valid and equitable defense to the claim of \$1,443,000 against the defendant company, which the directors have failed to make in an action for foreclosure, which will in all probability obliterate all interest that the holders of 65,000 shares of the capital stock of the defendant company have in the property, the court, though it might be obliged to dismiss the petition for the objections urged to it, would certainly give the petitioners an opportunity to apply to the board of directors, and, on their failing to make the defense, would then allow the petitioners to intervene to make it. The refusal of the board of directors to make a valid and equitable defense to the foreclosure of the mortgage, and a sale of all the franchises and property belonging to the road, when the existence of such a defense is brought to their knowledge, would of itself constitute such gross neglect or fraud on their part as to require the court to permit their interested cestuis que trustent, the stockholders, to make the defense themselves. *Dodge v. Woolsey*, 18 How. 331. We therefore find it necessary to proceed to the consideration of the defenses proposed to be made and their validity. Before doing so, however, we should observe that the averments in the petition with reference to the two plans of reorganization have no relevancy whatever to the question before the court except as evidence to enforce the charge against four of the directors that they are interested as bondholders not to make the defenses for the company which, as directors, it would be their duty to make. With the fairness and equity of the reorganization plans the court has nothing to do. Any person, or any number of persons, may purchase the road at the public sale. If the bondholders choose to buy in the road to protect their security, there is no obligation upon them whatever to divide the benefit of their purchase with

the stockholders. If the stockholders are of opinion that the road exceeds in value the debts which rest upon it, they are at liberty to bid such a sum for the road as will pay the debts and will leave a surplus for division among themselves upon their stock. In no other way can they secure action by the court to assist them in obtaining value for their stock.

We come now to the defenses which the petitioners propose to set up. The first is that the defendant company is not a legally incorporated company of Ohio. The averment of the amendment to the petition is that in February, 1888, "there was in existence another corporation, having the same name as the defendant, and owning a railroad from Toledo, Ohio, to Mt. Pleasant, Mich., and another corporation, known as the Toledo, Ann Arbor & Cadillac Railway Company owning a railroad from Cadillac, Mich., to Mt. Pleasant, Mich., both of said roads being parts of the railroad sought to be mortgaged under said consolidated mortgage, and described therein; and that on the 27th day of February, 1888, the boards of directors of said first-named corporation, and on the 29th day of February the board of directors of said last-named corporation, at meetings held by said boards respectively, adopted resolutions approving an agreement for consolidation, previously executed by three directors of each of said corporations for said corporations, respectively, but without any previous authority of either of said boards; that meetings of stockholders of said two corporations were held on the same day of the meeting of directors at which only a part of the stockholders of said respective corporations were present in person or by proxy, at which meetings resolutions were adopted purporting to approve of said agreement; that, as your petitioners are informed and believe, no notice, as required by law, was given of said stockholders' meetings of either of said corporations, and that it was impossible to give such notice between the time when said meetings of directors were held and when said meetings of stockholders were held, both directors and stockholders having met upon the same day; that, as your petitioners are informed and believe, said agreement was filed in the office of the secretary of state of the state of Michigan, but the same has never been filed in the state of Ohio, and that no effort was made to conform to the laws of Ohio regulating the consolidation of railway companies, and that no consolidation was effected or attempted to be effected of said companies, except as hereinbefore stated; and that said consolidated mortgage is not, therefore, a lien upon any part of said railroad." Section 3380 of the Revised Statutes of Ohio permits a railway company organized in that state to consolidate its capital stock with the capital stock of another company in an adjoining state, organized for a like purpose, where their roads, united and constructed, will form a continuous line for the passage of cars. Section 3381 prescribes the conditions and restrictions for such consolidation. First, the directors of the two companies are to enter into a joint agreement, describing the terms thereof with all the details necessary to

procure the new organization and consolidation. Second, the agreement is to be submitted to the stockholders at a meeting called separately for the purpose of taking the same into consideration, and due notice of the time and place of such meeting and the object is to be given by written or printed notices, addressed to each of the registered stockholders, and by a like notice published in a newspaper where the company has its principal office; "provided, that in case all the stockholders are present at such meeting, in person or by proxy, such notice may be waived in writing." A vote is required to be taken upon the question of the consolidation under the agreement, and if two-thirds of all the votes cast at the meeting be for the adoption of the agreement, the fact has to be certified by the secretary of each of the companies, and these certificates, together with a certified copy of the agreement, must be filed in the office of the secretary of state. Section 3382 provides:

"When the agreement is made and perfected, as provided in the preceding section, and the same or a copy thereof filed with the secretary of state, the several companies parties thereto shall be deemed and taken to be one company, possessing within this state all the rights, privileges and franchises, and subject to all the restrictions, disabilities and duties of a railroad company."

It is to be presumed, in the absence of an averment to the contrary in the petition, that the holders of two-thirds of the stock in each of the constituent companies at the two meetings approved the joint agreement. Since that time no objection seems to have been made by any stockholders or by the state to the exercise by the defendant company of its franchises as a consolidated corporation of Ohio and Michigan. It actually exercised franchises as such corporation. It operated as such a railroad from Toledo to Lake Michigan. The holders of the 33,000 shares of the stock of the defendant company represented by petitioners or their predecessors in title appeared and voted as stockholders in the defendant company at its different annual meetings, the last of which was held in April, 1894. It may be true that the failure to give the notice required in the statute, or the failure to file the certificate of consolidation required in the statute, prevented the new consolidated company from being legally incorporated under the laws of Ohio, but it is manifest that the new consolidated company was a de facto corporation of Ohio, while, in the absence of any averment to the contrary in the petition, we may assume that it was not only a de facto, but a de jure, corporation of the state of Michigan. It is too well established to need discussion that both a de facto corporation and the persons exercising the rights of stockholders in such a corporation are estopped to assert its unauthorized existence as a corporation to avoid a debt incurred by it in the actual exercise of corporate franchises and the doing of corporate business. *Ashley v. Supervisors*, 8 C. C. A. 455, 60 Fed. 65; *Phinzy v. Railroad Co.*, 62 Fed. 678; *Dallas Co. v. Huidekoper*, 154 U. S. 654, 14 Sup. Ct. 1190; *Close v. Cemetery*, 107 U. S. 466, 2 Sup. Ct. 267; *Bank v. Matthews*, 98 U. S. 621;

Macon Co. v. Shores, 97 U. S. 272; Chubb v. Upton, 95 U. S. 665; Douglas Co. v. Bolles, 94 U. S. 104; Wallace v. Loomis, 97 U. S. 146; Leavenworth Co. v. Barnes, 94 U. S. 70; Casey v. Galli, Id. 673. Certainly it showed no neglect of duty or bad faith on the part of any of the directors not to set up such a defense for the foreclosure of the consolidated mortgage.

Second. The petition alleges as follows:

"Your petitioners further respectfully show that the capital stock of said alleged consolidated railway company did not and does not exceed \$6,500,000, and that the issue of mortgage bonds exceeding that amount was, under the laws of Ohio, unauthorized and void; and that the said consolidated mortgage, being for the sum of \$10,000,000, and the bonds issued thereunder, together with the bonds secured by mortgage previously issued upon the so-called 'divisions' of said railroad, exceeding the amount of said capital stock, should be held to be unauthorized and void."

Section 3286 provides:

"A company may issue bonds, convertible or otherwise, bearing a rate of interest not exceeding seven per centum per annum, to an amount not exceeding two-thirds of its capital stock, actually subscribed, for one or more of the following purposes: completing or extending its road, constructing branch roads, laying double or additional track, increasing its machinery or rolling stock, building depots or shops, making improvements, paying its unfunded debts, or redeeming its bonds; and it may secure the bonds issued for such purposes by mortgage on its property, or otherwise, if authorized by the vote, in person or by proxy, of holders of a majority of the stock upon which all the installments called for by the board of directors have been paid; but such vote shall be taken at a meeting of stockholders of which thirty days' notice shall be given."

Section 3287 provides that:

"A [railroad] company may borrow money at a rate not exceeding seven per centum per annum, for any purpose that the same may be needed in its business and execute bonds or promissory notes therefor, in sums of not less than one hundred dollars; and it may secure the payment of such bonds and notes by a pledge of its property and income; but the aggregate indebtedness authorized by this and the preceding section shall not exceed the amount of the capital stock of the company."

It appears by a reference to the minutes of the company that the capital stock, until April 16, 1890, was 53,000 shares; that upon that day, at the regular annual meeting of the stockholders, at which were represented 43,160 shares, it was resolved to increase the capital stock of the company from 53,000 shares of \$100 each to 80,000 shares of \$100 each; and that an amended charter was adopted by the meeting for this purpose, all the shares represented voting in the affirmative. At the same annual meeting it was resolved that 9,000 shares of the new stock be delivered to the Toledo, Ann Arbor & Lake Michigan Railway Company as part payment for the purchase of its property and franchise, and that 15,000 shares be delivered as part payment for the Cincinnati, Saginaw & Mackinaw Railway Company, its property and franchises. The latter purchase fell through, and the stock was not delivered. Subsequently, at the annual meeting in 1892, the stockholders authorized the delivery of 5,000 shares of the company's capital stock to the Frankfort & Southeastern Railway Company as part payment for the purchase of that company's prop-

erty and franchises. The additional stock over and above the original 53,000 shares was voted at subsequent annual meetings. The consolidated mortgage, purporting to secure \$10,000,000 of bonds, is said to have been authorized at a stockholders' meeting on January 15, 1890, but no bonds were issued under that mortgage, so as to become a binding obligation of the company, until after the annual stockholders' meeting of April, 1890, when the increase of stock and the amended charter were adopted by the unanimous vote of all the stock represented. The number of bonds issued under the consolidated mortgage upon which a decree has been rendered is \$1,443,000. This sum, taken with the underlying additional mortgages, amounts to something over \$7,000,000.

Section 3307 of the Revised Statutes of Ohio provides that a company may increase its capital stock whenever, in the opinion of the directors, the same is insufficient for the construction of its road, or it becomes necessary for the transaction of its business to construct a second track, or to buy another road within the state, or for the purpose of extending the same, or to refund its debts, or for completing its line of road. Section 3308 provides that before any stock can be issued a majority of the directors shall call a meeting of the stockholders, designating the time, place, and purpose of the meeting, and the amount of stock required, that notice shall be given at least 30 days previous by publication in two newspapers, and by a like notice, mailed 30 days previous, to each stockholder whose residence is known. And that, "if at such meeting the consent of the holders of a majority of the stock upon which they would be entitled to vote at an election of directors of the company be given, the stock of the company may be increased to such amount as may be decided necessary or requisite for the purposes named in the preceding section." The purpose recited in the resolution adopted in this case was that of extending the line of the railroad company by purchase. Section 3310 requires that "ten days after the meeting the president and secretary of the company shall make an abstract, stating the whole amount of pre-existing capital stock, the amount authorized, the number of shares of stock upon which all the installments called for by the board of directors have been paid, and the vote at the meeting, and add a certificate that the provisions of the two preceding sections have been fully complied with; and they shall make affidavit to such abstract and statement and file the same in the office of the secretary of state, who shall cause the same to be recorded."

It may be conceded that the course actually taken was not the statutory method provided for increasing the capital stock; that it was defective in the character of the notice, which was a notice for a mere annual meeting; and also in the failure to file the proper certificate with the secretary of state, and to have the same recorded in his office. But we are of opinion that the same reasons make this defense unavailable to the petitioners which prevailed against the first one considered. The corporation in

which the petitioners are shareholders assumed the character and capacity of a corporation with 80,000 shares of stock, and, without objection from the state, acted as such, and had so acted for more than two years. It had assumed that character upon the authority of the almost unanimous vote of its shareholders, and had continued to exercise the functions incident thereto without dissent from any of them. Upon consideration of these facts it is clear that not only the corporation, but the stockholders also, are now estopped to defeat any obligations assumed by that company on the ground that its stock was not equal to 80,000 shares. Conceding that the limitation in section 3287 applies to a consolidated company, and that such a company cannot have an aggregate indebtedness, secured by mortgage, in excess of its capital stock, the limitation, it will be observed, is not upon the amount of the mortgage, but upon the amount of the bonds issued which the mortgage secures. The fact, therefore, that the mortgage is for \$10,000,000, does not invalidate it as security for \$1,443,000 of bonds issued under it. Of course, it is a mortgage which can be enforced only to the extent of the actual obligations created under it, and, as those obligations do not exceed \$1,443,000, it is only to be regarded as a mortgage for that amount. Taking it as such, with the other indebtedness, the total is less than \$8,000,000, which the stockholders of the company by unanimous vote agreed should be the capital stock of the company, and under which vote a large part of the increased stock was issued and subsequently voted. Under these circumstances we do not think that the corporation can be heard to urge section 3287 as a reason for invalidating the bonds by it, and that the stockholders who acquiesced in this action for more than three years are equally estopped to make such a defence. 2 Cook, Stocks & S. § 760; *Allis v. Jones*, 45 Fed. 148; *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100; *Fidelity Insurance, etc., Co. v. West Penn. & S. C. R. Co.* (Pa. Sup.) 21 Atl. 21; *Wood v. Water Works Co.*, 44 Fed. 146; *Water Co. v. De Kay*, 36 N. J. Eq. 548. We do not think that the decisions of the supreme court in *Nesbit v. Riverside Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746, and kindred cases, in which bonds were held invalid when issued in excess of an absolute limit fixed by statute,—as, for example, a percentage of the taxable value of property in a county,—have application to a case of this sort, where it is plainly within the power of the corporation, by properly increasing its stock, to issue bonds equal in amount to the increase, and where an increase is attempted, and the only defect is an irregularity in the method by which the increase is sought to be made, rather than in a total want of power to secure it.

The third defense proposed is that the consolidated mortgage was never authorized by the stockholders and directors at a legally called meeting. There is nothing in this defense. It rests on the absence of a record of such a meeting in the minutes of the railroad company. Ashley, one of the officers of the railroad com-

pany, testifies positively that there was such a meeting, and reference is made in the subsequent minutes to such a meeting of the stockholders and of the directors. Whether the meeting was duly called in accordance with the requirements of the statute is immaterial, because the binding effect of the mortgage and the bonds have been recognized at every annual meeting since its issuance, and by the payment of interest upon the indebtedness thus represented for three years. The binding effect of the mortgage and the bonds was recognized by the petitioners themselves, when acting as a reorganization committee. If there was any defect by reason of a want of original authority to issue the bonds and mortgage, it has been cured by subsequent ratification. *Hotel Co. v. Wade*, 97 U. S. 13; *Supervisors v. Schenck*, 5 Wall. 772; *Clay Co. v. Society for Savings*, 104 U. S. 587.

Fourth. The next and last defense proposed to be made is that the bonds issued under the mortgage were diverted from their lawful purpose, or, rather, that there was an overissue of them beyond the limit fixed in the mortgage itself and in the bonds themselves for the purposes therein mentioned. The mortgage and the bonds, as already stated, limit the amount to be issued to \$21,000 per mile of road then owned, and to \$18,000 per mile of road to be constructed or acquired. The bonds issued under the consolidated mortgage to buy the Lake Michigan road and the Frankfort & Southeastern road, with the obligations assumed as part of the purchase price, exceed \$30,000 per mile. The limitation in the mortgage was not a limitation upon the power of the corporation itself. It was a contract with the bondholders, affecting the extent of their security. It is true that if the only authority for the issuance of these bonds was to be found in the resolution authorizing the mortgage and the bonds, the limitation in the mortgage would be a limitation upon the power of the directors to use the bonds in the purchase of roads at a greater rate than \$18,000 per mile. But, if both the stockholders and the directors acquiesced in the issuance of bonds, at a greater rate under this mortgage, neither the corporation nor the directors nor the stockholders can now be heard to urge the limitation of the mortgage as a reason for defeating the obligation of bonds issued in excess of that limitation. The evidence overwhelmingly establishes that all the stockholders knew that the bonds were being issued in such a way as that the amount paid for the newly-acquired roads exceeded a rate of \$18,000 per mile. It was brought to their attention by annual reports, and the report of the petitioners themselves recommending their plan of reorganization shows conclusively that they had full knowledge upon this subject. It might be some ground for complaint on the part of persons who purchased bonds under the mortgage if those who were to share in the security were increased in number in violation of the assurance in the mortgage and the bonds. But certainly the corporation, which has taken the money or property of the bondholders with the acquiescence and the knowledge



of its stockholders, cannot be heard to urge such a limitation by way of the defense to a suit to recover on the bonds thus issued. The proof shows that all the bonds of the consolidated company were issued for value. A slight attempt is made to show that some of the bonds were disposed of by James Ashley, Jr., financial agent of the company, as collateral for his individual notes, but it has failed, and, whether it be true or not, the validity of the consideration received by the company for the great bulk of the bonds is undisputed and indisputable. The mortgage must therefore be foreclosed, and, if any of the bonds were fraudulently issued, they may be attacked before distribution, under the express provision of the decree for sale already made. The petition is dismissed.

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MARION COUNTY v. COLER et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

No. 239.

1. VALIDITY OF COUNTY BONDS—CONSTITUTIONAL LAW.

The Texas statute of February 22, 1873, appointing three persons named as commissioners and trustees of Marion county, to procure suitable grounds and erect a courthouse and jail thereon, at an expense not exceeding \$75,000, to be paid with county bonds, was not invalid as infringing the constitutional powers of the justices of the peace under section 20, art. 5, of the constitution of 1869, which declares that such justices shall constitute a court having jurisdiction similar to that theretofore exercised by the county commissioners, as may be provided by law.

2. SAME—ISSUANCE OF BONDS—IRREGULARITIES—LEVY OF TAX.

The fact that no tax was levied to pay interest and create a sinking fund before the issuance of the bonds, as required by section 3 of the act, did not render the bonds void, for the commissioners had full power to contract the debt, and the duty was imposed on the county government to execute the bonds and provide for the interest and sinking fund, and the failure of the county authorities to perform their duty at the time specified could not affect the validity of the bonds.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by W. N. Coler & Co., a firm composed of W. N. Coler, Sr., W. N. Coler, Jr., Bird S. Coler, and James W. Campbell, citizens of the state of New York, against Marion county, Tex., to recover some \$50,000 alleged to be due upon certain bonds issued by that county. Of this amount, about \$27,000 was claimed to be due on funding and refunding bonds, and about \$32,000 on courthouse and jail bonds. A jury was waived by written stipulation, and the case tried by the court, which filed written findings of fact, with its conclusions of law thereon. Judgment was entered in favor of the plaintiffs for \$59,757.43, with interest. Defendant brings error.

The courthouse and jail bonds sued upon were issued under an act passed by the legislature of Texas February 22, 1873. The provisions of this act which are material to the present controversy are found in sections 1, 2, and 3, which are as follows:

Section 1. Be it enacted by the legislature of the state of Texas: That J. T. Veal, J. Wilbourn Young and John B. Ligon, be and are hereby appointed

commissioners and trustees of the county of Marion, in the state of Texas, to procure grounds in a suitable location in the city of Jefferson, in the said county of Marion, upon which to erect a court house and jail for the use of said county, free of charge to said county. That said commissioners or any two of them may, after said grounds are secured, proceed as soon as practicable to cause said buildings to be erected for the use aforesaid, and to pay for the same with the bonds of said county as hereafter described, or to sell said bonds and pay for said buildings out of the proceeds arising from the sale of said bonds as to them may seem best.

Sec. 2. That when said grounds are selected by said commissioners, and the sum ascertained to be necessary to pay for said buildings, said commissioners shall cause to be printed or engraved the bonds of said county, to become due and payable twenty years after the date thereof, to bear interest at the rate of eight per cent. per annum from the date of said bonds, and to have coupons attached to each of said bonds for each year's interest thereon, to become payable to bearer on the 1st day of July of each year after the date of their issuance. The total amount of said bonds shall not exceed the sum of seventy-five thousand dollars, and they shall be issued in sums not less than one hundred nor more than one thousand dollars each, which said bonds when so printed or engraved, as aforesaid, shall be signed by the presiding justice of the peace of said county, and countersigned by the clerk of the district court of said county, and attested by the seal of said court, and shall then be numbered and registered by the said clerk in the records of said county and endorsed by any two of said commissioners, with a memorandum as follows, viz: "This bond is issued by the county of Marion, in the state of Texas, to pay for building a court house and jail for said county," which said endorsement shall be dated and signed by said commissioners or any two of them, and without said endorsements said bonds shall be null and void. In case of a failure of any of the commissioners to accept this trust or to act as such, any two of said commissioners may appoint a third one by recording said appointment in the records of the district court of said county, but if no two of them shall act as such then the county court shall appoint such number as may be required to fill the said commission.

Sec. 3. That when said bonds are signed and before they are issued the county or police court of said county shall levy and thereafter cause to be collected under general laws of this state, a poll tax of fifty cents on each male citizen of said county over twenty-one years of age, and a tax on all the real and personal property of the said county to raise a sum sufficient to pay the annual interest on said bonds, and a sinking fund of two per cent. to meet the principal thereof, which sum when so collected shall be used for no other purpose than that for which the same is collected. That said tax shall be annually thereafter levied and collected and appropriated as aforesaid. That in the month of June of each year said county or police court shall advertise in a newspaper published in said county, that they will on the 1st day of July of said year be ready to pay off and take up the amount of said bonds, which the funds on hand may meet, and if the holder or holders of any of said bonds shall present the same for payment in a sum sufficient to take up the funds on hand, said court shall purchase or pay off such an amount of the same as they may be able to do with the funds in their possession collected and set apart for this purpose, and if none of said bonds are presented the said court shall select by drawing from the whole number of outstanding bonds a number of the same of an amount equal to the sum of money then on hand, and shall publish in said newspaper for one month, that they are ready to pay off and take up the amount of bonds aforesaid, and shall designate the number of bonds which have been drawn as aforesaid, and notify holder or holders thereof to deliver the same for payment, and if the said bonds designated as aforesaid be not presented and paid off they shall cease to bear interest forever thereafter.

The findings filed by the court were as follows:

#### Findings of Fact.

(a) Plaintiffs' petition was filed in the United States circuit court at Jefferson against defendant, Marion county, on the ——— day of June, 1892, upon a large number of overdue coupons or obligations, cut from three kinds of bonds

issued and sold by defendant, to wit, coupons cut from what are known as "Courthouse and jail bonds," made June 30, 1873, bearing 8 per cent. interest, and to run twenty years from date, interest payable annually on July 1st of each year; also from coupons cut from a bond known as "Marion county funding bond," issued March 1, 1880, to become due March 1, 1900, and bearing 6 per cent. interest from date thereof, and payable March 1st and September 1st of each year; also coupons cut from a bond known as "Marion county refunding bond," issued — day of May, A. D. 1882, and to fall due July 1, 1902, and bearing interest payable July 1st and January 1st of each year. (b) That said defendant, under pleas and answers, denied the constitutional and legal right of Marion county to issue and sell the courthouse and jail bonds; that there was a failure of consideration; that fraud entered into the transaction; and that the bonds and coupons were void in the hand of the plaintiffs; and, as to the funding bonds, that the same in part was the funding of county registered scrip, and that there was fraud in this transaction, and an overissue to the extent of \$——, and these bonds were void to that extent. (c) Plaintiffs demurred, denied allegations of defendant, pleaded acquiescence and ratification by defendant, and estoppel. (d) The court finds that the courthouse and jail bonds, to the extent of seventy-five thousand dollars, were issued by defendant county June 30, 1873, bearing 8 per cent. interest, payable annually on July 1st of each year, and these bonds were issued under and by virtue of an act of the legislature approved February 22, 1873; that the said bonds were made and executed in strict conformity with said legislative act dated February 22, 1873; that at the January term of the commissioners' or county court of Marion county, 1874, an order was made and entered levying a tax to pay the interest and sinking fund of said bonds, and the taxes to pay the interest and sinking fund were collected until after 1876; that the funding bond was made and executed by defendant county under and by virtue of an act of the legislature approved March 25, 1879, and by orders of the commissioners' court of Marion county made in pursuance of said law, which authorized the issue thereof, and levied the tax for interest and sinking fund, and the said bonds funded indebtedness that existed prior to April 18, 1876, and included in part overdue coupons of the courthouse and jail bonds; that the greater part of the debt funded consisted of registered scrip, the amount of which the commissioners' court, on February 5, 1880, ascertained to be, and so declared in an order of said court that day, \$39,767.86, bearing 8 per cent. interest thereon; that the refunding bond issued by Marion county was executed under two acts of the legislature, one approved March 25, 1879, and one the 6th day of April, 1881, and that the indebtedness refunded by said bonds had its inception and was created prior to April 18, 1876, and included in part coupons cut from the aforesaid courthouse and jail bonds; that the commissioners' court made and entered proper orders authorizing the issuance of said bonds, the levy and collection of taxes for payment of the interest and sinking fund of the same, in pursuance of said laws; that said funding and refunding bonds were made and executed in conformity to the said legislative acts authorizing them and the orders of the commissioners' court. (e) The court finds from the evidence that the three suits were filed against the defendant, Marion county, in the United States circuit court prior to 1886, by W. N. Coler, Jr., one of the plaintiffs in this suit; and the causes of action in said suits were in part coupons cut from the said courthouse and jail bonds, also those cut from said funding and refunding bonds, and a part of registered scrip; and that, pending said suits, said defendant county made a settlement thereof, and by decrees and orders of the commissioners' court of Marion county made and entered September 11 and October 15, 1886, fully recognized the validity of said indebtedness, and paid off same in compromise by the execution and delivery of new bonds; and that the plaintiffs purchased said coupons sued on for value before maturity bona fide, and without notice of any infirmities therein; that, by the acts of defendant county in the levy, collection of taxes, and payment of interest on said several bonds, and the orders and decrees of the commissioners' court in settlement of such bonded indebtedness from time to time, the defendant has acquiesced in, confirmed, and ratified the validity of all of several issues of bonds. (f) The court finds that the amount of principal and interest at 6 per cent. on all the coupons of the funding and refunding bonds introduced in evidence, figured up to September 28, 1893, to be \$27,391.39,

with 6 per cent. interest thereon from that date; that the amount of principal and interest at 8 per cent. on all the coupons of the courthouse and jail bonds offered in evidence, up to September 28, 1893, is \$32,366.04, with 8 per cent. interest thereon from date; and the judgment will be entered for the aggregate amount of \$59,757.43, with 6 per cent. interest on \$27,391.39, and with 8 per cent. interest on \$32,366.04, from date.

#### Findings of Law.

(1) That the courthouse and jail bonds were issued under the constitution of 1869, and full power was conferred by it upon the legislature to authorize counties to issue bonds in such manner as prescribed by law. (2) That the act of February 22, 1873, prescribing the manner and conferring the power upon trustees and Marion county to issue the courthouse and jail bonds, was not in conflict with the constitution of 1869. See Sp. Laws 1873, p. 65, c. 9. (3) The power to create agents by counties to make contracts for building or repairing public buildings had existed since the act of December 29, 1849. See Oldh. & W. Dig. art. 275. (4) By section 20, art. 5, Const. 1869, the legislature was clothed with authority to grant such powers as it saw fit to the commissioners' court to make and issue bonds. This court became the creature of the law prescribed. The legislature could increase or diminish its authority, or even take away all other powers than such as the constitution had prescribed. The court, therefore, concludes that the legislature had the power and authority to pass the act of 22d February, 1873, and confer the power of making and issuing the courthouse and jail bonds upon trustees appointed in the first instance by the legislature, and upon the officers of the county. The county had no power before this act to issue these bonds. Under this act, the power was granted under limitations to be exercised by the officers of the county and the trustees; and, the act having been pursued, the bonds were issued, and therefore legal and valid. (5) The court further finds that the funding and refunding bonds were made under the acts of March 25, 1879, and April 6, 1881, after the adoption of the constitution of April 18, 1876, but the indebtedness, funded and refunded, was created and existed prior to April 18, 1876; and that the rules of decision arising under the constitution of 1869 are applicable to these bonds; and that the same are legal and valid obligations. (6) The court further finds that, under the evidence, the defendant has acquiesced in and ratified the validity of the several issues of bonds in question; that for twenty years the defendant has recognized the courthouse and jail bonds as valid, enjoyed the proceeds, levied, collected, and paid taxes on the interest and sinking fund, funded and refunded, and settled the interest maturing thereon, and, by reason thereof, the defendant is estopped now from disputing their validity or repudiating their payment. (7) Finally, the law applicable to a bona fide holder, for value, of negotiable paper purchased before due, and without notice of any infirmities therein, entitles the plaintiffs to recover in this suit. These obligations in the hands of plaintiffs, as innocent holders for value, had the right to presume that the bonds were made in pursuance of the laws granting the power; and the defendant cannot be heard to question their validity in the hands of plaintiffs as such holders and owners. The court, therefore, finds the law applicable to the evidence to be with the plaintiffs, and entitles them to judgment, which is entered accordingly.

F. H. Prendergast, W. T. Armistead, and L. S. Schluter, for plaintiff in error, set up the following contentions:

(1) That this act is unconstitutional, because it gives to the commissioners named powers which by the constitution of 1869 (section 20) are vested in the court composed of justices of the peace. Section 20: "Justices of the peace shall have such civil and criminal jurisdiction as shall be provided by law. And the justices of the peace in each county or any three of them shall constitute a court having such jurisdiction, similar to that heretofore exercised by county commissioners and police courts, as may be provided by law. And when sitting as such courts the justice who resides at the county seat shall be the presiding justice." It was claimed that the effect of this provision was to invest the court of the justices with such jurisdiction as the county commissioners and police courts had theretofore possessed, and that prior to that

time such jurisdiction was prescribed by Pasch. Dig. Laws, art. 1055 (Hart Dig. art. 217), which reads as follows: "The county courts may appoint an agent or agents to make any contract on behalf of the county for the erection or repair of any county building and to superintend their erection or repairing or for any other purpose authorized by law and the contracts or acts of such agent or agents duly executed and done for or on behalf of the county and within his powers, shall be valid and effectual to bind such county to all intents and purposes." Re-enacted under the constitution of 1869 (Act Aug. 13, 1870; 2 Pasch. Dig. 6128).

(2) That, even if the court should find that the law was constitutional, the bonds must be held to be void, because the law was not complied with in issuing them. The act provides (section 3) "that when said bonds are signed, and before they are issued," the county court shall levy a tax to pay the interest and 2 per cent. sinking fund every year. But it was proved and found by the court that the courthouse and jail bonds were issued June 30, 1873, and that no tax was levied to pay the bonds until January, 1874.

(3) That the fact that the county has levied taxes, and paid interest on the bonds, and created a sinking fund, did not estop it from denying their validity.

W. S. Herndon and Ben B. Cain, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

McCORMICK, Circuit Judge. The debt which is the consideration of the bonds involved in this case was contracted before the adoption of the constitution now in force in Texas. At the time it was contracted, there was no provision in the constitution of the state similar to section 9 of article 8, or to sections 5 and 7 of article 11, of the constitution adopted in 1876. The constitution being silent, the legislature had power to provide, in its discretion, for the taxing of property in the state, and for the distribution and appropriation of the taxes to be raised. *New Orleans v. Clark*, 95 U. S. 644.

The contention that the enabling act violated fundamental principles, and is therefore invalid, does not seem to be supported by authority. The contention that the enabling act of February 22, 1873, required provision to be made for the payment of the interest, and creating a sinking fund, before the contraction of the debt and the execution of the bonds, does not appear to be supported by the terms of statute. On the contrary, it appears that the authority given the specially named commissioners to contract the debt was full and complete, and the duty was imposed on the county government to execute the bonds to meet the debt, and to provide for the interest and required sinking fund before issuing the bonds. The power to provide the courthouse and jail is not made contingent on any action by the county. The contractor who erected the buildings might be paid in the bonds of the county, or out of the proceeds of the sale of its bonds; but the county could not, by its refusal to execute the bonds, or by its refusal or neglect to provide for the levy and collection of a tax sufficient to meet the interest and sinking fund, defeat the execution of the power conferred by the statute to provide a courthouse and jail for the county. These necessary public grounds and buildings were secured; the bonds were executed and issued;

and at the January term, 1874, of the proper court of the county an order was made and entered levying a tax to pay the interest and sinking fund, and the tax was collected annually for several years thereafter. We see no ground to question the validity of the bonds.

The judgment of the circuit court is affirmed.

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BARBER ASPHALT PAVING CO. v. CITY OF DENVER.

(Circuit Court, D. Colorado. March 28, 1895.)

No. 3,106.

**MUNICIPAL CORPORATIONS—LIABILITY FOR IMPROVEMENTS.**

The city of D. passed an ordinance providing for paving certain streets. In the clause relating to payment, it was provided that the street-railway company occupying A. street should pay such part of the cost of paving as was provided by the ordinance granting it the right of way, and that one-third of the remaining cost should be paid by the city and two-thirds by the abutting owners. Provision was made in regard to the manner of payment by the city and the property owners, but not by the railway company. The ordinance granting right of way to the railway company provided that such company should pave between its rails and two feet outside thereof. A contract was made, under the paving ordinance, between the city and a paving company, providing for payment by the city and the property owners of their shares of the cost, but making no provision for payment by the railway company. The city charter provided that the city should not be liable, under any circumstances, on an implied assumpsit. *Held*, that it did not appear that the city had promised in any way to pay the paving company the cost of paving between and two feet outside the rails, and that it could not be held liable, on the ground of negligence, in not providing for collection from the railway company.

This was an action by the Barber Asphalt Paving Company against the city of Denver to recover for certain paving. Defendant demurred to the complaint.

Wolcott & Vaile and C. W. Waterman, for complainant.  
A. B. Seaman, for defendant.

HALLETT, District Judge (orally). The Barber Asphalt Company against the city of Denver is an action to recover the price of certain paving in the streets of the city which was done by the plaintiff. The facts upon which plaintiff relies are set forth at great length in the complaint: First, the ordinance under which this work was done. In the twelfth section of that ordinance provision was made for payment. In the first clause of that section it is said:

"That the several street railway companies occupying Arapahoe street, or any part thereof, between said limits, at the time of making said improvements shall pay such parts of the cost of said paving as is provided by the several ordinances granting the said companies their respective rights of way upon, over, or across said streets."

Referring to the ordinance which is here mentioned, as granting a right of way to the railway company, it appears that it provides  
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that the railway company shall pave between the rails and two feet on the outside of each rail, even with the track, whenever the city orders such streets to be paved. In section 12, before mentioned (the ordinance under which the contract was made), provision is made for payment by the city of one-third of the cost of paving parts of the street other than that which was put upon the railway company by the first clause, and two-thirds by the owners of lots abutting. The manner in which the city would pay, and the manner in which the owners of lots abutting would pay, is also set down in the ordinance. Nothing is said as to how the railway company shall pay, or how it shall be collected from it in case the railway company refused to pay, but only that it shall pay. So that there is clearly appearing a defect in the ordinance in not providing some method of collecting from the street-railway company the cost of paving the part assigned to the company. It is not put upon them in an effective way, as a charge upon the right of way, or as a debt against the company to be collected by suit or otherwise. As before stated, there is no manner of payment required; it is only declared that the company shall pay. A contract was made under this ordinance which provides for payment by the city of one-third of the cost outside of the track of the railway company, and two-thirds of the cost by the abutting owners. No provision is made for any payment by the railway company, by the city, or by the abutting owners in respect to the track of the railway company, and two feet on each side thereof. So that the question is whether the city can be charged as upon an implied assumpsit, or for negligence, as the counsel seems inclined to maintain, in not providing in its ordinance for the collection of this sum from the railway company.

It is very clear that there cannot be an implication of assumpsit. There is in the charter of this city a provision that the city shall not be liable under any circumstances in that manner. That was decided by the supreme court of the state in the case of *Smith Canal Co. v. City of Denver* (May 21, 1894) 36 Pac. 844. There are cases to the effect that if provision be made for collecting a tax of this kind, or money for the payment of paving from the abutting owners of lots, and the city fail in the collection for a considerable time, it shall be liable for the principal amount, apparently because of its failure, and upon some ground of negligence imputed to the city in that behalf. The case which discusses that question as clearly as any that I have seen is *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532. There was an ordinance for collecting the amount due for paving, and the city failed for a long time to proceed in that collection, and it was held primarily liable for the amount because of its failure to collect from the abutting owners. But there is no case that I have seen in which it is held that, because of the failure to make a sufficient ordinance in the first place, the city can be so charged. On the contrary, it is held in the case of *Barber Asphalt Paving Co. v. City of Harrisburg*, 62 Fed. 565, that a city is not chargeable upon the failure of

the law on which the tax is based. In that case the act under which the city proceeded (an act of the legislative assembly) was held to be void, perhaps unconstitutional; and the city went on as if it were a good and valid act, plaintiff agreeing to have payment under the terms of an ordinance passed by the city from the abutting owners of lots. The whole matter failed because of the insufficiency of the act, and the court said, and cited several decisions of the supreme court of Pennsylvania to the same effect, that the city was not liable upon the failure of the law. The defect in this ordinance must have been as clear to the plaintiff in this suit as to any one when the work was begun, and the plaintiff must have looked to the ordinance and the charter of the city to ascertain whether it could collect from several parties from whom payment would be due, or by whom payment was to be made. It does not appear but that the paving company relied upon some outside agreement—some collateral contract—with the railway company for doing this work. It certainly cannot be said from the ordinance, from the contract, from anything that appears anywhere, that the city promised to pay this sum to the plaintiff under any circumstances whatever.

The demurrer to the complaint, I think, must be sustained.

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TERRE HAUTE & I. R. CO. v. MANSBERGER.

(Circuit Court of Appeals, Seventh Circuit. April 8, 1895.)

No. 178.

ACTIONS FOR PERSONAL INJURIES—REHEARING DENIED. 12 C. C. A. 574, 65 FED. 196, REAFFIRMED.

This was an action by William Mansberger against the Terre Haute & Indianapolis Railroad Company to recover damages for personal injuries sustained while in its employment. The circuit court rendered judgment for the plaintiff upon the verdict of a jury in the sum of \$7,000. Defendant brought error, and the judgment was heretofore affirmed. 12 C. C. A. 574, 65 Fed. 196. Defendant has now filed a petition for a rehearing.

On pages 59 and 60 of the record on appeal, certain proceedings which occurred in the trial court during the cross-examination of plaintiff are thus set out:

Q. Did you have at that time, or when you were employed upon the road, a copy of the time card, with a copy of the rules and regulations on the back? A. Yes, sir. Q. Had that with you, and had read all those rules? A. Yes, sir. Q. You know it was the duty of every man to read the rules? A. Yes, sir. Q. I wish you would look at this (exhibiting), and see whether that is a copy of the time card and rules? A. That is the one I got hurt on; yes, sir. Q. You recognize it? A. Yes, sir.

Mr. Craig: If the court please, we offer rules seventy-six and seventy-seven. Mr. Golden: If they offer the rules, we will offer them. The Court: They can be considered in evidence.

The rules mentioned were then read by Mr. Craig, as follows: "(76) Whenever a train or engine is run over any portion of the road without a conductor, the engineman will be regarded as both conductor and engineman,



and act accordingly. He will be required to make conductor's running reports, and return them to the proper officials. (77) When the conductor is disabled, the engineman will be accountable for the full charge of the train until an authorized person takes charge of it."

The plaintiff here closed the evidence on his part.

On Behalf of Defendant.

Mr. Golden: I wish here, now, if the court please, to offer rule sixty-seven. Objection: I don't think it proves any issue in the case. Mr. Golden: Let the court look at it. The Court: I don't know in what light this case may be presented. Several different views. Depends on the views of counsel. I am inclined to think this ought to go. Objection not sustained.

Mr. Golden then read as follows: "(67) Should any portion of the train be uncoupled while running, the brakeman must stop the rear section as quick as possible, the engineman being careful to keep the forward section out of its way. The engineman and fireman must look back frequently to see that all is right, and, in case the train is broken apart, great care must be taken to keep the forward part out of the way of the detached part, and every precaution used to prevent a collision. The engineman must in all cases go back, under the protection of the flagman, after the detached portion. It must be absolutely sure it has stopped. Trains going up behind will wait indefinitely, unless otherwise ordered by the train dispatcher."

BAKER, District Judge. Notwithstanding the statement referred to by counsel for the plaintiff in error, found on page 60 of the record, it would seem from what is disclosed on page 59 of the record that all of the printed rules of the time card were in evidence before the jury. These rules had been exhibited to the defendant in error while testifying as a witness in his own behalf, and were identified by him. Thereupon, the attorney of the defendant in error offered two of them in evidence. Counsel for plaintiff in error then said, "If they offer the rules, we will offer them." The court said, "They can be considered in evidence." But, if we are mistaken in the conclusion that the record did not contain all the evidence, it was an immaterial error, because we examined the evidence with care, and reached the conclusion that it was sufficient to carry the question of negligence to the jury. We still adhere to that opinion. Hence, no error was committed in refusing to give a binding instruction.

The other questions presented in the petition of the plaintiff in error were considered and decided adversely to its contention. Having considered—and, as we still think, correctly decided—all the questions presented by the record, no good purpose would be subserved by a further discussion of them. Petition for a rehearing overruled.

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FLYNT BLDG. & CONST. CO. v. BROWN.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

1. NEGLIGENCE—CONSTRUCTION OF RUNWAY—EVIDENCE OF CUSTOM.

In an action for injuries received by tripping over a wooden runway, built across a sidewalk, on which to carry materials for a building, the claim of plaintiff being that the runway was composed of two layers of two-inch plank, making its entire height four inches above the sidewalk, and that its sides arose therefrom perpendicularly, plaintiff, for the purpose of proving that the runway was not properly made, may show that

the usual and ordinary way of constructing them was to have the sides slope gradually to the sidewalk.

**2. SAME—OPINION EVIDENCE.**

In such case, where defendant claimed that the runway was composed of ceiling boards seven-eighths of an inch thick, laid two deep, plaintiff, for the purpose of showing that the runway must have been more substantial, may ask an expert witness what effect it would have to run eight loads per day, weighing two tons each, over a runway composed of such boards, a witness for defendant having testified that that was the number and weight of the loads driven over it daily.

Error to the Circuit Court for the Eastern District of New York. Action by Jacob A. Brown against the Flynt Building & Construction Company for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles J. Patterson, for plaintiff.

Jesse Johnson, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** In December, 1891, the Flynt Building & Construction Company, the defendant in the circuit court, was engaged in altering a building upon Adams street, in Brooklyn, and for the convenience of the company and for the protection of the sidewalk had built across the paved walk a wooden runway, over which material was carried into the building. The plaintiff tripped over this runway, about 5 o'clock in the afternoon of December 18, 1891, at a point under the elevated railway, where the light was very dim, and broke his arm, and thereafter brought this suit against the construction company to recover damages for its alleged negligence. The height of the runway above the sidewalk was a material and disputed question of fact. The plaintiff's testimony was to the effect that the structure consisted of two tiers of planks, each two inches thick, the tiers or layers being placed crosswise to each other, and one above the other; making the entire height of the wooden way four or four and one-half inches above the sidewalk, from which its square sides rose perpendicularly. The defendant's testimony was to the effect that the runway was made of ceiling boards seven-eighths of an inch thick, laid in two similar layers, and that on each side where foot passengers approached the way the boards were beveled off with a hatchet. The jury rendered a verdict for the plaintiff. The defendant assigned two causes of error, each of which related to the admissibility of testimony.

An expert witness was asked by the plaintiff, "What is the usual and ordinary way of constructing these runways resting upon the sidewalk?" The question was asked for the purpose of proving that the customary way was to nail a triangular board, called a "skewback," upon each edge of the double layer of planks, so that the top service of the skewback should slope towards the sidewalk, and present a gradually inclined surface to persons as they approach the runway, and prevent stumbling over a perpendicular edge. The defendant objected to this question, which the court

admitted. It is true that the person who is charged with an act of negligence which has caused an injury cannot protect himself by showing that similar acts were customary in the community where he lived. If an act is careless in itself, the legal responsibility for the carelessness is not mitigated by the fact that others are alike careless. But when the question is whether a structure is properly made, or work which, from its nature, involves danger, is properly carried on, it is competent for the party who has the burden of proving negligence to show that the other abandoned the use of precautions which universal experience had shown to be necessary. Thus, where work in a mine was being carried on under known circumstances of danger, without precautions on the part of the superintendent to avert the result of which he had been warned, evidence was given that "such precautions were practicable, and frequently adopted in other mines" (*Pantzar v. Mining Co.*, 99 N. Y. 368, 2 N. E. 24); and where the question was whether sufficient precautions were provided by an employer for the safety of his workmen in their work, evidence was given that a specified method of construction of the machinery and appliances would have added to the safety of the employees, and was usual in like work (*Davidson v. Cornell*, 132 N. Y. 228, 233, 30 N. E. 573). While it is true that the question of the inherent negligence of an act which has produced an injury does not depend upon the fact that similar acts had become common without injury, yet, when general experience has shown that in the construction of buildings or machinery certain precautions must be taken to avoid calamity, it is evidence tending to prove negligence that these precautions were deliberately omitted. As has been stated, the height of the runway above the sidewalk was a question in issue. The defendant asserted that the wooden walk was made of boards seven-eighths of an inch thick. A witness for the defendant had testified that the weight of the loaded trucks which were driven over the runway was two to two and a half tons, and that on some days as many as eight such loads were driven over said runway. For the purpose of showing that the runway must have been more substantial than as claimed by the defendant, an expert witness for the plaintiff was asked what effect it would have to run eight loads per day of brick, of two tons each, over a runway composed of seven-eighths inch pine planking. The admissibility of this question against the objection of the defendant as incompetent is the second subject of error. The defendant thinks that the question was asked for the purpose of disproving that which the plaintiff had admitted in his complaint, viz. that the runway was made of boards. The question was asked for the purpose of showing the improbability of the defendant's testimony that the walk was made of thin ceiling boards, and was admissible. The judgment of the circuit court is affirmed, with costs of this court.

## TEXAS &amp; P. RY. CO. v. CODY.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 316.

## 1. TRIAL—OMISSION TO INSTRUCT ON MEASURE OF DAMAGES.

Defendant cannot complain of the court's omission to instruct the jury as to the measure of damages when he has failed to request a proper charge; and this is especially true where the action is for personal injuries producing total disability on the part of a man, but 35 years old, previously in vigorous health and earning over \$65 a month, who claims only \$10,000, as in such case it would seem safe to trust the average jury to measure the damages correctly.

## 2. RAILWAY COMPANIES—ACCIDENT AT CROSSING — INSTRUCTIONS AS TO NEGLIGENCE OF TRAVELER.

An instruction declaring, in substance, that a person about to cross a railroad track is required to exercise due care fitted to the time, occasion, and circumstances,—such care as an ordinarily prudent man would exercise under similar circumstances,—*held* to be correct and sufficient; and *held*, further, that there was no error in refusing a requested charge, that plaintiff was bound "to stop, look, and listen," before attempting to cross the track.

## 3. SAME.

A requested charge "that the rights of the railway company and of the public are not equal, but the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings," *held* to be defective and misleading, even if conceded to be technically correct, as people have the same right to travel upon streets as railway companies have to run trains on their tracks.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by Henry D. Cody against the Texas & Pacific Railway Company to recover damages for personal injuries sustained while attempting to cross defendant's tracks on Jennings avenue, in the city of Ft. Worth, Tex. In the circuit court judgment was rendered for plaintiff, upon the verdict of a jury, in the sum of \$7,500. Defendant brings error.

Among the instructions given by the court, which are complained of by the defendant and assigned as error, were the following:

"The plaintiff, if he was injured on Jennings avenue while attempting to cross defendant's track, was required to use due care himself to avoid danger. The care which a person who crosses a railroad track on a street in a city is required to use is a question of fact for the jury. It varies with the surrounding circumstances. Such person is required to use due care to avoid danger. Should he not do so, and his own negligence is the proximate cause of his injuries, he cannot recover, although the railroad company may not have given the signals which the law requires to indicate the approach of the train."

"Should you believe from the evidence that the plaintiff knew, or by the use of reasonable diligence might have known, of the approach of defendant's train, and thereby have avoided the danger, then you will find for the defendant."

"A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the road results in his injury, then he cannot recover."

"The degree of care that was proper care on the part of the plaintiff and defendant must fit and grow out of the time, the occasion, and circumstances. If the night was dark and misty, and no arc light or other light lit up the crossing at Jennings avenue, then to the extent that such facts, if at all, increased the danger at the crossing of Jennings avenue, then to that extent was greater care and prudence required of both plaintiff and defendant at said crossing."

"The care to be exercised is such as an ordinary prudent man would exercise under similar circumstances. This is the true rule, whether applied to the alleged negligence of the railroad company or the alleged contributory negligence of the plaintiff, and what is due care under a given state of facts must be determined by the jury by applying the rule as to what in their judgment a man of ordinary prudence would have done under the circumstances shown by the evidence."

The second assignment of error was in the following terms:

"The court erred in that portion of its charge wherein it instructed the jury that if they found for plaintiff they would find for him in any sum not to exceed \$10,000, in this: that said charge prescribed no measure of damages, but leaves their assessment to the unbridled discretion of the jury."

T. J. Freeman, for plaintiff in error.

Farrar, Jonas, Kruttschnitt & Ginley, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE and TOULMIN, District Judges.

McCORMICK, Circuit Judge. Reducing the assignment of errors in this case to its due proportions, excluding repetitions and argument, it appears that the plaintiff in error contends that the trial court erred (1) in refusing to direct a verdict for the defendant; (2) in failing to instruct the jury as to the measure of damages; (3) in refusing to instruct the jury in the very words that it is the duty of a traveler to stop and look and listen, etc., before attempting to cross a railroad track; (4) in refusing to charge the jury that the right of the railroad company on every part of its track is superior to that of the public.

Five of the repetitions of the first assignment of error are in express terms based on the defendant's view of what "a fair preponderance of the evidence showed." It can hardly be made clearer that the case was not one to be withdrawn from the jury. The defendant did not submit a proper charge on the measure of damages. The plaintiff had lost his leg; had been two months in the hospital; had required and received medical, surgical, and other attention proved to be of the value of \$700. He was 35 years old; a man of sound and vigorous health up to the injury; earning \$65 a month, besides board and washing, the year round. After the injury he could go only on crutches; could not earn any wages in the calling he had followed for the next preceding 11 years. He claimed only \$10,000 damages. The court might safely trust the average jury to measure the damages. The settled rule is that the party cannot complain of such omission when he omitted to propose and request a proper charge. If the defendant had suffered injury from the want of such a charge,—which it has not,—it would be barred of redress by its contributory negligence. As to the third ground of error in our redaction of the assignment we are of

opinion that the charge of the court on that subject was correct and sufficient. It was therefore right to refuse the requested charge. "A judge is not bound to charge upon assumed facts in the *ipsissima verba* of counsel, nor to give categorical answers to a judicial catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts; and if a judge states the law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial. But when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form, based upon assumed facts, which counsel choose to present to him." *Improvement Co. v. Stead*, 95 U. S. 161. The fourth ground of error assigned is not well taken. The refused charge was in these words: "You are instructed that the rights of the railway company and of the public are not equal, but that the right of the company is superior to the right of the traveling public on all parts of its track, even at crossings." If we concede that, as an abstract proposition, the language of this request is technically correct, still, standing alone, as a requested charge, it is defective and misleading; for the people have the same right to travel on public streets and ordinary highways that railway companies have to run trains on their railroad tracks. The judgment of the circuit court is affirmed.

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FARMERS' LOAN & TRUST CO. et al. v. TOLEDO, A. A. & N. M. RY. CO.  
et al.

(Circuit Court, N. D. Ohio, W. D. March 14, 1895.)

No. 1,182.

1. MASTER AND SERVANT—NEGLIGENCE—DERAILMENT OF RAILROAD TRAIN.

Where a railroad train was derailed and thrown down an embankment into a marsh in such position that the contents of the tender were thrown into the cab of the overturned engine, and no sound was thereafter heard from the fireman and engineer, *held*, both as matter of fact and matter of law, that the derailing of the train was the cause of their death, and that although an oil car was coupled next to the tender, which after the accident discharged oil into the cab, causing it to take fire and burn up, yet the placing of such oil tank in that position in the train by the servants of the engineer and fireman could not be considered as a contributing proximate cause, which would bar a recovery.

2. SAME—PRESUMPTION FROM OCCURRENCE OF ACCIDENT.

The fact of the derailment of a train or a sliding and giving way of the entire roadbed, over a newly-constructed embankment, makes a *prima facie* case of negligence, which it is the duty of the defendant to overcome by testimony showing that all proper precautions were taken in preparing for and carrying on the work of constructing the embankment, and in running trains over it.

**3. DAMAGES FOR WRONGFUL DEATH—AMOUNT—STATE STATUTES.**

The fact that the legislatures of a large number of states have limited the amount of recovery in cases of death by wrongful act to \$10,000 *held* to be a legislative construction of a fair maximum award, which should not be exceeded by a federal court upon interventions against a receiver operating a road under direction of the court.

These were intervening petitions filed by Cassie Alberts, administratrix of George Alberts, deceased, and by Ida B. Beaulieu, administratrix of Silvio H. Beaulieu, deceased, in the suit brought by the Farmers' Loan & Trust Company against the Toledo, Ann Arbor & North Michigan Railway Company and others, to recover damages for alleged negligence of the receiver and his agents and employes, resulting in the death of the petitioners' intestates, respectively. On the 6th and 25th days of April, 1894, respectively, orders were made referring the matters set forth in the petitions to L. S. Trowbridge, special master, to ascertain and compute the damages of the petitioners. By stipulation, the testimony in each case was made admissible in the other, as the death of both intestates was caused at the same time and by the same accident. The special master having filed his report, the case is now heard upon exceptions to the same. The material parts of the report are set forth below:

On the 25th of October, 1893, George Alberts, the husband of the petitioner Cassie Alberts, of whose estate she is administratrix, and Silvio H. Beaulieu, the husband of the petitioner Ida B. Beaulieu, and of whose estate she is administratrix, were killed, while in the employment of Wellington R. Burt, the receiver of the defendant railway company. As the whole case centers about their death, a brief statement leading up to this catastrophe will be necessary. The railway, which the receiver was at that time, and still is, operating, between the stations of Hamburg Junction and Pettysville, passed over two tamarack swamps, known as the north and south marshes. There was considerable testimony relating to the north marsh, but it may all be disregarded, as the events connected with this case are confined to the south marsh. The roadbed across this marsh was originally built 9 or 10 years ago, and was from 1½ to 2 feet high. There was no evidence that there had ever been any unusual sinking of the roadbed. To improve the track and do away with a steep grade on the north side of the marsh, the receiver, through his general manager, Mr. Ashley, determined to raise the roadbed or embankment across this marsh to a height of 8 or 9 feet. Work was commenced on the 2d of October, and continued until the 25th of October. It is not clear whether the embankment was considered as finished at that time or not. Mr. Riggs, the chief engineer, said it still lacked two or three inches of being up to the required grade. Mr. Stein, the master of construction, seemed to think it was completed, and spoke of the work train taking the men to Howell as if they had finished that job, but, as the men boarded at Howell, that circumstance may have been nothing more than the usual going home at night. It is not very important whether it was considered finished or not. A train load of earth was dumped on the embankment at the place where the accident afterwards occurred, between 4 and 5 o'clock in the afternoon of October 25th. The work train passed over the track twice after that. About a quarter past five o'clock a passenger train passed over it. Between 6 and 7 o'clock a freight train of 27 cars, drawn by a heavy locomotive, left Hamburg Junction, bound north. When about one-half or two-thirds of the way across the marsh, the track and the embankment under the locomotive slid off to the east. The locomotive and tender and seven cars were derailed, the locomotive thrown over on its side near the foot of the embankment, the cab being thrust two or three feet into the soft muck of the marsh, beyond

the foot of the embankment. A flat car carrying an oil tank was next to the tender. The tender was doubled around and lying next to the engine, its rear being towards the front of the engine. The oil tank was lying, one end on the tender, and the other upon the bank. The oil ran out through a crack in the tank, down the bank onto the tender, and into the cab; took fire, and burned up. George Alberts, who was the fireman on the locomotive, and Silvio H. Beaulieu, who was the engineer on the locomotive, were never after seen, and no portion of their remains that could be identified was found. The right of the complainants to recover in this case and the liability of the defendant must depend upon where the responsibility for the accident shall be found to rest.

On behalf of the complainants, it is claimed that the accident was due to the faulty construction of the embankment across the marsh, and the want of such care and attention as, under the circumstances, ordinary prudence required; that the embankment sloughed off or slid away on the east side, causing the engine to fall over on its side. On behalf of the defendant, it is claimed that the accident was due to the sinking or giving way of the foundation under the embankment; that that was a latent defect, not discoverable by ordinary means; and that the defendant, having exercised all the care and taken all the precautions which a reasonable prudence would require in constructing the embankment, is not liable.

Before proceeding to the consideration of the main questions involved, I desire to dispose of two minor matters.

It was urged with much persistence by one of the counsel, on behalf of the defendant, that the complainants, having alleged in their petition that "the grade of said road \* \* \* settled, the ground and earth thereunder giving way, and slid out on the east side, and toppled over," etc., could not base their claims upon any other theory than that of the sinking or giving way of the foundation underneath the embankment; that is, the soft muck of the marsh. I cannot agree with the counsel's construction of the phraseology of the allegation in the petition, or the conclusions which he drew from it, but do not think it necessary to discuss the subject.

In the amended answer of defendant, it was alleged that the complainants could not recover by reason of the contributory negligence of a fellow servant of their decedents, in making up the train, and placing an oil car next to the locomotive, in violation of an established order of the defendant. I have not been furnished with a copy of the amended answer, but such is my recollection of the allegation. No evidence was offered to show any such order. It was not contended that the placing of the oil car next to the engine contributed in any way to the derailment of the train, but that it may possibly have contributed to the death of the engineer and fireman. The most that could be claimed for it would be that it may have aggravated the injury. But that, as a question of fact, is purely speculative, and not supported by any evidence. If the men were dead when the fire broke out, then the placing of the oil car next to the engine was of no consequence. It did not contribute to their death. There is not much positive evidence on the subject, and the conclusion must be rather from inference than from positive proof. Some time elapsed between the derailment of the train and the breaking out of the fire. Not much, it is true, but some time; perhaps two minutes, more or less. No outcry was heard, and they had not been able to extricate themselves from the muck. When the conductor Fludder reached the engine, standing where he could put his hand on it, he could hear no sound of human voice. Brakeman Good, on the other side of the fire, shouted to his brother brakeman, but received no response. The engine had been thrown over, and the cab thrust two or three feet into the soft muck of the marsh. The contents of the tender, doubtless several tons in weight of coal, had been overturned into the engine and cab. The door of the fire box was opened, and its contents had been emptied into the cab. Such portions of the remains of the engineer and fireman as were afterwards found were taken from the hole made by the cab in the muck, at the foot of the embankment. I think, therefore, that the preponderance of the evidence indicates that the death of the engineer and fireman was caused by the derailment and overturning of the engine.



and not by the fire which afterwards ensued; and so I find as a matter of fact. If, however, I should be mistaken as to that fact, there would still be left the question whether the negligence complained of would be a bar to the complainants' right to recover. It is hardly within the scope of this report to enter upon a thorough discussion of the subject of contributory negligence. I think it may be safely stated that the following principles are well established by authority:

As stated by Judge Cooley (Cooley, Torts, p. 816): "The negligence that will defeat a recovery must be such as proximately contributes to the injury. The remote cause will no more be noticed as a ground of defense than as a ground of recovery." In other words, the negligence of a fellow servant of the plaintiffs, to be a bar to recovery, must have been the proximate cause of the injury, or, at least, must have contributed to the proximate cause. It was said by Coleridge, J., that "that negligence upon the part of the plaintiff which is to bar his recovery should have substantially contributed to the occurrence of the injury, and not merely to its amount." *Sills v. Brown*, 9 Car. & P. 601; *Patt. Ry. Acc. Law*, § 48; *Wasmer v. Railroad Co.*, 80 N. Y. 212. Where the plaintiff's negligence contributed merely to aggravate the injury, without contributing to the happening of the accident, it will be no bar. *Stebbins v. Railway Co.*, 54 Vt. 464; *Gould v. McKenna*, 86 Pa. St. 297; *Shearm. & R. Neg.* § 95; *Lane v. Atlantic Works*, 107 Mass. 104.

What was the proximate cause of the injury in this case? Manifestly, the derailment of the train. "Proximate cause is the efficient cause that necessarily set the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate and responsible causes, though they may be near in point of time. The proximate cause, therefore, must be that which preceded and directly brought on and set in motion the intermediate series of incidents which ended in the casualty." *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795; *Whart. Neg.* § 341. "No wrongdoer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption, he must show, not only that the same loss might have happened, but must have happened if the act complained of had not been done." *Davis v. Garrett*, 6 Bing. 716; *Beauchamp v. Mining Co.*, 50 Mich. 163, 15 N. W. 65; cited in Cooley, Torts, in note, p. 78. "My remote negligence will not protect a person who, by proximate negligence, does me an injury." *Whart. Neg.* § 324.

I think it will not be seriously argued that the position of the oil car in the train, or its proximity to the locomotive, contributed in the slightest degree to the derailment of the engine. As was well said on the hearing, if the oil car had been the last car in the train, or had been left out entirely at Toledo, the roadbed and embankment would have slid away as it did, and the engine have been derailed as it was. I find therefore, as a fact, that the placing of the oil car next to the engine, if negligence on the part of a fellow servant, was not, in the eye of the law, contributory to the accident, and constitutes no defense in this case.

I am brought now to the consideration of the more serious and important question: What caused the accident by which the complainants' decedents lost their lives? Was the accident due to the sinking of the earth or foundation under the embankment; and had the defendant used all the care which ordinary prudence in such a case would require, or was it due to the giving way of the embankment itself, and had the defendant used such care and precaution in its construction as would acquit him of all blame? An intelligent consideration of these questions renders necessary some references to the evidence, which I will endeavor to make as brief as the importance of the case will allow.

It was stated by all the experts who testified on the subject—and I presume will be conceded—that the first duty of the defendant before raising the embankment was to ascertain, by proper soundings, the condition of the marsh, and the depth of the muck or soft earth on the line where the old embankment

was built. The defendant recognized that duty, and offered evidence tending to prove the taking of such soundings. On this point there are remarkable discrepancies in the statements of witnesses for the defendant. Mr. Ashley, the general manager for the defendant, testifies that he went to the locality on the 2d of October, 1893, in his private car, for the purpose of making soundings across the marsh or swamp; that he left his car on the siding at the ice-house at Hamburg Junction; that he commenced his soundings about 250 feet from the south side of the marsh; that he went north, making soundings at intervals of 18 to 20 feet, until halfway across the swamp, afterwards at longer intervals; that he made 10 or 12, or perhaps 15, soundings in all,—not more than 15; that they extended across the marsh, which he estimated to be about 700 or 800 feet in width; that he made soundings at about the place where the accident afterwards occurred, and found the depth to be about 8 feet; that the depth of the soundings ranged from 4 to 14 feet; that he made no record of them, and did not direct Mr. Stein, then superintendent of track, to make any record; that he did not see Mr. Stein make any record, though Mr. Stein afterwards told him that he had done so; that the rod was easily removed after being forced to the bottom; that he removed it alone; that the work was begun the following day, and was in continued progress up to the time of the accident, and up to the present time. "The work is just now completed." Mr. Riggs, a civil engineer for the receiver, testifies that Mr. Ashley and Mr. Stein made soundings several weeks prior to the commencement of the work; that they were reported to him by Mr. Stein the day they were taken, but not in writing; did not see any written record of soundings; that the work was begun a week or so after he had made his plans for doing the work. Witness presented a blue print (Exhibit —), showing the profile of the old grade and the new grade line, the width and slope of the embankment, etc., and stated that the scale was 5 feet to the inch; that the distance from the north end of the marsh to the lower end of the map was 800 feet; but that the marsh extended 1,400 feet beyond. He thought there was an error of judgment in sounding. Mr. Stein, at that time superintendent of track, testified: That on the 2d of October he met Mr. Ashley by appointment, and assisted in making the soundings, and in some cases in taking the rod out. Mr. Ashley left his car on the Bennett siding. That he entered the soundings in his book, just as quick as the rod was pulled out and cleaned off, and he had washed his hands. No sounding was complete until he had it down in his book. That he did not give engineer any soundings or figures of soundings. Never reported soundings to anybody, and never took record of any other soundings. These soundings commenced 300 feet north of where the wreck afterwards occurred, and went south, and his record continued to a point 600 feet from where he commenced. There were further soundings, but he made no record of them. The page of the book upon which the record of the soundings was made is remarkably clean for one used in that way, and the figures and handwriting are remarkably good, being made under such circumstances.

I cannot resist the conviction that this record was entirely an afterthought, and was not made at the time, but afterwards, from recollection or information of others. The witness, in making it, commenced at the opposite end of the marsh from where Mr. Ashley commenced. If this record was made at the time, as testified to, it is incredible that Mr. Ashley should not have known it. Other witnesses assert most positively that there was no siding at Bennett's; that it had been taken up some time before. It is not worth while to consider in detail the many and various contradictions in the statements of these witnesses. It is impossible to reconcile them. They cannot all be true. Some one of the three must have been mistaken, but which one? If the marsh was 2,200 feet across, as Riggs testifies, and he measured 800 feet of it, and Ashley made the number of soundings that he testified to, then either he could not have covered the whole extent of the marsh, or his soundings were at much longer intervals than he supposed. If, in the exercise of ordinary care and precaution, it was necessary to make soundings at all, of which there seems to be no doubt, then it was equally necessary that they be made thoroughly and carefully. Upon that subject these numerous contradictions by defendant's witnesses would seem to cast a reasonable doubt, especially in view of the fact that in one sounding, made by Prof. Green, a disinterested witness, at the place

where the accident occurred, the sounding rod was put down 80 feet without reaching solid bottom. If the case depended on that fact, I should be obliged to find that the defendant has not shown by a clear preponderance of evidence such care and precaution as ordinary prudence, under the circumstances, required. But, in the view that I take of the case, the soundings are not of great importance.

#### The Sinking of the Foundation.

To establish the theory that the accident was caused by the sinking of the foundation under the embankment, the defendant sought to show that on two occasions, one on the 26th or 27th of October, 1893, and the other in the spring of 1894, in digging down at the place of the accident, they found the old roadbed three or four feet below the level of the marsh. Mr. Stein testified that on the 26th or 27th of October, in digging down to get a solid foundation for the jacks, to raise the engine, he found the old roadbed. It does not appear very distinctly just where that excavation was made, but it must have been made near the foot of the embankment; otherwise it could not have reached the marsh at all. A couple of weeks before his examination, he made another excavation, for the purpose of finding the old roadbed, and he found it three or four feet below the level of the marsh. "It went down level, and a little over four feet." The place of this excavation was fixed with great particularity. It was on the side of the slope at the bottom. It was about 13 feet from the fence, and he points out on Exhibit E the place. He knew the old roadbed, could tell it when he saw it. It is not too strong to characterize this testimony as reckless. He had already testified that the old roadbed extended beyond the ties  $1\frac{1}{2}$  feet on each side, and that the new roadbed was 38 or 40 feet wide at the bottom. It follows, then, as a mathematical certainty, that the place where this excavation was made was at least 9 or 10 feet beyond the extreme edge of the old roadbed. To find the old roadbed there was a physical impossibility. It could not have been there, as he testified, unless, by some inconceivable freak of nature, it had slipped out from under the mass of new material that had been placed on it, and slid away, horizontally on a level, a distance of 9 or 10 feet.

It would seem reasonable that, if there had been a giving way of the foundation, the whole roadbed would have sunk uniformly, but it did not. Had it done so, the engine would not have tipped over. By a great preponderance of evidence, the west side stood up, and was nearly as high after the accident as before. The top may have been disturbed by the sliding away of the track, but evidently there was no sinking. To confirm defendant's theory, it was sought to show that there was a sinking about 90 feet north of where the engine went down. Mr. Stein testified that the morning after the wreck, about 11 o'clock, he found the roadbed was down 4 or 5 feet. The ties were hanging to the rails, so a man could crawl under the ties. He is confirmed somewhat by witness Kettel, but contradicted by witness Russell, who had charge of the work train, and who testified that the place was not in the shape as described by Stein; that the dirt and rails all settled together; that he ran his train on it, and it settled about three feet; that he lifted the track probably 22 times that day, and it went down probably 10 or 15 feet; that there was a heaving of the marsh after they got almost to the bottom. That was undoubtedly a genuine sink, but the whole embankment sank, and the train that was on it was not derailed or overturned. Two witnesses, Sweet and Duff, testified that they were present when the tamarack logs were put in; that they were down in where the men were at work, and the logs were laid on the old roadbed. One of them was sure that he stood on it. There are other considerations which would seem to settle conclusively that there was no sinking of the foundation. There was no upheaval of the marsh, as would probably, if not necessarily, have been the case had the sink occurred. Again, if the foundation did sink, why did it stop at the depth of 4 feet? The soundings, testified to by Ashley and Stein, showed a depth of the soft muck of the marsh, at the place of the accident, of from 8 to 12 feet. In the sink, 90 feet north of the accident, the embankment continued to sink until they had raised the track 22 times in one day, or 10 or 15 feet altogether. Now, if there was a sink at the place of the accident, why did it not sink uniformly,

and continue to sink until it reached solid bottom, 8 or 10 feet below? I conclude, therefore, as a question of fact, that the derailment of the engine was not caused by the sinking or giving way of the foundation under the embankment.

#### The Giving Way of the Embankment.

Was the accident caused by the sloughing off or the giving way of the embankment itself, and had the defendant used such care and precaution in its construction as would acquit him of all blame? An affirmative answer to the first part of this question necessarily follows the finding that the accident was not caused by the sinking of the foundation. The more serious question is, did the defendant use such care as, under the circumstances, reasonable prudence required? A presumption of negligence often arises from the accident itself. It has been held to furnish proof of negligence in the derailment of trains, and in the giving way of railroad embankments. *Curtis v. Railroad Co.*, 18 N. Y. 534; *Edgerton v. Railroad Co.*, 39 N. Y. 227; *Railroad Co. v. Anderson*, 94 Pa. St. 351. The presumption would not seem to be a violent one in this case. A railroad embankment in process of construction (for it could not be considered as completed), upon which earth had been deposited, and the track raised but a few hours before the accident, gives way, resulting in the overturning of the engine, and the death of the engineer, fireman, and brakeman. It is a matter of common knowledge that such embankments, when constructed with proper care, do not give way, so that the presumption of negligence does not seem to be unreasonable. To rebut this presumption, the defendant sought to show the condition of the embankment on the 25th of October, in addition to some other evidence, by measurements taken six months afterwards, and by showing that the embankment, when so measured, had not been enlarged after it had been restored. Such proof, to be satisfactory, should be very clear, definite, and distinct. These measurements show an embankment of reasonable proportions, except in one place, where the sink had been, where the embankment was only  $10\frac{1}{2}$  feet wide on the top,— $5\frac{1}{2}$  feet narrower than the standard roadbed. I do not think, however, that it appears by a preponderance of evidence that the embankment of April, 1894, was practically or substantially the same as that of October 25, 1893. The evidence is conflicting as to how much work was done on the embankment after the accident. Two of defendants' witnesses, Kettel and Russell, say the work was finished in five or six days, and nothing was done after that. Mr. Stein said they hauled in 78 car loads of material in one day, and nothing was done after that. Mr. Ashley said the work commenced the day after the soundings were made, and "was in continued progress up to the time of the accident, and up to the present time. The work is just now completed." He afterwards qualified that by saying that "just at the point of the wreck the track was brought up to grade in five or six days, but between that point and Pettysville station, work was continued until it froze up in the fall, and that was finished this spring." On the other hand, two witnesses for the complainant (Duff and Kline) testified that they made four measurements of the embankment north and south of the place of the accident, on October 27th, just after the accident, and found the width on top to be 10 and  $10\frac{1}{2}$  feet, and the slope as steep as the dirt would lie. Blades testified that he worked on the embankment until the 24th or 25th of November. The testimony of Mr. Swetzer was certainly very much to the point. Less than four hours before the accident, he rode on the work train from the steam shovel to where the earth was plowed off, the place where the accident afterwards occurred. He jumped off the train, and went into the earth up to his knees. He could not go along next to the ties, but was obliged to go down to the foot of the embankment, and go along the marsh. He climbed up the bank, which was steep, and took hold of the end of the ties to pull himself up. That the embankment did not extend beyond the ends of the ties on the east side, and in some places not as far as that. That two-thirds of the dirt was plowed off on the west side of the cars. He was corroborated by William Leverett, who worked on the grade, who said it took three men to shovel the dirt on the west side, and one on the east, and that it was usually and not exceptionally so; about every train was loaded heavier on

the west side than on the east side. George Blades, who also worked on the grade, testified that there was a slack place in the embankment, at about the place where the accident occurred, when he quit work that night. Mr. Kettel, a witness for the defendant, had his attention called to the testimony tending to show that the embankment was heavier on the west side than the east side. He said, "The banks are even on both sides. I have never had any dirt shoveled from one side of the cars to the other; consequently it must have fallen evenly." I do not think the reason conclusive or very satisfactory. Then this question was asked: "Q. There is testimony showing that the ends of the ties on the bank on the east side stuck out over the embankment. What is the fact, and what is the first part of the tie you are supposed to tamp?" His answer was: "It is the end." The question was not repeated. Defendant's counsel introduced some photographs, taken three days after the accident, but, of necessity, they cannot show the condition of the bank where the accident occurred, at the time it occurred.

In carefully weighing the evidence, it is a matter worthy of note that nearly all the witnesses for the defendant have a special interest in the case, not only by reason of their being the employés of the defendant, but also because their work is on trial. Their reputation as competent and prudent railroad workmen is at stake. It is but natural that they should wish to give their work as good a character as possible. On the other hand, no motive was apparent or suggested why the witnesses Sweitzer, Blades, and Leverett should have any wish to color or distort the facts one way or the other. If the embankment was in the condition on the 25th of October, as testified to by these witnesses, whatever may have been its width, or however much or little earth may have been put on it afterwards, it was in a dangerous and unsafe condition; and the defendant's general manager, who passed over it a few hours earlier the same day, and his master of construction, who passed over it less than two hours before the accident, should have known it. The strongest evidence that it was weak and dangerous was the accident itself. The first heavy strain that was put upon it, after the day's work was done, caused it to go down. I apprehend the presumption of negligence must remain until the accident is reasonably accounted for in some other way. The giving way of the embankment was certainly strong evidence that the defendant's witnesses must have been mistaken as to its construction and proportions. If not, why did it go down?

There was another point on which negligence was claimed. I believe all the experts who testified on the subject said that reasonable and ordinary care in such a case required that a watchman should be kept on such an embankment until the earth had become settled,—say from four to six weeks,—whose duty should be to patrol the embankment, and note the effect on it of the passage of trains, so as to give timely warning in case of danger. No such watchman was provided. It is no sufficient answer to say that, had there been a watchman, he could not have seen any defect in the embankment. How is any one to know that? How can any one say that there may not have been such signs of weakness or loosening in the sides of the embankment as to be clearly apparent to a watchman charged with the duty of examination? I find, therefore, as a fact, that the accident was caused by the giving way of the embankment. Whether that was due to quicksand, or too much wetness, or inadequate bolting of the angle bars, or the manner in which the earth was tamped under the ties or shoveled down the bank, or to a combination of all these, I do not think it important to determine. I think the defendant did not exercise the care which reasonable and ordinary prudence in such cases requires.

#### As to the Question of Damages.

To show the expectancy of life on the part of the decedents, complainants offered in evidence section 4245 of Howell's Annotated Statutes, being a "Table of Mortality Based on American Experience." According to that table, George Alberts, the decedent, who was 30 years of age, immediately prior to his death had an expectancy of life of 35½ years, and Silvio H. Beaulieu, who was 34 years old, had an expectancy of life of 32½ years. It

was urged by counsel for the defendant that that table ought not to be made the basis of the calculation of the expectancy of life, because that table is based upon general mortality, while the decedents were engaged in an extrahazardous occupation. No case has been cited in which such a distinction has been made. Mortality tables have been used in evidence in a great number of cases, and in the following cases, where the decedents were employes of the defendants, but no such distinction was made: *Haden v. Railroad Co. (Iowa)* 48 N. W. 733; *Gorman v. Railway Co. (Iowa)* 43 N. W. 303; *Hunn v. Railroad Co.* 78 Mich. 513, 44 N. W. 502. It is true there is no law compelling the decedents, had they lived, to remain in the hazardous employment of a locomotive engineer; yet their earning capacity was based on their employment in that occupation. Whether they could earn as much in some less hazardous employment is a matter of opinion, as there was no evidence on the subject. There was no evidence as to the extent or degree to which the extrahazardous employment would affect the expectancy of life. Making allowance for that, and considering the increased earning capacity that would come with additional experience, and the further sum that might be reasonably added for the care, assistance, and instruction of the children during the remaining years of minority, I assess the damages of complainant Cassie Alberts at the sum of \$9,935, and of complainant Ida B. Beaulieu at the sum of \$11,606.

Charles H. Kline, for Cassie Alberts.

Justice & Lairy and W. S. Thurstin, for Ida Beaulieu.

Alex. L. Smith, for receiver.

RICKS, District Judge. This case is now before the court upon the exceptions to the report of the special master, Gen. L. S. Trowbridge, filed upon the intervening petitions of Cassie Alberts and Ida Beaulieu. The claims set forth in the intervening petitions grow out of one accident, and the facts to be considered apply equally to both cases. The master has filed with his report a stenographic report of all the testimony taken in the case, which I have read with great care. I have likewise given full consideration to the questions of law involved, and am of the opinion that the report of the master in both these cases, so far as it finds negligence on the part of the receiver as the cause of the accident, should be confirmed. The fact that the accident occurred by derailment of the train, or, what is perhaps equivalent to a derailment, a sliding and giving way of the entire roadbed, makes a prima facie case of negligence, which it is the duty of the receiver to overcome by testimony. I have considered very carefully the evidence showing the precautions which the subordinates of the receiver took before deciding to raise the grade through that part of the swamp or marsh where the accident occurred. There is a good deal of conflict as to the nature and extent of the soundings made preliminary to the work, and I think the master found correctly, as a matter of fact, that these soundings were not of a character to relieve the receiver from the charge of negligence as to putting upon that roadbed the large additional weight made necessary by the elevation of the track for the distance stated. It is very evident from the way the accident happened that the freight train which the engine was drawing, upon which these unfortunate men were working, was too heavy for that track in the condition in which it was then left by the construction trains. More time for the proper ballasting of the

roadbed should have been given. But it is not necessary to go into a detailed statement of the facts. As stated before, I am satisfied that the master has reached a correct conclusion, and that there was negligence on the part of the receiver and his subordinates in undertaking to move that train over that track in its condition at that time.

The question, however, about which I have been more perplexed, is the amount of damages awarded by the master. He has given the basis upon which that award was made. The earning capacity of these two men was shown. Their probable future life was established by the annuity tables, and the master, giving due allowance for the extra hazard to life because of the nature of the employments of the deceased, made his calculation, and allowed to Cassie Alberts the sum of \$9,935, and to Ida Beaulieu the sum of \$11,606. It is evident in this estimate that the master has given to these petitioners the full benefit of all the probable years of life before them, and the full benefit of their present maximum earning capacity. One of the most difficult questions for a court to determine is a correct and just measure of damages in a case of this kind. It is hard to say that a human life is not worth such a sum as the master has given in this case, because the record shows these men were men of excellent habits, fond and affectionate husbands, and in every way a help and comfort to their families and useful to the public, and it is with great reluctance that I interfere in any way with this award. But in a large number of states where the limit for the loss of life has been fixed by legislation the sum of \$10,000 has been fixed as the maximum allowance to be made. This is a legislative construction of a fair maximum sum to be awarded in such cases. I think the court may properly, therefore, accept this concurrent judgment of so many different state legislatures as justifying it in saying that the maximum ought not in any one of these cases to exceed that sum. So that, if the petitioner Ida Beaulieu will remit sufficient of the award made to her to reduce it to the sum of \$10,000, and if the petitioner Cassie Alberts will remit sufficient of the award made to her to reduce it to \$8,500, the court will then approve an award to that amount, and order the receiver to pay the same.

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MILLER v. MORGAN.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1894.)

No. 327.

**BILLS OF EXCEPTIONS—TIME OF FILING—EXPIRATION OF TERM.**

A bill of exceptions allowed and filed after the close of the term, without authority or any standing rule or consent of the parties, and not within the time specially allowed or any extension thereof, is improvidently granted, and cannot be considered. *U. S. v. Jones*, 13 Sup. Ct. 840, 149 U. S. 262, followed.

**In Error to the Circuit Court of the United States for the Northern District of Texas.**

This was an action brought by George B. Morgan, receiver of the Ninth National Bank of Dallas, Tex., against W. B. Miller and his wife, E. A. Miller, to recover \$3,000, being an assessment of \$60 made by the comptroller of the currency of the United States upon each of 50 shares of the stock of the bank held in the name of E. A. Miller. The court charged the jury that the stock on which the assessment was made was the community property of W. B. Miller and his wife, and directed the jury to find for the plaintiff, as against defendant W. B. Miller, but not to find anything against defendant E. A. Miller. A verdict was returned in accordance with these instructions, and the court entered judgment thereon against W. B. Miller for \$3,172.50, and in favor of E. A. Miller for her costs. W. B. Miller brings error.

Barry Miller, for plaintiff in error.

U. F. Short, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. Judgment was rendered in this case on May 30, 1894, and on June 1, 1894, a motion for a new trial was made, which, on July 2d, was overruled; the overruling order reciting that "the defendants be allowed twenty days from this date within which time to prepare, submit, and file bills of exception herein." The court adjourned for the term on July 11, 1894. No bills of exception were prepared and filed within the 20 days allowed by the order of the court, but some 8 days after the expiration of the time, to wit, on the 30th day of July, 1894, the plaintiff in error, without notice to the defendant in error, and without his consent, and without any standing rule of the court authorizing the same, applied to the judge who tried the case, and obtained an order, to wit: "In this case the defendants are allowed until August 10, 1894, to prepare and present bills of exceptions." No exceptions were filed within the time allowed by this order, but bills of exception were prepared and submitted to the trial judge, and by him signed and delivered to the clerk, who, on the 20th day of August, 1894, indorsed thereon: "Filed as of date Aug. 10th, 1894, by order of John B. Rector, U. S. Dist. Judge."

The bills of exception were improvidently allowed. U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, and cases there cited. See, also, Railroad Co. v. Russell, 60 Fed. 501-503, 9 C. C. A. 108; U. S. v. Carr, 61 Fed. 802, 10 C. C. A. 80. As the errors assigned arise wholly upon the bills of exception, we are compelled to affirm the judgment; and it is so ordered.



## CENTRAL TRUST CO. v. CONDON et al.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1895.)

No. 207.

## 1. CONTRACTS—INTERPRETATION.

One E., in April, 1890, made a contract with the K. Ry. Co. for the construction of its road. The contract was dated back to August, 1887, to cover the time during which a construction company had been engaged in building a part of the road, under a contract which had been assigned to E. The first clause provided that E. agreed to build and complete the road on the designated route, according to specifications. By the second clause E. agreed to furnish the money to pay for right of way and depot grounds, and for legal proceedings necessary to acquire the same, and it was mutually agreed that all works, materials, and plant theretofore constructed, equipped, and provided by either party, then in use about the construction or operation of the road, should be deemed works, materials, and plant provided under the agreement by E., and should be his property. By the third clause the K. Ry. Co. agreed, whenever required by E., to survey and lay out its road, and acquire by purchase or condemnation such rights of way, etc., as were necessary. The fourth and fifth clauses provided that the railway company should execute a mortgage to secure its bonds, or the bonds of any other company taken or used by E. in payment, to the amount of \$20,000 per mile, and to pay E. for the railroad construction \$20,000 per mile in first mortgage bonds and \$20,000 per mile in stock. The last clause provided that the road should be fully constructed, and furnished with all the appurtenances contracted for, before August 13, 1890, but that E. might sooner deliver to the railway company any completed portion of the road, and the same should then be operated by the railway company, E. paying all expenses and receiving all the earnings. *Held*, that this contract did not impose upon E. an obligation to furnish the road with an equipment of rolling stock.

## 2. SAME—DAMAGES—FAILURE TO DELIVER WORTHLESS STOCK.

E. received a large amount of the stock of the railway company, but less than he was entitled to receive. At the time when he first made a demand for the stock, however, it was worthless. *Held*, that E. was not entitled to any damages for the failure to deliver such stock.

## 3. SAME—CONSTRUCTION OF RAILROAD.

In order to complete the road within the time limited, and to secure certain stock subscriptions, made conditional upon such completion, E., with the assent of the railway company, constructed a temporary line around a difficult part of the road, and afterwards constructed a part of the permanent line by a more direct route, which required more difficult and slower work. E. received the stipulated rate per mile for the temporary line. *Held*, that E. was entitled to payment and a lien for so much of the permanent line as he completed as it was reasonably worth.

## 4. SAME.

*Held*, further, that E. was not entitled to extra pay for building cattle guards, water tanks, stop gaps, slides, sidings, or Y's, the same being all parts of the complete construction of the road; nor was he entitled to a lien, under the Tennessee statute (Mill. & V. Code, § 1774), for a steam shovel, purchased by E., and which passed into the possession of the railway company.

## 5. SAME.

*Held*, further, that E. was entitled to be repaid for expenditures for engineering of the road.

## 6. SAME—PAYMENT OF INTEREST ON BONDS.

Pursuant to an arrangement between the K. Ry. Co. and the M. Ry. Co., a line owned by the same persons who had projected the K. Ry. Co. as an extension of the M. Ry., bonds of said M. Ry. Co. were issued to E. in part payment of the amounts due under his contract. Before the contract was completed, certain interest on these bonds fell due,

and E., by arrangement with the M. Ry. Co., took up and paid part of the coupons on such bonds out of the proceeds of bonds delivered to him under his contract. *Held*, that E. was entitled to be reimbursed by the K. Ry. Co. for such payments, and the amount received by him under the contract was to be considered reduced *pro tanto*.

7. SAME—ENGINEERING—LIEN.

*Held*, further, that assistant engineers, engaged upon work which, under the contract between the railway company and E., the company was bound to pay for, were entitled to recover the amounts due them directly from the railway company, and to have liens therefor against its property, upon complying with the requirements of the statute as to the steps necessary to secure such liens.

8. CORPORATIONS—AUTHORITY OF PRESIDENT.

*Held*, further, that while the contract with E. was in existence, the president of the K. Ry. Co. had no authority, as such, to make a contract which would bind the company, with another person or firm, to do part of the work which E. was bound to do, especially when such other person or firm knew of E.'s contract.

9. LIENS—PRIORITIES—ALLOWANCE OF INTEREST.

In the distribution of the proceeds of a common security between liens of different priorities, interest should be allowed upon the superior lien up to the time of satisfaction.

10. RAILROADS—AUTHORITY TO MORTGAGE—TENNESSEE STATUTE.

The provisions of the Tennessee statute (Mill. & V. Code, § 1277) requiring notice to be given, by advertisement in certain newspapers, of a meeting of the stockholders of a railroad company at which a mortgage is authorized, is for the protection of stockholders, and, until some stockholder objects to the validity of a mortgage authorized at a meeting which was not so advertised, no other person can object on that ground.

11. JUDGMENTS—EVIDENCE.

A judgment against a railroad company for material claimed to be furnished in its construction directly to the company is not evidence that such material was furnished directly to the company, and not to a contractor building its road, as against holders of the bonds of the company, in a cause where the controversy is as to the priority of the lien of the mortgage securing the bonds and a lien claimed by the person furnishing the material.

12. MECHANICS' LIENS—TENNESSEE STATUTES—SUIT TO ENFORCE.

Under the statute of Tennessee relative to liens of mechanics and others against railroads (Act 1883, c. 220), an intervening petition, filed by the claimant, in a cause to which the railroad company is a party, claiming a lien, in the alternative, either against the railroad company direct, or through another party to the suit as principal contractor, as the facts might appear, is a sufficient compliance with the requirement of a suit to enforce the lien of a principal contractor.

13. SAME—ATTACHMENT.

Under such statute it is not necessary for a claimant to issue an attachment against the property of the railroad company.

14. SAME—WHAT CONSTITUTES NOTICE.

Under such statute, a declaration, in a suit by the claimant against the railroad company, served upon such company, and containing a count based upon a subcontractor's lien arising out of a contract with the principal contractor for the construction of the road, is a sufficient notice to the railroad company of the plaintiff's claim of a subcontractor's lien, though the suit is afterwards dismissed by the plaintiff.

15. SAME—SUIT TO ENFORCE.

Within the time limited by said statute after serving notice of lien on the railroad company, a subcontractor filed a bill against the railroad company, to which the principal contractor, and all other parties holding liens or mortgages on the road, were made parties, in which he claimed a principal contractor's lien, but averred that, owing to the dealings

between the principal contractor and the railroad company, it was doubtful whether complainant and others engaged in the construction of the road were principal or subordinate contractors, and asked that their liens be declared first liens, or for such other or different relief as might seem meet. *Held*, that the bill might be treated as one to enforce a sub-contractor's lien, and hence as a compliance with the statute.

16. COLLECTION OF TAXES—TENNESSEE STATUTE.

The statute of Tennessee relative to taxation of railroads (Acts 1875, c. 78, Mill. & V. Code, §§ 669-708) provides that state taxes may be collected by the comptroller by distress and sale, and, on failure to obtain satisfaction out of the personal property, by sale of the real property and franchises; and also that the collector of taxes of any county shall collect the amount due to the county as now provided by law, in case of delinquents. *Held*, that these provisions constitute an exclusive mode of collection of railroad taxes, and that as, at the time of the passage of the act, the general tax laws provided no penalty for delinquents, no such penalty could be imposed on a railroad delinquent in payment of taxes, notwithstanding a penalty had been imposed by subsequent legislation for delinquents under the general laws.

17. PRACTICE—ALLOWANCE TO COUNSEL.

Where a bill has been filed to foreclose a mortgage on a railroad, and persons holding liens on the road afterwards file a general creditors' bill to ascertain and clear all liens on the road prior to the mortgage, making the mortgagees and all other lien holders parties, it being necessary to a successful sale of the property that the various liens should be ascertained and cleared off, and such creditors' bill being consolidated with the foreclosure suit, the plaintiffs in such creditors' bill are entitled to an allowance for counsel fees out of the fund derived from the sale of the road for their services in filing the bill and bringing in all lien claimants.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a suit by the Central Trust Company of New York to foreclose a mortgage given by the Marietta & North Georgia Railway Company, with which was consolidated a suit by V. E. McBee and others against the Central Trust Company and others to restrain the prosecution of the foreclosure suit and of other claims against the property on which they claimed liens, and praying for a sale and payment of their claims from the proceeds. All creditors were directed to file their claims in the consolidated cause, and numerous lien claimants accordingly filed intervening petitions. A motion to dismiss the bill of McBee et al. for want of jurisdiction was denied. 48 Fed. 243. A decree for sale and distribution was made, from which cross appeals were taken by the Central Trust Company and the lien claimants, and which was reversed on the Central Trust Company's appeal. 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. After further hearing in the circuit court a new decree was entered, from which both the Central Trust Company and some of the lien holders again appeal.

This is a second appeal in this case. The opinion of the court on the former appeal is reported under the name of Central Trust Co. v. Bridges, 16 U. S. App. 115, 6 C. C. A. 539, 57 Fed. 753. The controversy relates to the priority of liens on a railroad running from Knoxville south towards Marietta, in Georgia, 118 miles, and known at the time of its construction as the Knoxville Southern Railroad. The Marietta & North Georgia Railway Company of Georgia owned a narrow-gauge railroad running north from Marietta towards the North Carolina and Tennessee lines. Persons interested in its stock, especially R. M. Pulsifer and George R. Rager, conceived the plan of making

it a standard-gauge road, and extending its line to Murphy, N. C., and thence to Knoxville, Tenn. Accordingly contracts were made between the railroad company and George R. Eager, by which the latter agreed to carry out the proposed improvement in Georgia as principal contractor, receiving his pay in first mortgage bonds of the company. The mortgage under which these bonds were issued contained a provision that they should be used to pay for the construction of the road in Georgia and North Carolina at not exceeding \$16,000 a mile, and in Tennessee at not exceeding \$20,000 a mile. The mortgage was executed in 1887, and at that time the Marietta & North Georgia Railway Company had no authority to build or mortgage a railroad in Tennessee. About the same time, however, the same persons organized the Knoxville Southern Railroad Company to build and operate what was intended to be and was the Tennessee extension of the Georgia Company's railroad. The Knoxville Company made a contract in 1887 or 1888 with a corporation of New Hampshire known as the North Georgia Construction Company as principal contractor to build the road in Tennessee. Eager was president of this construction company, and a large owner of its stock. The city of Knoxville agreed to subscribe for \$275,000 of the stock of the Knoxville Southern Railroad Company on condition that the railroad should be completed in time to permit the running of trains from Marietta to Knoxville by August 13, 1890. Much work was done on the Knoxville road during the year 1888. From the fall of that year until the spring of 1890 the work was substantially suspended. R. M. Pulsifer, a large stockholder in the railroad company and in the construction company, died late in 1888, and this seemed to stay the further prosecution of the work. The construction company, for all the work it did, received its pay in bonds of the Marietta & North Georgia Railway Company, issued under the mortgage already referred to, although that company did not own the road being constructed, and had no authority to mortgage it. The construction company, in 1889, assigned to Eager all its rights under its contract, and all its liabilities, and in April, 1890, a contract was made between the Knoxville Southern Railroad Company, acting by Arthur, its vice president, and George R. Eager, for the construction of the entire railroad. The contract was dated back to August, 1887, and was thus made doubtless to overreach the time during which the building had proceeded under the contract of the North Georgia Construction Company. This contract was spread on the minutes of the meeting of the stockholders of the Knoxville Southern Railroad Company of May 29, 1890, and was ratified and approved. The contract provided that the Knoxville Company would mortgage its road to secure the bonds of any other company issued to Eager to pay him for the construction of the road. Accordingly, at a meeting of the stockholders of the Knoxville Company of July 14, 1890, the directors and officers were directed to execute a mortgage to the Central Trust Company to secure all the bonds of the Marietta & North Georgia Railway Company issued to pay for the building of the Knoxville Southern Railroad not exceeding \$20,000 a mile. The meeting at which the mortgage was authorized does not appear to have been advertised in the Knoxville, Nashville, and Memphis papers. Before August 13, 1890, trains were running from Marietta to Knoxville, and the subscription of the city of Knoxville became absolute, and was paid in bonds of the city. In November, 1890, the Marietta & North Georgia Railway Company and the Knoxville Southern Railroad Company were consolidated, in accordance with the laws of Georgia and Tennessee, under the name of the former company.

In the construction of the Knoxville Southern Railroad, with but one or two exceptions, all the claims of contractors and material men for work done or material furnished before 1890 were paid. When the road went into the hands of a receiver, in January, 1891, there were left unpaid upwards of \$300,000 of claims by contractors and material men. Substantially all the contracts under which these claims arose were made after the execution of the contract between Eager and the Knoxville Company in April, 1890, and the work and materials were all furnished thereafter. In October, 1890, Eager became slow in his payments, and suits were begun by subcontractors. Many of these suits were prosecuted to judgment in the state courts of Tennessee against Eager as principal contractor and the railroad company as garnishee. In November, 1890, in a manner described in the opinion on the

former appeal, Eager secured a judgment as principal contractor for \$375,000, and subsequently assigned this judgment to S. B. Luttrell, trustee, for the benefit of all the subcontractors and material men to whom he was indebted. Of the men who did work or furnished materials for the construction of the railroad, McBee & Co., J. W. Wilson, W. McD. Burgin, W. B. Crenshaw, J. H. Odell, James H. Moses, and George Bruster were the only lien claimants who did not take judgment against Eager as principal contractor and the railroad company as garnishee in the state courts. On January 12, 1891, the Central Trust Company filed its bill in the circuit court of the United States for the Northern district of Georgia against the Marietta & North Georgia Railway Company to foreclose the mortgage of 1887. The next day a similar and ancillary bill was filed against the same company in the court below, the circuit court of the United States for the Eastern district of Tennessee. The next day, McBee & Co., J. W. Wilson, and W. McD. Burgin filed a bill in the same court to establish their liens against the Knoxville Southern Railroad, to marshal the liens, and to sell the railroad. To this bill they made parties the Knoxville Southern Railroad Company, the Marietta & North Georgia Railway Company, and all the contractors, including Eager, and all the material men having claims against the road, so far as they knew them. They attacked the validity of the mortgages of 1887 and of 1890 and the consolidation. The foreclosure bill and that of McBee & Co. et al. were consolidated, and a receiver was appointed. It was ordered that the McBee bill be treated as a general creditors' bill, and that all persons having claims against the Knoxville Southern Railroad Company be brought in by due advertisement. Subsequently the Central Trust Company filed an amended bill, setting up the Knoxville Southern mortgage of 1890, and praying foreclosure under that. The Central Trust Company and the two railroad companies filed answers to the McBee bill, in which they averred that the work for which liens were claimed had been done for George R. Eager, principal contractor, and not for the Knoxville Southern Railroad Company; and that, as nothing was due from the company to Eager, no lien could be asserted against the railroad. The contract relied on specifically was that dated August 20, 1887, and actually executed in April, 1890. Thus was evolved a controversy, which was referred to a master to hear and determine, between the bondholders on one side and the contractors and lien holders on the other, and in which the main question was whether the work done and material furnished by the lien claimants had been done for George R. Eager, principal contractor, or for the Knoxville Southern Railroad Company. The master reported that, although Eager represented himself to be a contractor, and actually did the work under a contract, his contracts were nevertheless the contracts of the railroad company, because he was the largest stockholder of the company, and the directors were his tools and employes, quick to do his bidding. This view was confirmed by the circuit court, and all the claims were decreed to be liens against the road as principal contractor's liens, and in no way dependent on or limited by the amount owing, if anything, from the railroad company to Eager. In its decision on the former appeal this court differed from the court below and the master, and held that Eager was a principal contractor with the railroad company under the contract dated August 20, 1887, and that all who had taken judgment against him as principal contractor were in fact subcontractors, and could only assert liens as such against the railroad company to the extent of the company's indebtedness to him. This court also held that Eager's judgment against the Knoxville Company was fraudulently obtained, and that it did not furnish even prima facie evidence of the amount due him. The case was accordingly remanded to the circuit court for two purposes: First, for the hearing and determination on further evidence of the amount due from the Knoxville Southern Railroad Company to Eager; and, second, for the hearing and determination on further evidence of the question whether McBee & Co., J. W. Wilson, W. McD. Burgin, W. B. Crenshaw, J. H. Odell, James H. Moses, and George Bruster had contracted directly with the railroad company or with Eager. By consent of counsel, the claim of Kellar & Findlay to the extent of about \$1,800, though it had been included in a judgment for a much larger amount against Eager as principal contractor, was resubmitted to the master for decision as to whether this part of their claim was not properly to be treated as a

direct debt of the railroad company. The master reported that the railroad company was not indebted to Eager at all, and that of all the persons whose claims had been referred to him for determination only McBee & Co., and they only to the extent of half their claim, had a valid debt and lien directly against the railroad company. The court below sustained the exceptions to the master's report, and held that all the claimants above named were principal contractors with the railroad company, and that the railroad company was indebted to Eager as follows:

Unissued stock.....	\$103,020 00
Interest thereon from Jan. 1, 1890, to date of filing bill in this cause .....	6,438 75
On account of permanent line around the W.....	55,145 04
On account of cattle guards, water tanks, and stock gaps.....	9,850 00
Interest from Aug. 13, 1890, to Jan. 16, '91.....	245 88
On account of slides.....	14,142 90
On account of expenses of engineering.....	51,072 82
Interest from Aug. 13, '90, to Jan. 16, '91.....	1,276 80
On account of Goodlin lot.....	293 01
Interest from Aug. 13, '90, to Jan. 16, '91.....	7 30
On account of steam shovel.....	5,100 00
Interest from Aug. 13, '90, to Jan. 16, '91.....	127 50
On account of extra mileage, four side tracks, and "Y".....	45,000 00
Interest from Aug. 13, 1890, to Jan. 16th, '91.....	1,125 00
Making a total of.....	\$292,855 00

All said items were allowed as proper credits in favor of said George R. Eager, and against the Knoxville Southern Railroad Company; but against said amounts it was adjudged that the said Knoxville Southern Railroad Company was entitled to credits as follows:

For completion of the bridge over Little Tennessee river .....	\$5,500 00
For strengthening trestle at the W.....	2,500 00
For rights of way which are yet unpaid for, and adjudged in this proceeding.....	2,142 93
	<hr/>
	\$ 10,142 93
Leaving a balance of.....	\$282,712 07
Due to George R. Eager, but from the foregoing sum there was deducted the sum of.....	27,834 67
Being the amount above adjudged to be due to the said V. E. McBee & Co., James M. Wilson, Wm. McD. Burgin, and Kellar & Findlay, and leaving the final balance due to the said George R. Eager from the Knoxville Southern Railroad of.....	<hr/>
	\$254,877 40

The decree of the court was appealed from by the Central Trust Company, and many errors were assigned. Cross appeals were taken by the subcontractors from the decree on the ground that the amount adjudged to be owing by the Knoxville Southern Railroad Company to Eager was too small. Another question presented by the record on the Trust Company's appeal is whether, under the railroad tax law of Tennessee, the county and state are entitled to collect 10 per cent. penalty upon the delinquent taxes due from the railroad company.

The contract executed in April, 1890, and dated August 20, 1887, between Eager and the Knoxville Southern Railroad Company contained, among other recitals, this: "Whereas, the Knoxville Southern Railroad Company is desirous of contracting for the making and construction of its railroad, and is willing to that end, in order to accomplish the purpose of its organization, to pledge and employ in the payment therefor all of its property and franchises, and whereas George R. Eager is able and willing to enter into contract for the construction of railroads and other works." The first clause of the contract provided that: "The party of the second part agrees to build

and complete the railroad of the party of the first part, and the party of the first part agrees that the party of the second part shall and may build said railroad, commencing at a point on the south side of the Tennessee river, where the road of the Knoxville Belt Railroad Company and the said road connects, within one mile of the city limits of Knoxville, in the state of Tennessee, to a connection with the Marietta and North Georgia near where the Hiwassee river crosses the North Carolina and Georgia state line, in accordance with the specifications hereto annexed, upon such route as has been or may hereafter be designated by the party of the first part. Second. The party of the second part agrees to furnish the money to pay for right of way, depot grounds, except the terminals at Knoxville, which it may be necessary for the first party to acquire for the convenient uses and operation of the railroad herein agreed to be constructed, and to pay the expenses of all legal or other proceedings that may be necessary therefor. And it is mutually agreed that all works, materials, and plants heretofore constructed, equipped, and provided, either by the party of the first part or by the party of the second part, now in use in or about the construction or operation of the railroad of the party of the first part, as and shall be deemed for all purposes of this agreement, as works, material, or plants heretofore constructed, equipped, or provided under agreement by the party of the second part, provided that the party of the second part shall be at liberty to replace any or all of such works, material, or plant with others conforming to the terms of this agreement, and thereupon such works, material, or plant so replaced by other shall be and remain the property of the party of the second part. Third. The party of the first part agrees, whenever requested to do so by the party of the second part, to survey and lay out its road or roads as hereinbefore agreed to be constructed, and to acquire by purchase or condemnation or otherwise such rights of way, depot grounds, and other real estate as may be necessary or convenient for the construction, use, or operation of the said road or roads." By the fourth clause the railroad company agreed to execute a mortgage to "secure the payment of bonds of the party of the first part, or to secure the payment of bonds of any other company taken or used by the said Geo. R. Eager as a part of his compensation for the building of the road of the party of the first part, or any portion thereof, under this or any contract to the amount of \$20,000 per mile for each and every mile of constructed road, and to make and execute any other or further deeds, conveyances, or mortgages or instruments as counsel learned in the law selected by said Eager may advise as necessary or proper to secure any first or other mortgage bonds issued to aid in the construction or equipment of said road, or to pay any expenses connected therewith, or with the management or operation of said road, or with the marketing of said securities." The fifth paragraph provided that: "The party of the first part shall pay to the party of the second part, for the said railroad constructed and to be hereafter constructed by the party of the second part as aforesaid, all the first mortgage bonds of the party of the first part to be issued under or secured by the said mortgage, namely, \$20,000 per mile, also full-paid shares of the capital stock of the party of the first part to the amount of \$20,000 per mile of said railroad, excepting that there shall be deducted from the total amount of said capital stock such amount thereof as shall be required to be issued to fulfill the terms of the conditional subscription by the city of Knoxville, or any other subscription that may be made to said railroad company by any county or community. The stock herein mentioned shall be paid whenever and as each mile of the road is graded, and the party of the second part shall be entitled to demand, and the party of the first part agrees to deliver to the second party, full-paid capital stock to the amount of \$20,000 per mile as each mile is graded. The bonds herein mentioned shall be paid whenever each mile of road is built and ready for the operation of trains." The sixth paragraph of the contract was an assignment by the railroad company of all the stock subscriptions to Eager, and of all the funds in its possession at that time, in further payment of the work and services to be performed. The seventh paragraph provided that the entire railroad contracted to be built should be fully constructed and furnished in accordance with the stipulations, with all the appurtenances therein con-

tracted for, to the party of the first part, before the 13th day of August, 1890. "But the party of the second part shall have the right at any time to deliver to the party of the first part any portion of the railroad or railroads as completed, and, as soon as any portion of the road or roads herein contracted to be built shall be delivered to the party of the first part, the same shall be operated by the said party of the first part, through its officers and agents, to be appointed with the consent of the party of the second part, and the said party of the second part shall receive all the earnings and shall pay all the expenses of operating such completed portion until the entire construction and delivery of the road under the provisions of this agreement."

Butler, Stillman & Hubbard, Henry B. Tompkins, and Tillman & Tillman, for Central Trust Co.

W. L. Ledgerwood, for state of Tennessee and Monroe county.

W. P. Washburn and Jerome Templeton, for McBee & Co. et al.

Green & Shields, J. W. Caldwell, and Templeton & Cates, for interveners.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Of the questions left open by the decision on the former appeal, the principal one now to be determined is that of the amount owing by the Knoxville Southern Railroad Company to George R. Eager. The first important point of difference between the parties is in respect to the liability of Eager under the contract to furnish the railroad company with a complete equipment of rolling stock. The master reported that Eager was bound to supply rolling stock, and that, not having done so, he was chargeable with the sum required for the purpose. The circuit court sustained the exception to this view, and held that the contract did not impose such an obligation on Eager. We concur with the court below. In the recital the desire of the railroad company to contract "for the making and construction of its railroad" is referred to. In the first clause Eager agrees to build and complete the railroad, and the company agrees that he may build it according to specifications (which never appear to have been made). In the second and third clauses reference is made to the "railroad herein agreed to be constructed." By the fifth clause the payment under the contract is to be for the railroad "constructed and to be hereafter constructed," and the bonds which constitute the final payment are to be paid "whenever each mile of road is built and ready for the operation of trains." These expressions are utterly inconsistent with the idea that Eager was bound to furnish the rolling stock in addition to completely constructing the road. The second half of the second clause inserted manifestly for the purpose of merging the contract of the North Georgia Construction Company in this one of Eager does refer to "all works, materials, and plants heretofore constructed, equipped, and provided, now in use in or about the construction or operation of the railroad," but this clause does not necessarily include rolling stock, though it may not necessarily exclude it. Rolling stock is usually not



referred to either as "works" or "plant" or "materials." Works and plant which must be furnished in the building of a road are as necessary in the operation of the road as rolling stock, so that "operation" does not necessarily imply that the works, plant, or materials referred to were rolling stock. In the fourth clause of the contract the company agrees to execute a mortgage to secure the bonds to be issued as compensation for Eager's building the road, and also to issue additional mortgages necessary to secure any first or other mortgage bonds issued to aid in the construction or equipment of the road. Just what the bonds were which the additional mortgages were expected to secure is not quite clear. Certainly so obscure a sentence cannot be held to impose on Eager an obligation to equip the road, when the clause in which his obligations are defined excludes such an idea. But it may be suggested that the feature of the contract by which all the available assets of the company were to be delivered to him to pay for his work, leaving nothing to the company to buy rolling stock, made it reasonable and probable that he should furnish the rolling stock, and requires this effect to be given to the contract, if possible. This road was built as an extension of the Marietta & North Georgia Railway, with an immediate consolidation in view, and it would not be unreasonable to suppose that the parties to this contract looked to the latter road for aid in this respect. The agreement in the fourth clause of the contract that the company would give an additional mortgage to secure bonds issued to aid in the equipment of its road suggests that the parties then had some plan for the issuance of other bonds by the Marietta & North Georgia Railway to pay for equipment of this road, also to be secured by mortgage on this road. However this may be, the court cannot disregard the plain limitations imposed by the language used, and expand an agreement to build and construct into an agreement to construct and furnish rolling stock.

The main argument of counsel for the trust company is based on the language of the certificates of the chief engineer of the Marietta & North Georgia Railway Company upon which Eager obtained his bonds from the Central Trust Company and an agreement for the negotiation and sale of the bonds between one Hambro and the Marietta & North Georgia Railway Company represented by Eager in which it was provided that bonds should be delivered by the trust company at the rate of \$20,000 per mile only on the presentation of such certificates. The certificates were to the effect that five miles of road had been constructed, and the necessary and proportionate amount of rolling stock had been furnished. We do not see how the Hambro agreement and the certificates of the engineer of the Marietta & North Georgia Railway Company can vary the construction of the contract between Eager and the Knoxville Southern Railroad Company. The latter was not a party to the Hambro agreement, and its engineer did not issue the certificates. It only bound itself to secure by mortgage on all its property the bonds issued for its construction.

It may be that, as between himself and the bondholders under the Marietta & North Georgia mortgage, Eager, if he had furnished equipment, would be estopped to assert title to it, or a claim for it in priority to the mortgage; but such an estoppel, arising dehors the written contract between him and the Knoxville Southern Railroad Company, could not affect his subcontractors and the material men. *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520. They had the right to rely on the contract as defining the extent of Eager's lawful claims against the Knoxville Southern Railroad Company, and as furnishing the fund for the payment of their liens, when duly fixed in accordance with the statute. The contract was their security. *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737. Whether this contract dated August 20, 1887, is one which might have been set aside as not securing to the Knoxville Southern Railroad Company that which in good conscience it should have had because of Eager's fraud and undue influence in obtaining it, is a question not before us for decision. It is the contract upon which both the railroad companies and the Central Trust Company have planted themselves in their pleadings, and it is the contract upon which this court has supported their claim that Eager was the principal contractor, and that all the other claimants were subcontractors under him. The Central Trust Company cannot use the contract for one purpose and repudiate it for another. The contract provided that the bonds should be paid when each mile of road was built and ready for the operation of trains. By its terms Eager agreed to construct the railroad, not to equip it. The construction of the road does not include its equipment, and any such interpretation of the contract would be making a new agreement.

It is said, however, that the circuit court of appeals of the Fifth circuit has decided in the case of *Central Trust Co. v. Hiawassee Co.*, with respect to a similar contract, that Eager was obliged to furnish the equipment. The case is reported in 2 U. S. App. 1, 1 C. C. A. 116, 48 Fed. 850. An examination of the opinion does not bear out what is claimed for it. The controversy there arose over the title to certain rolling stock between Eager's assignee and the bondholders. It appeared that Eager had furnished the rolling stock to the Marietta & North Georgia Railway Company, and that on the faith of the company's owning it Eager had obtained the bonds under the Hambro agreement. It was held, although his contract with the railroad company might not have required him to furnish the equipment, that, as against the bondholders, he, and therefore his assignee, were estopped to assert title to the rolling stock, and defeat the lien which the bondholders would have on it as the property of the railroad company. The controversy there was, of course, very different from here, and has no bearing upon the question at bar.

The second important question with reference to the indebtedness of the company to Eager is whether he can claim any recovery now for the deficiency in the amount of stock in the Knox-

ville Southern Railroad Company which should have been issued to him under the contract. We had occasion to consider this claim in our first opinion. The judgment of \$375,000 in favor of Eager was founded on an agreement arrived at in the stockholders' meeting of the Knoxville Southern Railroad Company, wherein Eager and all the other lien claimants were represented, by which agreement the value of \$300,000 par value of the shares of the capital stock of the Knoxville Southern Railroad Company was fixed at \$275,000. This was at a meeting on the 29th of November, 1890. We held in the former opinion that the amount of stock due to Eager was at the time worthless, and that the fixing of its value at \$275,000 was a mere fraudulent device to make Eager's claim against the company sufficiently large to pay all the subcontractors under him, and fasten a lien to that extent upon the corpus of the railroad company, prior to that of the bondholders. It now appears that the deficiency in stock due to Eager was more than \$600,000, instead of \$300,000. He had already received, however, \$1,500,000 par value of the stock. The court below, overruling the master, who found the claim for stock to be worthless, held that Eager was entitled to this stock on the 1st of January, 1890; that at that time its value was 15 cents upon the 100, and that Eager should be allowed a credit of \$103,020 therefor. We think this finding cannot be supported for several reasons. First, there is no sufficient evidence in the record to show that the stock had any market value on the 1st of January, 1890. That which was introduced to show it, was of a very flimsy character. More than this, it is by no means clear that on the 1st of January, 1890, Eager, who, at that time had 12,000 shares of the stock, had graded more than 60 miles of the road. Under the contract, therefore, he had all the stock he was then entitled to. Again, Eager made no demand upon the company for the stock, and was not entitled to recover in damages, except from the time he made his demand, and such demand was refused. When he did make a demand, in November, 1890 (if it can be treated as a demand in good faith), it is conceded that the stock was absolutely worthless. But it is said that the capital stock of the company was only \$1,500,000, so that the company on January 1, 1890, was not able to issue the stock, and therefore a demand was not necessary. The charter provided that the capital stock might be increased by a vote of the directors, and there is nothing to show that, if Eager had requested the increase of the stock, the directors and stockholders would not have secured such increase by amendment of the charter, or such other step as might be necessary. On the contrary, it is manifest that they would have done so if Eager had really in good faith requested it.

The next item in the claim of Eager against the company is on account of the permanent line around the W. The railroad company, in order to secure certain subscriptions, was obliged to complete its line and have trains running upon it from Marietta, Ga., through to Knoxville, on the 13th day of August, 1890. Part

of the Knoxville Southern Railroad lay through and over mountainous country. In crossing Bald Mountain it was found that the work of constructing an easy grade would consume more time than could be given if the subscription contract with the city of Knoxville was to be fulfilled. It was therefore deemed best to build what was called a "W," and at some later period to construct a permanent line on easier grades. The W was accordingly constructed, and Eager received his pay by mileage upon that line, but he also constructed about one-third, or three miles and a half, of a permanent line, which would give the company a much easier mode of getting around Bald Mountain. He never has received any pay for the part of the permanent line which he built. This will be of great advantage to the company and to the purchaser at the foreclosure sale. It is now in the hands of the receiver, and the title to the right of way is in the Knoxville Southern Railroad Company, or its grantee, the new Marietta & North Georgia Railway Company. It must be presumed that so much of the permanent line as was built was built with the consent of the railroad company, and that the change from the permanent line to the W was with its acquiescence. Clearly, the permanent line around the W must be treated as an extra not paid for by bonds delivered under the contract. We think that it is such an addition to the value of the railroad company, over and above the line which Eager agreed in his contract to build, that he ought at least to have credit for its actual cost. It is a part of the railroad, and, when completed, will be part of its main line. The amount due for its actual cost is \$55,145.04.

A credit for cattle guards, water tanks, and stop gaps, amounting to \$9,850, was allowed by the court below to Eager, but these, we think, were all a part of the complete construction of the railroad, for which Eager was paid in the bonds delivered to him under his contract. The same is true of slides. It may be that, where a contractor is building for a railroad company certain work, under carefully drawn specifications, and there are unusual slides, it is customary to allow him for the same; but the present is an unusual contract. It covers the complete construction of the road, and the company places everything in the hands of Eager to assist him, and gives him the widest discretion in reference to the way in which he shall build the road. In such a case we think it reasonable to hold that he assumes the additional cost arising from natural causes.

The next item is that of the expenses of engineering. There is nothing in the contract imposing upon Eager the duty of paying the expenses of the engineering of the road. The railroad company had a chief engineer duly appointed, and it had four or five assistant engineers under him, whom Eager paid. The services which they rendered were services which would ordinarily be paid by a railroad company in the construction of a railroad, and there is nothing in the contract to show that it was expected that Eager should meet these expenses. He did meet them be-

cause the company had no funds to draw upon at the time, but we think that under the contract he may be properly credited with the amount paid by him therefor. This sum is \$51,072.82. It was paid out of the proceeds of the bonds delivered to him in fulfillment of the company's contract with him, and may be fairly said, therefore, to reduce the amount actually paid him for his work by the company.

It is conceded that on account of the Goodlin lot there is \$293.01 due to Eager.

The court below allowed \$45,000 for side tracks and Y's built by Eager, on the theory that under his contract he was entitled to \$20,000 per mile of track laid in their construction. The master reported that their actual cost was but \$16,000, and that he was inclined to the opinion that they were properly a part of the completed road which Eager was bound to construct. Eager's contract was to build a completed road, ready for the operation of trains. Y's are but the equivalents of turntables, and are thus indispensable in the operation of a railroad. It is impossible to run trains upon a single-track railroad, 100 miles long, without side tracks. We are satisfied from the evidence that both the Y's and the side tracks were only part of the necessary construction of the completed road, and were paid for by the bonds delivered to Eager at the rate of \$20,000 per mile of main track. There were no specifications, and he took a lump job for a completed road. Under these circumstances, the item for side track and Y's cannot be allowed.

A claim is made on account of a steam shovel, of \$5,100, which was in the possession of the railroad company when this suit was begun, and passed thence into the hands of the receiver. Eager would have no claim against the company on construction account for such a shovel, and could certainly not claim any lien under the statute against the company for furnishing it. The statute allows liens only for work of construction and materials therefor, and for engineering and superintendence, but not for tools or machinery for construction. Mill. & V. Code, § 1774. If Eager delivered this shovel to the company, its delivery simply created a debt which was not a debt of construction, and could not give rise to a lien.

In addition to the foregoing items a claim was made before the master and before the court below in favor of Eager for the amount paid by him to take up and cancel interest coupons upon the bonds of the Marietta & North Georgia Railroad Company. The amount claimed was \$164,000. It was disallowed both by the master and the court below. It is brought here for our consideration by cross appeal and proper assignment of error. As has already been stated, the Knoxville Southern Railroad Company was an extension of the Marietta & North Georgia Railroad Company. The Marietta & North Georgia Railroad Company issued all the bonds for the construction of both roads at the rate of \$20,000 per mile for the construction of the Knoxville Southern and at

a somewhat less rate per mile for the construction of the Marietta & North Georgia Railroad. In the issuance and delivery of the bonds to Eager under the Knoxville Southern contract, the Marietta & North Georgia Company really acted as the agent of the Knoxville Southern Railroad Company. While Eager was building the Knoxville Southern Railroad the interest upon the bonds of the Marietta & North Georgia Railroad Company began to fall due. By agreement between the president of the Marietta & North Georgia Railroad Company and Eager, the latter took up, paid, and canceled all the interest coupons of the bonds which were presented for payment. The coupons thus falling due, and which might have been presented for payment, amounted in all to \$164,000. As a matter of fact less than this number were presented; how many less the record does not definitely show. It does appear from the record, however, by Bradley's testimony, exactly how many interest coupons Eager paid and canceled of those bonds which were delivered to him under the Knoxville Southern Railroad contract, to wit, \$36,290.01 down to July 1, 1890. This sum Eager testifies was paid out of the proceeds of the bonds for the construction of the Knoxville Southern Railroad Company. We do not think that Eager is entitled upon his Knoxville Southern Railroad contract to credit for interest paid by direction of the Marietta & North Georgia Railroad Company on bonds issued by that company, and not used in the construction of the Knoxville Southern Railroad. Such payment was made under what must be regarded as an independent agreement, by which an indebtedness was created in favor of Eager against the Marietta & North Georgia Railroad Company. But we do think that there may be properly credited to Eager on his Knoxville Southern contract the sum paid by him under direction of the agent of that company out of the proceeds of the bonds delivered to him to take up coupons on previous bonds delivered to him under the same contract. These interest coupons were obligations of the Knoxville Southern Railroad Company, and a contract between the agent of that company and Eager, by which the latter paid them out of the proceeds of new bonds, reduced pro tanto the amount paid to Eager under the contract for the construction of the road.

There are other items, some of which were allowed to Eager by the court below and others of which were rejected. We think that they were all for work required of Eager under the contract, and cannot be made the basis for any claim in his favor against the railroad company.

Eager must be debited with the amount required to elevate the bridge over the Little Tennessee river; also for the amount required to strengthen the trestles built by him, and for the amounts due for rights of way which in his contract he agreed to pay for and did not, and which are adjudged in these proceedings against the railroad company and in favor of the owners. The account would therefore stand as follows:

## Credits.

On account of the permanent line around the W.....	\$ 55,145 04
On account of engineering.....	51,072 82
On account of Goodlin lot.....	293 01
On account of interest coupons on bonds.....	36,290 01

\$142,800 88

## Debits.

To amount required to elevate Little Tennessee river bridge .....	\$5,500 00
To amount required to strengthen trestles.....	2,500 00
To amount required to pay for rights of way adjudged in these proceedings against the R. R. Co.....	2,142 93
	<u>10,142 93</u>

Balance due Eager.....\$132,657 95

These matters constituted a running account between Eager and the railroad company, and, in view of the fact that he did not really complete all the work under his contract until about December 15, 1890, we do not think that interest should be calculated on the balance until that date. The amount due to Eager is the fund out of which his subcontractors who have perfected liens are to be paid. This was the limit in the aggregate of subcontractor's liens upon December 15, 1890. They were liens superior to the bonds. They should bear interest, or, what is the same thing, the fund from which they are payable should bear interest until paid. The security and priority of the lien attach as well to interest as to principal. The aggregate of the subcontractor's claims exceeds by at least 50 per cent. the fund due Eager, even with interest, so that in the distribution no interest need be calculated on the claims after December 15, 1890, for the share applicable to each will not be varied by adding interest to all claims for the same period from December 15, 1890, to the date of the decree. But the limit in the aggregate of the liens fixed on the property must be increased by interest until satisfaction. This is not a case where the distribution is to be made pro rata between the lienholders and the bondholders, in which case, of course, interest is not to be calculated upon the claims after the time of the sequestration of the property for sale and distribution, so long as the claims cannot be paid in full. *Bank v. Armstrong*, 16 U. S. App. 465, 8 C. C. A. 155, 59 Fed. 372. In the distribution of the proceeds of a common security between liens of different priorities, we know of no principle by which interest can be stopped on the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment, and the decree should therefore include interest on the amount herein found due Eager from December 15, 1890, until it shall be entered.

We come now to the claims made by McBee & Co., J. W. Wilson, W. D. McD. Burgin, Kellar & Findlay, W. B. Crenshaw, J. H. Odell, J. H. Moses, and George Bruster. These claimants aver that they dealt directly with the Knoxville Southern Railroad

Company, and that they are entitled to liens as principal contractors for the work which they did, or the material which they furnished, directly against the railroad without regard to the indebtedness of the railroad company to Eager. With respect to Crenshaw, Odell, Moses, and Bruster, we think they may properly recover the amounts due them directly from the railroad company. They acted as assistant engineers under Walton, the chief engineer of the company. They sue for their salaries as such. The amount which they did receive was paid, it is true, by Eager, but we have found that it was the duty of the company, under the contract, to pay the engineering expenses. In paying and employing these men, therefore, Eager was not arranging and paying for work to be by him done under the contract, but he was pro tanto acting as agent for the company in arranging and paying for work which was imposed by the contract on the company. The amounts due to these four claimants are not disputed, and they are entitled to interest on the same from the time they became due until the date when the decree shall be entered below. It is objected that these assistant engineers have not taken the necessary statutory steps to perfect their liens as principal contractors. The statute (Acts 1883, p. 296, c. 220; Mill. & V. Code, § 2774) gives a lien on the railroad for engineering and superintendence, which is to continue in force for six months after the performance of the work, and until the termination of any suit commenced within the time for its enforcement. Section 2 provides as follows:

"That the lien created under section 1 of this act may be enforced by a suit against the railroad company in the circuit court of the county or district where the work or some part thereof was done, or the material or some part thereof was delivered. The plaintiff shall set out in his declaration, with reasonable certainty the work done, the amount of indebtedness claimed therefor, and the nature and substance of the contract, and such suits shall be docketed and conducted as other suits in said court."

The work of engineering done by these claimants was continued nearly to January, 1891. On April 13, 1891,—within six months thereafter,—they filed petitions in this cause, to which both the railroad company and Eager had already been made parties. Crenshaw's petition, of which those of the other three are duplicates, was as follows:

"Your petitioner, W. B. Crenshaw, a citizen of Knox county, Tennessee, which is in the Northern division of the Eastern district of Tennessee, respectfully shows to the court that the Knoxville Southern Railroad Company, a body corporate, and a defendant herein, is justly indebted to him in the sum of \$716.39, with interest from January 15, 1891, as follows: Said Knoxville Southern Railroad Company, as shown by the bill filed in these causes, undertook to construct, and did construct, between the 23d day of August, 1887, and the 1st of January, 1891, a line of railroad extending in a southeasterly direction from Knoxville, in Knox county, Tennessee, in the Northern division of the Eastern district of Tennessee, to Blue Ridge, Georgia. The contract for the construction of the entire line of said road, which was about 100 miles in length, was let by said company to its codefendant, George R. Eager, as principal contractor. Your petitioner is a civil engineer by profession, and as such was employed under said Eager for the performance of professional work, and did perform professional work as such civil engineer.



during the construction of said line of railroad, and for said work said railroad company and said principal contractor became indebted to petitioner in a considerable sum of money, and are indebted to him for said service in the amount above shown. Petitioner shows that he has made demand upon said company and upon said Eager for the payment of said sum, and by both of them payment has been refused. On the 15th day of January, 1891, complainant, according to the statutes of Tennessee, filed his notice of lien against said Knoxville Southern Railroad Company, and he will exhibit the original notice, with the acknowledgment of service by said company thereon, in the progress of this cause, if the same shall be needed or called for. Petitioner is advised that he has the right to come into this cause, and to be made a party thereto, for the purpose of setting up and proving his claim. He is further advised that his said claim constitutes, under the statutes of Tennessee and the laws of the land, a lien upon said Knoxville Southern Railroad, superior to all claims except those which are, by the statutes of Tennessee, expressly made equal to it. He is advised that said lien is superior to all claims, except claims for work and labor done and material furnished to said railroad company or said principal contractor, and is of equal dignity and effect with all claims of the kinds last named. Petitioner is advised that his lien exists, whether said Eager was really principal contractor for said railroad company or not, and he prays that your honors will so determine and decree, in view of the fact that his work and labor was done in the construction of said railroad. He prays that he may have a decree for the amount above shown to be due him, and that said decree declare his said claim to be a lien upon said Knoxville Southern Railroad, and that said lien be enforced by your honors by proper orders and proceedings."

The petition was evidently framed in the alternative to establish a lien in favor of the petitioner, either as principal or subcontractor, as the court might determine that Eager had been agent of the company, or merely a contractor in employing the petitioner. We have found that in employing and paying the engineers, Eager was merely acting for the company, and not as a contractor, and therefore conclude that this petition must be construed to be an intervening suit to establish a principal contractor's lien against the railroad in the custody of the court, and that it is sufficient for the purpose. It follows that Crenshaw, Odell, Moses, and Bruster must be decreed to have liens on the proceeds of sale for their claims and interest from January 15, 1891, the date of the receivership to the date of the decree.

McBee & Co. were a firm composed of V. E. McBee and J. W. Morgan. They did bridge-building work on the Knoxville Southern Railroad under two contracts. One was a contract for the construction of the bridge over the Little Tennessee river, for which they were to be paid at a certain price per lineal foot of material used; and the other was a contract under which they did all bridge work assigned them, in consideration of the payment of the men employed, the furnishing of the material, and a certain stipulated salary to Morgan for superintendence. Both McBee and Morgan state that the original contracts were made by them with Eager, but they say that they thought he was the president of the Knoxville Southern Railroad Company, and that he gave them to understand that he was dealing with them in this capacity. Their evidence upon this point is obscure and labored. McBee testifies that shortly after the oral agreements Eager sent him a written contract for signature, in which Eager,

and not the railroad company, was named as the party of the first part; that he at once sent the contract back to Eager by his secretary, Foster, with directions to decline signing a contract made with any one but the railroad company. Foster says that he went to Eager with the contract, and stated this as McBee's chief objection; that he made an interlineation in lead pencil in the proposed contract, striking out Eager's name as a party, and inserting that of the Knoxville Southern Railroad Company; that Eager readily consented to the change, and the interlined type-written draft of the contract was left with him to prepare a new one. Eager denies ever representing to McBee that he was the president of the railroad company, and says that it was distinctly understood between them that he was dealing with them as principal contractor. He denies that either McBee or Foster ever objected to contracting with him as such. He says, and it otherwise appears, that he never filled any office in the Knoxville Southern Railroad Company. Moreover, he produces the letter of McBee, acknowledging the receipt of the draft of contract, McBee's letter which Foster brought with him when he came to object to the form of the contract, and the original draft of the contract, with Foster's lead-pencil interlineations. From these it appears beyond controversy that McBee received the form of contract on the 14th of May; that he did not return it by Foster until about the middle of July; that in the letter returning it he complained, not that the contract was with Eager, but only that the specifications were burdensome; and, finally, that the interlineations made by Foster in the contract not only did not involve a substitution of the railroad company for Eager as a party, but that in one of them Foster had written the name of Eager as such party. The case made by the testimony of McBee and Morgan is so shattered by this documentary evidence as seriously to impair the credibility of their statements with reference to a subsequent conversation held by them with W. B. Bradley, president of the Knoxville Southern Railroad Company, in which they say Bradley, on behalf of the railroad company, in consideration of their not withdrawing their men from the unfinished bridge, agreed that the railroad company should be directly liable to them for the amount due and to become due. Bradley was at the same time president of the Knoxville Southern Railroad Company and superintendent of construction under Eager. On the 30th of October, 1890, McBee, Morgan, and one McNeely, a stenographer of McBee, went to see Bradley about their pay. Bradley says that he told them that Eager was then in the East for the purpose of raising funds. He denies that he ever said to them that the railroad company would see to it that they were paid. McNeely, one of McBee's witnesses, says that by direction of McBee, without Bradley's knowledge, he took notes of the conversation, and had them when examined in chief, but before his cross-examination he had lost them. It further appears that some weeks after this Morgan signed a receipt for about \$3,000 as a payment on account by George R. Eager, contractor, and that he had signed a similar receipt in the

previous July. In addition, there are produced in evidence accounts for work, presented by McBee & Co.'s timekeeper, against the North Georgia Construction Company, Eager's predecessor as principal contractor, as late as December, 1890. The master reached the conclusion that McBee's original contracts were with Eager as principal contractor, but that Bradley did give McBee to understand that the railroad company would see his firm paid. Were the question material, we should have difficulty in supporting the latter finding, for the circumstances strongly corroborate Bradley, and impeach McBee and Morgan. But it is not necessary for us to decide the point. The master reported that Bradley, as president, had no authority as president, by agreement or otherwise, to impose on the railroad company Eager's obligations under the McBee contract, and in this we fully concur. The board of directors had made a contract with Eager for the complete construction of the road, as McBee and Morgan well knew, and such a contract necessarily excluded any authority on Bradley's part to make a new contract for part of the same work with some one else. It is true that in some cases the contract of the president of a railroad company is held binding upon the company, though no express authority be shown, because from the performance of it by the other party to the benefit of the company, and within the knowledge of the directors, without objection by them, their acquiescence is presumed. *Pennsylvania R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770; *Indianapolis Rolling-Mill v. St. Louis, Ft. S. & W. R. Co.*, 120 U. S. 256, 7 Sup. Ct. 542. Here, however, the work was presumably done by subcontract with Eager; therefore no presumption of acquiescence by the directors in a new contract with McBee & Co. could be indulged. The master, while finding that Bradley had no authority to make a new contract with McBee & Co., nevertheless held the company liable for the work done after the conversation of October 30th on principles of estoppel. We cannot concur in this result. There was no holding out by the railroad company that Bradley had authority to make such a contract. Indeed, as already stated, McBee knew that Eager was the principal contractor, and might well infer that Bradley had no power to make the company liable for what was due only from Eager. For these reasons, we conclude that McBee & Co. were only subcontractors under Eager. The master reported the amount due to McBee & Co. on their contracts to be \$18,615.87, with interest from December 16, 1890, while the court below found the amount to be \$23,187.44. The discrepancy arises chiefly from the fact that the court allowed McBee & Co. the freight on material used by them from the point of purchase, while the master held that they were only entitled to free transportation from the termini of the railroad under construction. We think the master was clearly right. There is substantially no competent evidence to sustain the claim that the freight beyond the termini of the road was to be borne by Eager. McBee's claim must therefore be reduced to the amount found by the master.

The next claim is that of J. W. Wilson. He was chief engineer of the Knoxville Southern Railroad from 1887 to May 21, 1890, when he was succeeded by Walton. He did substantially no work as such after the fall of 1888. He did, however, buy ties, which were used in the construction of the railroad company. These ties were furnished before his resignation as engineer. He says that he furnished these ties to the company, and not to Eager, and that he never heard of Eager as contractor until a short time before trains were running on the road. He is manifestly mistaken in his evidence. As many as three bills for ties presented by Wilson to Eager, as principal contractor, and receipts of money from Eager as such in payment of them signed by Wilson, are produced in evidence. They leave no doubt that in selling ties he was dealing with Eager, and not with the railroad company. It is said, however, that Wilson has recovered a judgment against the railroad company, as principal contractor, for the full amount of his claim. This is true, and, though the judgment was rendered by default, there was no fraud in the procuring of it, and it is therefore conclusive upon the railroad company. The judgment is not, however, evidence of any indebtedness against the railroad company, such as to give Wilson's claim priority of lien over the bonds in a controversy with the bondholders. This is settled by the case of *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590. Reference was made to this case in the previous opinion in disposing of the claim that Eager's judgment was conclusive upon the bondholders. With respect to Eager's judgment, it was not found necessary to apply the principle announced in the case of *Hassall v. Wilcox*, because the circumstances under which Eager's judgment had been obtained were so plainly fraudulent as to make it not even conclusive against the railroad company. It was then contended on behalf of those lien holders who had taken judgment in the state courts that *Hassall v. Wilcox* did not apply in this case, because the mortgage to the bondholders had not been issued in accordance with the statutes of Tennessee, and did not confer upon their trustee the legal title. The objection to the validity of the mortgage was that notice of the meeting of the stockholders at which it was authorized had not been advertised in the newspapers at Memphis, Nashville, and Knoxville, as required by the General Statutes of Tennessee (Mill. & V. Code, § 1277), under which the issuance of mortgages by railroad companies is authorized. Section 1277 is as follows:

"Railroad companies existing under the laws of this state, or of this state and any other state or states, whose original charter of incorporation was granted by this state, are empowered to issue bonds, and secure the payment thereof by mortgage upon their franchises and property in any state, or upon any part of such franchises and property, or to issue income or debenture bonds and such guaranteed, preferred and common stock as may be determined upon by the stockholders; provided, the same be approved by the votes of the holders of three-fourths in amount of the entire stock of said company at a regular or called meeting of the stockholders of said company; and that sixty days' notice be given in a Memphis, Knoxville and Nashville daily newspaper of the time, place and purpose of the meeting."

We are clearly of opinion that the provision as to notice is for the protection of the stockholders, and that, until some stockholder objects to the validity of the mortgage on the ground that he had no notice of the meeting and its object, this cannot be used by other persons to invalidate it. It appears by the record that at the time the mortgage to the Knoxville Southern road was made there were 12,051 shares represented at the meeting out of a total of 12,053. For this reason we think the mortgage or deed of trust given did confer the legal title upon the Central Trust Company as trustee. It therefore follows from *Hassall v. Wilcox* that Wilson's judgment against the railroad company, to which the Central Trust Company was not a party, does not bar the trust company, as mortgagee and trustee for the bondholders, from contesting the validity of his claim against the railroad company, so far, at least, as to defeat its priority as a lien over that of the bonds.

Burgin's claim is for work done in 1888-89 in the construction of the Knoxville Southern Railroad. The documentary evidence shows beyond a doubt that he did this work for the North Georgia Construction Company, and not for the railroad company.

Nor is there any doubt that Kellar & Findlay were knowingly rendering their services as subcontractors to Eager as principal contractor. The evidence is overwhelming upon this point, and they reduced their entire claim to judgment against Eager as principal contractor, and the railroad company as garnishee, in the state court. Their claim was really covered by the decision of this court on the former appeal, and it has only been re-examined on this appeal by consent.

A careful review of all the evidence presented at the former appeal and of that adduced on the second hearing below strongly confirms the conclusion announced in our former opinion that the work of constructing the Knoxville Southern Railroad was done under the North Georgia Construction Company and George R. Eager as principal contractors, and that no work of any kind except the engineering was done for the railroad company on direct contracts with the railroad company. The evidence to the contrary consists chiefly of opinions and impressions of interested witnesses, whose memories are shown to be defective by the uncontrovertible documentary evidence produced from the records of Eager's office and of the railroad company.

Having thus decided that McBee & Co., Wilson, Burgin, and Kellar & Findlay were subcontractors under George R. Eager, principal contractor, it remains to consider whether they have taken the proper steps under the Tennessee statute to fix their liens as such. Eager recovered a judgment against the railroad company for \$375,000 in a suit to enforce his lien as principal contractor. He assigned that judgment to S. B. Luttrell, trustee, for the equal benefit of his subcontractors and material men. In our former decision we held that this judgment was fraudulently procured, and could not be even *prima facie* evidence of the validity of such a claim in this suit. To the extent to which

we have upheld Eager's claim in this case, we may concede, without deciding, that Eager and his assignee might avail themselves of the formal steps taken by him to fix his lien under the statute, and therefore that he would be entitled to a principal contractor's lien for the amount already found due to him, and thus, that his subcontractors, as beneficiaries under his assignment to Luttrell, might share the benefit of his lien, whether they took the necessary statutory steps to fix their liens as subcontractors or not. But a subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520. It is independent of and superior to his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien. The claims of the subcontractors who have perfected their liens in this case far exceed in the aggregate the amount due to Eager, and therefore he could take nothing by his lien, and could pass nothing by the assignment of it to Luttrell. It follows that only those subcontractors can share in the fund due from the railroad company to Eager who took the necessary statutory steps to perfect their liens.

The third section of the railroad lien act of 1883 provides that the subcontractor, in order to secure a lien against the railroad company, "may give notice in writing to the railroad company, setting out the work done or material furnished, and the amount claimed therefor, and thereupon the amount that may be due or owing from the railroad company to the principal contractor (not exceeding the sum claimed) shall be bound and liable in the hands of the railroad company for the payment of the amount so claimed, and shall constitute a first lien in favor of the claimant, superior to all other liens upon the company's railroad, and shall continue in force for a period of ninety days from the date of service of such notice, and until the termination of any suit commenced within that time to enforce it. \* \* \* The claim provided for in this section may be enforced against the railroad company as garnishee, and the principal contractor as debtor in the circuit court." Of the four claimants whose liens are under consideration, Kellar & Findlay filed a notice with the railroad company, and seasonably began suit in the state court, and took judgment for their entire claim against Eager as the principal debtor and the railroad company as garnishee. They therefore are entitled to share in the fund found due to Eager as principal contractor, with the many persons who, as subcontractors, took similar judgments in the state courts, and whose names are given in the decree of the court below from which this appeal is taken. It is objected, however, both against Kellar & Findlay's rights to a subcontractor's lien and against all but one of the subcontractor lien claimants below, that their liens have not been perfected because an attachment was not issued against the property of the railroad company during the suit. This objection applies to all the lien claim-

ants except the South Tredegar Iron Company, which did issue an attachment both against the property of Eager and that of the railroad company. But it is untenable. The statute does not provide that an attachment shall issue in suits to enforce railroad liens. It is true that under the mechanic's lien law of Tennessee (Mill. & V. Code, § 2747) the lien must be enforced by attachment, but this is because the section expressly requires it. *Dollman v. Collier*, 92 Tenn. 660, 22 S. W. 741. There is no such provision in the railroad lien law. The lien of the principal contractor is to be enforced merely by suit, and the form of the declaration is prescribed in the statute. The lien of the subcontractor may be enforced by suit against the principal contractor as principal debtor and against the company as garnishee. But there is not a suggestion in the statute that attachments are necessary to the perfecting of the lien. We think, therefore, that all who took judgments in the state courts against Eager as principal debtor and the company as garnishee have valid liens as subcontractors, and are entitled to share pro rata in the amount found due from the company to Eager.

A more difficult question remains for decision. It is whether McBee & Co., Wilson, and Burgin have taken the necessary steps to secure a subcontractor's lien for the amount found due them from Eager. McBee & Co.'s work was not completed until December, 1890. On December 31, 1890, their counsel filed with the railroad company the following notice:

"To the Knoxville Southern Railroad Co.: You are hereby notified that we, the undersigned firm, have a balance due us of the sum of twenty-one thousand one hundred and fourteen and 84-100 (\$21,114.84) dollars due by account for material furnished and labor done in building the bridge of said railroad across the Little Tennessee river; said railroad being the same constructed by you from Knoxville, Tennessee, southwardly through the counties of Knox, Blount, Monroe, McMinn, and Polk, to the line between Tennessee and Georgia, and we rely on our lien under sections 2774-2783, inclusive, of the Mill. & V. Code of Tennessee, as security for said money. We claim to have been in said work contractor with you, but give this notice because we understand you claim we are subcontractors under George R. Eager, and that said sum is due from him as principal contractor. In any event, we look to you for payment.

"This Dec. 31, 1890.

V. E. McBee & Co.

"(V. E. McBee. J. W. Morgan.)

"By Washburn & Templeton, Attys."

On January 2, 1891, they filed a suit in the circuit court of Monroe county, Tenn., against the Knoxville Southern Railroad Company. There were two counts in the declaration. The first was based on a contract averred to have been made directly with the railroad company, and the second count was based on a subcontractor's lien averred to have been made with Eager as principal contractor. The second count further averred that the company was largely indebted to Eager. Eager was not made a party to this suit. In January, 1893, the suit was finally dismissed at plaintiff's costs. It is probable that such a suit could not now be relied on to preserve the lien, because it was dismissed, and because Eager was not a party to it, as the statute seems to require. But

certainly, if the notice of December 31, 1890, quoted above, was not sufficient, the second count of the declaration would serve the purpose of the notice, and was a compliance with the statute in this regard. By the terms of the statute, the fund then owing from the railroad company to Eager became bound to McBee & Co. by the service of the notice, and the lien, by virtue of the statute, was then fixed to continue for 90 days, and to be prolonged thereafter by a suit brought within the 90 days to enforce it. The question remains, therefore, was such a suit brought by McBee & Co.? It must be a suit to enforce the subcontractor's lien, and must, of necessity, make the principal contractor a party. The bill of McBee & Co. in the court below was filed January 15, 1891, within 90 days from the foregoing notices. It averred that the Knoxville Southern Railroad Company was indebted to the complainant, McBee & Co., for work and material furnished directly to the company. It further averred that Eager occupied various capacities in relation to the Knoxville Southern Railroad Company, being at one time its principal contractor, and at another time its agent, at another time its president; and that it was matter of doubt whether the persons engaged in the construction of the road, and whose claims were unpaid, were creditors of Eager or creditors of the railroad company. The bill attacked the validity of both mortgages; asked that all the persons having claims for work and material furnished in the construction of the road be made parties defendant; that Eager, who had recovered a judgment against the road for \$375,000 for work and material done by him in the construction of the road, be made a party, and that he be compelled to set up the contract, if any existed between him and the railroad company. The Marietta & North Georgia Railroad Company and the Central Trust Company were also made parties. By an amended bill complainants reiterated the averments of their original bill, and further charged that Eager was the Knoxville Southern Railroad Company, and that all contracts made with him were made with the Knoxville Southern Railroad Company, and therefore that all persons furnishing work and material to him were entitled to claim as principal contractors. The prayer of the bill was that the claims of the complainants and all the creditors made defendants should be adjudged to be first liens on the property of the railroad company, that the mortgages to the trust company should be set aside and held to be invalid, and "for all such other further and different relief" as might seem meet and proper to the court. The answers of the two railroad companies and the trust company denied the invalidity of the mortgages, averred that Eager was a principal contractor, and that all the material claimed to have been furnished by complainants and the other intervening lien claimants had been furnished to him as principal contractor, and were claims against him, and not the company. While the bill and amended bill in terms charged that the debts for which liens were asked had been contracted directly with the railroad company, we are of opinion that, taken in connection



with the notice already served upon the railroad company by McBee & Co., which notice is referred to in the bill, the difficulty set forth in the bill of determining whether Eager was principal contractor or not, the fact that Eager was made party to the bill, and finally the prayer for all other and different relief which might seem proper to the court, the bill may be treated as a suit in the alternative either to enforce a principal contractor's lien, or, if that should not be upheld, then to enforce a subcontractor's lien. Certainly, upon such a bill and such a prayer, the circuit court may, under the liberal rules of equity practice, adjudge and enforce a subcontractor's lien in favor of complainant without requiring an amendment of the bill. If so, then it is clearly a suit to enforce a subcontractor's lien, for otherwise the court could not enforce it. Moreover, we think this conclusion to be in accordance with the liberal construction which the supreme court of Tennessee has placed upon all proceedings under the lien laws in favor of the meritorious contractor. *Reeves v. Henderson*, 90 Tenn. 521, 18 S. W. 242. Analogous cases may be found in *Pomeroy v. Lumber Co.*, 33 Neb. 240, 44 N. W. 730; *Buckley v. Taylor*, 51 Ark. 302, 11 S. W. 281; and *Reed v. Norton*, 90 Cal. 590, 26 Pac. 767, and 27 Pac. 426. For these reasons we hold that McBee & Co. did perfect their lien and bring suit within the required time to enforce it, and that they are now entitled to share in the fund found due to Eager, as subcontractors.

With respect to Wilson's claim, we cannot find that he is entitled to a lien as subcontractor. The ties which he seeks to recover pay for were furnished before his resignation as chief engineer on May 21, 1890. There is no express limitation in the statute for the filing of notice by the subcontractor with the railroad company of his claim against the principal contractor. The limitation is upon the time within which suit must be brought after the filing of such notice, to wit, 90 days. It would seem, however, to be an indispensable step under the statute that such a notice shall be filed by the subcontractor with the railroad company before any claim for a subcontractor's lien can be asserted. Wilson filed no notice of any kind with the railroad company, and we must therefore hold that he did not perfect his lien as subcontractor in accordance with the statute.

The question whether McBee & Co., Wilson, and McD. Burgin have perfected subcontractors' liens is not one which affects the bondholders in this case. The fund out of which all the subcontractors are to be paid is the fund due to Eager, and the distribution thereof is a matter of indifference to the bondholders. The question is one which only affects the other subcontractors who have perfected their liens. Each of them is entitled to object to any other person's sharing in the fund who has not taken the steps which the statute prescribes for the fixing of such a lien. When, therefore, it appears that Wilson did not file any notice with the railroad company of his claim as a subcontractor, it becomes impossible to sustain his lien as such. His claim is a meritorious one, and we regret the necessity of a ruling which shall exclude

him from a share in the fund for subcontractors. The same result must be reached with reference to Burgin. Burgin's work was all done in 1888 and 1889. For more than 18 months he took no steps whatever to perfect either a principal or subcontractor's lien. He filed no notice of any kind with the railroad company, and cannot be allowed to share in the subcontractors' fund.

Reference is made in the brief of counsel for the trust company to the alleged error of the master and the court below in allowing certain right of way claims reduced to judgment in favor of Dunn & Patty and Hegdon & Chastain. There is no sufficient assignment of error to require our examination of the validity of these claims, but, even if there were, we think that the court below properly allowed them.

A question presented on this appeal is whether, under the tax laws of Tennessee, applicable to railroads, the state and the county are entitled to collect 10 per cent. penalty because of the delinquency of the railroad company in paying the taxes admitted to be due. The collection of delinquent taxes on railroad companies is regulated by chapter 78, Acts 1875, p. 100, entitled "An act declaring the mode and manner of valuing the property of railroads for taxation and the amendments thereto," which are codified in chapter 5, tit. 5, pt. 1, Mill. & V. Code, §§ 669-708, inclusive, entitled, "Of the assessments and taxation of railroad companies." After the special provisions for assessing railroad property, section 704 provides as follows:

"The taxes so assessed in behalf of the state shall be due as other taxes, and if the same be not paid to the comptroller within the time allowed other taxpayers he shall proceed to collect the same in the manner following: He shall issue a distress warrant against the company for the amount thereof, to any sheriff in the state, whose duty it shall be to levy the same upon any personal property of the company to be found in his county, and sell the same as other property of like character is sold for taxes.

"No. 705. In the collection of said taxes, the comptroller is hereby empowered to do all acts and things, which any collector of revenue is authorized to do by law; and should he fail to realize the taxes and costs from the sale of personal property or otherwise, he is authorized and empowered to expose to public sale to the highest bidder, all the property of such defaulting railroad company lying and being in this state, together with its franchises after giving thirty days notice of the time and place of sale in some newspaper published in the city of Nashville; and to make a deed of conveyance thereof to the purchaser.

"No. 706. It shall be the duty of the governor to issue his warrants to any of the sheriffs along the line of said railroad, authorizing and commanding the sheriffs to put such purchaser into full and complete possession of such road and all its property and the sheriff shall execute the same.

"No. 707. The collector of taxes for any county shall collect the amount due to the county as is now provided by law in case of delinquents."

We think this is an exclusive mode prescribed by statute for the collection of railroad taxes. The comptroller of the state is authorized, when he cannot collect the taxes by the sale of personal property without judicial process, to expose the realty to public sale to the highest bidder, and to make a deed of conveyance thereof to the purchaser. For delinquent county taxes the collector was required to collect the amount due the county "as is now provided by law in

case of delinquents." This refers us back to the general tax laws which were in force at the time of the enactment of the railroad tax law, and it is conceded that there was then no statutory provision for penalties of any sort on delinquent taxes, or for the payment by the delinquent of the fees of the collector in addition to the tax. The use of the word "now" prevents us from giving an ambulatory construction to the reference to the general tax laws, and from holding that every amendment of the general tax law respecting the collection of taxes must effect an amendment in the railroad tax law. It follows that, although at present, under the general tax laws, 10 per cent. penalty is imposed for delinquent taxes, and although there may be no good reason for distinguishing between taxes to be collected from railroads and those from other taxpayers, we are limited by the language of the statute, and must decide that there is no authority for imposing a 10 per cent. penalty on delinquent railroad taxes. The state comptroller is given power to enforce the collection of state taxes against railroads without judicial process, and this may explain why it was not thought necessary to provide a penalty for delinquent railroad taxes, it being supposed that by the extraordinary remedy afforded him he could prevent any such delinquency. It is true that the remedy cannot be enforced so long as roads are in the possession of receivers of the federal courts, but this was a defect in the statute, which the legislature has thus far failed to remedy, and which we cannot supply. The assignment of error by the trust company to the allowance by the court below of this 10 per cent. penalty must be sustained.

Error is assigned to the following clauses in the decree of the court below.

"It is further ordered and decreed by the court that the bill of V. E. McBee & Company and others is an original bill, and the same is declared to be a general creditors' bill, and that the prosecution of the suit of the Central Trust Company was properly enjoined under the same, and that the complainants in said bill No. 922, and all the interveners whose claims are above set forth, are entitled to have the Knoxville Southern Railroad sold in said cause of V. E. McBee & Company and others. \* \* \* It is further adjudged and decreed that the counsel representing the claimants in the original bill of V. E. McBee & Company et al. vs. Knoxville Southern Railroad Company et al., viz. Washburn and Templeton, are entitled to compensation out of the general fund arising from the sale of said road for their services in bringing said railroad to sale, and administering the assets of said insolvent railroad company, and a lien is declared upon said fund in their favor; but the amount of said compensation is left unadjudicated, to be fixed and determined after the sale of said railroad shall have been reported to the court."

We see no error in these provisions. The bill of the trust company was merely a bill to foreclose a mortgage. It was indispensable to a successful sale of the property that it should be cleared of the liens growing out of its construction. The complainants who filed the creditors' bill and brought in all the lien holders did a work in the administration and distribution of the assets of the railroad company beneficial to all concerned. For services in filing the bill, therefore, and bringing in all lien claimants, it was not im-

proper for the court to order a fee paid to complainants' counsel out of the fund realized from the sale. *Trustees v. Greenough*, 105 U. S. 527; *Railroad Co. v. Pettus*, 113 U. S. 116, 122, 5 Sup. Ct. 387; *Hobbs v. McLean*, 117 U. S. 567, 582, 6 Sup. Ct. 870; *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728; *Meddaugh v. Wilson*, 151 U. S. 333, 14 Sup. Ct. 356. But the compensation must be limited to the service in filing the bill and assembling the creditors. After the creditors were brought in, two hostile camps were formed, the bondholders in one and the lien claimants in the other. Services rendered by counsel in the litigation thereafter, in which the case, after two trials below, has been brought twice to this court, must be paid for by their own clients, and not by the bondholders.

This naturally brings us to the question of costs. As we have sustained assignments of error on the appeal and the cross appeal, we shall divide the costs of appeal between the bondholders on the one hand and the lien claimants as a class on the other. The half to be paid by each side shall be deducted from the fund awarded to them from the proceeds of sale before distribution. The order with respect to the costs in the court below will be that each party shall pay his own costs. All costs incurred in the bringing in of defendants and the service of process upon them shall be taxed to the proceeds of sale. The compensation of the special master shall be paid one-half by the bondholders and one-half by the lien claimants out of the funds awarded to the two sides respectively, before distribution. The expenses of the receivership and the sale must, of course, be paid from the general fund arising from the sale.

We have been asked to prepare the decree in this court for entry in the court below, but this is impracticable. We have considered all the assignments of error to the decree appealed from, and we hope we have made this opinion sufficiently specific to render easy the drawing of a proper decree. The decree of the circuit court is reversed, with instructions to enter the same decree, modified in accordance with this opinion.

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PICKHARDT et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

No. 83.

CUSTOMS DUTIES—CLASSIFICATION — BURDEN OF PROOF—GALLEIN AND COERULINE.

Certain imports of gallein (being a dyestuff producing blue and purple shades, and consisting of two parts pyrogallie acid, which is derived from nutgalls or other vegetable matter, and one part phthalic acid, which is derived from coal tar) and of coeruline (which produces green shades, and is made by boiling gallein in sulphuric acid) were classified by the collector as coal-tar colors or dyes not specially provided for, under paragraph 18 of the act of October 1, 1890. *Held*, the evidence being contradictory, that the importer had not sustained the burden resting upon him to overthrow the correctness of the collector's classification, and show that the dyestuffs were dutiable, as claimed in his protest, under paragraph 61, as "other paints and colors, \* \* \* including lakes, crayons, \* \* \* not specially provided for."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by William Pickhardt and Adolph Kuttroff, partners as William Pickhardt & Kuttroff, importers of certain dyestuffs, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such goods. The circuit court affirmed the decision of the board of general appraisers. The importers appealed.

Edward Hartley, for appellants.

James T. Van Rensselaer, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The appellants, composing the firm of William Pickhardt & Kuttroff, imported into the port of New York, after October 1, 1890, and during the year 1891, sundry invoices of the dyestuffs known as "gallein" and "coeruleine." The collector classified this merchandise as coal-tar colors or dyes, and exacted a duty of 35 per cent. ad valorem, under the provision of paragraph 18 of the tariff act of October 1, 1890, which reads as follows: "All coal tar colors or dyes by whatever name known, and not specially provided for in this act, thirty-five per centum ad valorem." The importers protested against this decision upon the ground that the gallein was not a coal-tar color or dye, but should pay a lower rate of duty, because it should be classified as either an extract of logwood or of dyewood, or as a color not specially provided for, or as a chemical compound, or as a coal-tar preparation, not a color or dye. They protested against the collector's exaction upon the coeruleine, because it was one of the first three articles just named, and, in some protests, because it was a coal-tar preparation, not color or dye, not specified. The decision of the collector was affirmed by the board of general appraisers, whose decision was affirmed by the circuit court. Upon this appeal the appellants confine themselves to the claim in the protests that the goods were dutiable under paragraph 61 of the tariff act of October 1, 1890, which reads as follows: "All other paints and colors, \* \* \* including lakes, crayons, \* \* \* not specially provided for in this act, \* \* \* twenty-five per cent. ad valorem." The position of the appellants is that the goods are not coal-tar colors or dyes, and, not being so, they must be dutiable under paragraph 61.

Gallein is a dye which produces blue and purple shades, and is made of two molecules or parts of pyrogallic acid and one molecule or part of phthalic acid. The source of commercial supply of pyrogallic acid is from nutgalls, or other vegetable matter. The present source of commercial supply of phthalic acid is from coal tar. Coeruleine is a dye made by boiling gallein in sulphuric acid, and produces green shades. Both are used for dyeing wool, cotton, and silk, as woods were formerly used. They are imported

in petroleum barrels, in the form of paste suspended in water, and containing as much as 20 per cent. of the dyeing property. The board of general appraisers found that both of these articles were commercially known as "coal-tar colors or dyes," and the circuit judge was of opinion that the witnesses for the importers did not substantially contradict this finding. The record does not contain the testimony upon which the board of general appraisers relied, and the new testimony before the circuit court, upon commercial designation, does not justify the conclusion that these two kinds of dyes are designated in the speech of commerce as "coal-tar products." The oral testimony was of a technical character. The position of the appellants, as stated by a chemist of repute, is that tannic acid is the dominant characteristic or constituent of gallein, and has the color-producing property, while the phthalic acid is the uniting substance. The expert for the United States is a chemist, and is the manager of the factory of a corporation which manufactures coal-tar colors and dyes in this country, but does not make gallein or coeruleine. He was of opinion that the gallic acid furnishes the coloring matter, but that if the phthalic anhydride was eliminated, while the thing that remained would be a coloring matter, it would not be worth anything as such. He states his theory as follows: "Without the presence of phthalic anhydride, the body could not exist at all. It would not be worth anything at all. The phthalic anhydride imparts to the methyl very strong acid properties, which alone makes it possible for the dye to combine with metallic bases and form lakes. That is the *conditio sine qua non*." The same divergence existed, as a matter of course, in regard to the ingredient which was the determining characteristic of coeruleine. The respective witnesses were asked their opinion in regard to the correctness of the definition of "gallein" in the Century Dictionary, which defined it as a coal-tar color. The appellants' chemist objected to the definition because he would not call it a coal-tar color, but an artificial coloring matter. As the gallic acid was the chromogenous substance, and was of vegetable origin, he could not call the whole product a coal-tar color. The expert for the government, under his theory of the proper controlling or determining ingredient of the product, pronounced the definition to be a true description of the article.

Under this state of the testimony, the appellants did not sustain the burden which rested upon them to overthrow the presumption of the correctness of the collector's decision. They did not show that the articles were not coal-tar colors, and, if they had, it does not follow, necessarily, that they are dutiable under paragraph 61, for there may be a question which was not examined in the record,—whether this paragraph, which provides for all paints and colors, includes dyestuffs. It is understood that the board of general appraisers has decided this question in the negative. The decision of the circuit court is affirmed.

## In re MAIOLA.

(Circuit Court, S. D. New York. February 2, 1895.)

**1. IMMIGRATION—CONTRACT LABOR ACTS—TO WHOM APPLICABLE.**

The statutes of the United States relating to the exclusion of contract laborers, including the act of March 3, 1891, making the decision of the immigration officers final as to the right of such laborers to land, are directed solely against alien immigrants, not against alien residents returning after a temporary absence; and the courts therefore have power, upon habeas corpus, to inquire whether one who is refused admission to the country by the immigration officers is or is not an immigrant, and so within the jurisdiction of such officers.

**2. SAME—WHO ARE IMMIGRANTS.**

An unmarried man, who has immigrated to the United States in 1892, with the intention of making his home there; has remained about two years, working at his trade; and then, being taken ill, has returned to his native country, remained about ten months, doing no work; and then, in 1895, returns to the United States,—is not an immigrant on his return, in 1895.

This was a petition for a writ of habeas corpus by Giacondo Maiola, alleging that he was illegally restrained of his liberty by the immigration officers at the port of New York.

Ullo, Ruebsamen & Cochran, for commissioners.  
John Palmieri, for the immigrant, Maiola.

LACOMBE, Circuit Judge. The relator is detained, under a decision of the immigration authorities, as "an alien or foreigner intended to be imported into the United States under a contract or agreement to perform labor therein." By statute of the United States, the decisions of inspecting officers touching the right of any alien to land, when adverse to such right, are made final, and it has been held to be within the constitutional power of congress to make them so. See *In re Howard*, 63 Fed. 263, and statutes and authorities therein cited. The relator, however, contends that under the decisions of this court (*In re Panzara*, 51 Fed. 275; *In re Martorelli*, 63 Fed. 437) the question whether or not the alien is an immigrant may still be inquired into, since courts, upon habeas corpus, will always look into the question of jurisdiction, and jurisdiction to decide finally touching the right to land has only been confided to the inspecting officers in the case of an immigrant. The relator's point is well taken. The entire body of statute law touching the exclusion of contract laborers, viz. Act Feb. 26, 1885 (23 Stat. 332); Act Feb. 23, 1887 (24 Stat. 414); Act Oct. 19, 1888, c. 1210, Deficiency Bill (25 Stat. 566); Act March 3, 1891; and Act March 3, 1893,—conclusively show that it is directed solely against alien immigrants, not against alien residents when returning after a temporary absence. The very section (section 8) of the act of 1891 under which the inspection officers acted, and which makes their adverse decision final, provides for an inspection of "alien immigrants" who may arrive by water; and it is testimony touching the right of "such aliens" to enter the United States that the inspecting officers are to take and consider, during which inspection "such aliens" are to be properly housed, fed, and cared for. The next en-

suing clause in the same paragraph, which provides for the finality of a decision made by the inspection officers "touching the right of any alien to land," can refer only to those aliens whose inspection by such officers has been provided for, viz. "alien immigrants"; and if it appear that an alien is restrained of his liberty solely by reason of a decision of the inspection officers adverse to his right to land, and further appears that he is not an alien immigrant, he must be discharged from custody, since it is only as to alien immigrants that jurisdiction finally to determine as to the right to land has been confided to the inspection officers. In the case now before the court, it appears that the relator, an unmarried man, sold out what small property he had in Italy, some three years ago, and thereupon immigrated to this country, with the intention of making it his permanent home. He remained here for about two years, working at his trade as a silk weaver, and keeping a small grocery store, apparently in partnership with his brother. He was taken ill about a year ago with some disease of the lungs or chest, and after he had been to two different hospitals the doctors advised him to go to Italy. He sold out his grocery business, followed their advice, and remained in Italy for some 10 months, doing no work, but living with his father and mother, and gradually improving in health. When sufficiently recovered, he returned to this country, as was his intention when he left it. His case is closely similar to those of *In re Panzara*, and of *In re Martorelli*, above cited. He was an immigrant when he came here, in 1892, but not when he returned here, in 1895. He is therefore discharged.

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## LACING STUD CO. v. PACKARD.

(Circuit Court, D. Massachusetts. March 29, 1895.)

## No. 42.

## 1. PATENTS—INFRINGEMENT—IMPROVEMENTS.

Where the whole function of a patented device is performed by the same means and in the same way, the result is an infringement, although there is an additional function, which may be an improvement on the patent.

## 2. SAME—ANTICIPATION.

A patent is not anticipated by a device which accomplishes the same thing, but by a different method, or which, while accomplishing similar ends, is not adapted to the particular work performed by the patented machine.

## 3. SAME—MACHINE FOR SETTING AND FEEDING LACING HOOKS.

The Eppler patent, No. 255,076, for a machine for feeding and setting lacing hooks, *held* not anticipated as to claims 1, 3, 6, and 7; and *held* further, that the same are infringed by a machine made in accordance with the Smith patent, No. 309,166.

This was a bill by the Lacing Stud Company against Nathaniel R. Packard for alleged infringement of a patent.

Fish, Richardson & Storrow, for complainant.  
John L. S. Roberts, for defendant.



CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of letters patent No. 255,076, issued March 14, 1882, to Andrew Eppler, Jr., for machine for feeding and setting lacing hooks. The machine used by the respondent is shown and described, with the exception of one particular, hereafter to be referred to, in letters patent No. 309,166, issued December 9, 1884, to Stephen N. Smith for machine for setting lacing hooks or studs.

The first, third, sixth, and seventh claims of the Eppler patent are here in issue. The first and sixth claims are as follows:

"(1) In a machine for feeding and attaching lacing hooks, the reservoir having the rotary feeding plate provided with arms, substantially as described, adapted to collect and discharge lacing hooks, as set forth."

"(6) The reservoir having the rotary armed feed-plate, J, and a groove, 5, receiving the outer ends of the arms of said feed-plate, whereby the lacing hooks are prevented from clogging the plate and from wearing the outer ends of the arms thereof, as set forth."

These claims cover a reservoir for the lacing hooks having a feeding plate rotating vertically within and at such a distance from one side of the reservoir that those hooks which present themselves to the arms of the feeding plate with the setting prong towards the side of the reservoir cannot be taken up, while those which present themselves with the prongs extending towards the middle of the reservoir are taken up and carried forward and delivered to a track from which they pass to the setting mechanism; and provided also with an annular groove in which the ends of the arms of the feeding plate run, whereby the hooks are prevented from falling between the ends of the arms and the periphery of the reservoir, and so clogging the operation of the machine. The respondent admits that he infringes these claims, and I see no reason to doubt that such is the fact.

The third claim is as follows:

"(3) The combination of the reservoir, having an aperture, I, the inclined guide or roadway set edgewise and projecting at its upper end into said opening, and the substantially vertical intermittently-rotating feeding-plate having arms, R, adapted to collect lacing hooks in the reservoir, each arm coinciding with the roadway when in an inclined position, whereby the hooks collected upon said arms are caused to slide upon the roadway, as set forth."

The characteristic function of the device here claimed is that of the inclined roadway which carries the hooks to the setting mechanism, and which projects into the reservoir so that the end thereof "coincides with" the arms of the feeding plate as they successively approach to deliver the hooks. The whole of this roadway is fixed and immovable. The respondent has a fixed inclined roadway which approaches very nearly to the end of the arms of the feeding plate; and for the purpose of carrying the hooks from the arms to this track there is interposed a short track, which extends within the reservoir, and coincides with the arms of the feeding plate in the same way as in the patent in suit, and has the further capacity of being depressed in case a hook should happen to project beyond the inner end of the movable track, and come in contact with the moving arm of the feeding plate, in which case the track will yield and allow the hook to be thrown out from

the path without injury or detention of the machinery. This device seems to me to show, exactly as in the patent, an inclined track, projecting into the reservoir, and coinciding with the arms of the feeding plate. The whole function of the patented device is here performed in the same way as in the patent, and there is the additional function, which may be an improvement on the patent, whereby an inconveniently projecting hook may be removed from the track. The patented device is here, with perhaps a patentable improvement.

The seventh claim is as follows:

"(7) The reservoir, having the rotary feed plate, J, the groove, 5, receiving the outer ends of the arms of said feed plate, and the cover, 3, secured to the body of the reservoir by screws, whereby the space between the outer side of the plate, J, and the cover, 3, may be regulated, as set forth."

The purpose of the mechanism here claimed is to provide means by which the side plate of the reservoir may be adjusted to and from the vertical rotating feeding plate, so that hooks of different sizes may be conveniently and efficiently taken up and carried to the inclined roadway. I have no doubt that the machine of the respondent has precisely this function. The side plate of the reservoir is in two parts, connected by a hinge, instead of being in one piece, and one part is fastened in place by a latch instead of by a screw. These differences appear in the machine used by the respondent, and are not shown in the Smith patent. But the side plate is none the less adjustable by the same means as those suggested in the patent in suit.

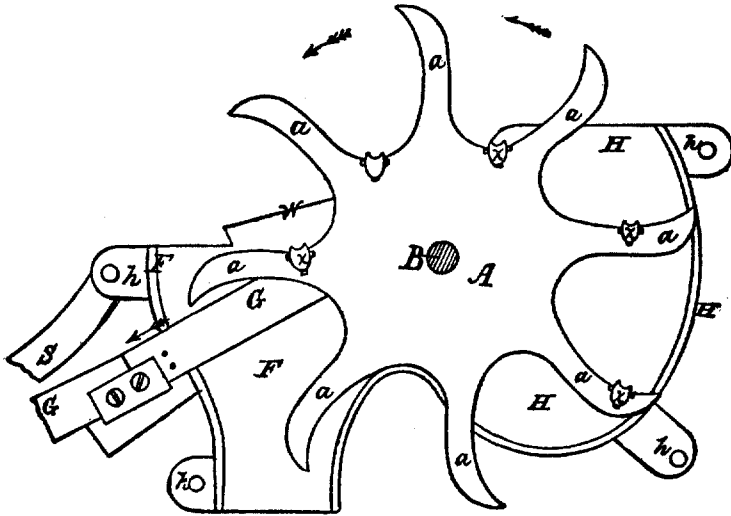
On the question of the validity of the patent, the respondent refers to certain prior patents and to two alleged anticipatory devices. The patent No. 104,257, to Horace C. Bradford, shows a vertical separator, which rises intermittently through the mass of hooks, carrying at each upward movement several hooks. This accomplishes the same thing as the patent, but by a different method. The patent No. 88,900, to Elijah S. Pierce, is in the same class, as it shows a rotating drum, on the inner surface of which are projecting slotted arms, which take up and deliver the screw blanks which are placed in the drum. The same observation may be made as to the patent No. 88,901, to Elijah S. Pierce, in which is shown a device of an intermittently swinging arm, which pushes forward the screw blanks. The patent No. 85,224, to A. J. French, shows a circular feed plate with circumferential hooks, each of which enters a percussion cap and carries it forward. It transports the caps, but in a manner different from that used in the patent in suit. The patent No. 212,124, to Mellen Bray, shows a cylindrical reservoir adapted to be tilted or inclined, and an inner cylinder, which is rotated within the cylindrical reservoir, and has an opening, the edge of which is arranged to collect lacing studs from the mass placed in the reservoir, and elevate them to such an extent that when the reservoir is tilted the lacing studs will slide by gravitation from the edge of the inner cylinder onto an inclined roadway, thus reaching the same result by a method different from that of the patent in suit. The patent No. 101,228,

to Nathan S. Clement, shows rotating slotted arms which take up screw blanks and deliver them by gravity at a point near the center of rotation, thus varying from the method of the patent under consideration. The patent No. 232,169, to Thomas G. Bennett, shows rotating arms which take and carry cartridge shells in much the same way, so far as the present discussion is concerned, as the device of French. The patent No. 108,295, to Charles D. Rogers, shows a reservoir which, by tilting, discharges such of the screw blanks as have fallen into a slot in the reservoir. The method here seems to me to be radically different from that of the patent in suit. It is to be observed also that most of the devices described in the patents above referred to are not adapted to feeding lacing hooks, and for this reason also do not anticipate the invention here in question.

The first of the alleged anticipating devices to which I shall refer was made and used by Samuel W. Shorey in July or August of 1880. The device itself is not shown, and its construction is to be learned only from an exhibit which is testified to be substantially similar to the alleged anticipating device. I should hesitate in this case to base a decision on this alleged anticipation, for the reasons more particularly set forth in the opinion in *Campbell Printing Press & Manuf'g Co. v. Marden*, 64 Fed. 782. There is also some reason to think, from the evidence, that the device was never practically operative. But I pass by these considerations, because it seems to me that the device is not an anticipation. It contains a reservoir and an intermittently rotating plate with radial arms which move through a mass of staples, some of which are taken up on the arms and slide by gravity to the center of rotation, and are there transferred to an inclined roadway. The method of operation, in the first place, is different from that of this patent. The staples remain on the same arm throughout the operation, and move only in a right line. But the main difference goes deeper than this. The Shorey device cannot handle lacing hooks which are unsymmetrical with reference to one diameter. The device of this patent is a reservoir with a feeding plate provided with arms substantially as described, adapted to collect and discharge lacing hooks, as set forth. This requires the peculiar arrangement of the feeding plate parallel with and not far from the side of the reservoir. This arrangement is of the essence of the invention; and it is not found in the Shorey machine, in which, indeed, it was not needed, since it is immaterial in what way the staples are arranged on the radial collecting arms.

The second of the alleged anticipating devices is a machine for feeding lacing button hooks, which was constructed by John S. Palmer in 1868. It appears that a considerable number of these machines were constructed and put into use, and so remained for some time, when they were disused, not, as appears from the evidence, because they failed to set the button hooks, but because shoes with button hooks were not wanted by the public, on account of certain inconveniences arising from the style of feminine dress then

prevailing. But the machines were practically used in business, and lacing hooks were by means of them put on a considerable number of pairs of shoes which were sold in the market. It therefore becomes necessary to consider that machine with reference to the question whether the invention of the patent in suit is there found. The device cannot, perhaps, be fully understood without reference to the following drawing, which is a copy of part of the application made by Palmer for a patent on his machine:



The construction and operation of this machine is correctly stated by the respondent in the following terms:

"The hopper or reservoir containing the loose mass of lacing hooks is provided with a rotary feeding plate journaled in the reservoir, and provided with a series of arms which pass through the mass of lacing hooks in the lower portion of the reservoir, each of which, as it passes through, catches one or more hooks which bestride the edge; as the plate revolves, the arms move upwardly, so that the hooks slide inwardly towards the center, and as the plate continues to revolve the hooks finally slide on to the next arm outwardly until they reach the roadway leading from the hopper, onto which they slide, and pass down the roadway to the setting devices."

"Upon reference to the drawing, it will be seen that the front or curved edges of the arms act as collectors of the hooks, and the rear or straight edges as chutes, to discharge the hooks upon the roadway or guide."

"There is an inwardly projecting piece or shoulder attached to the flat side of the reservoir, and arranged to collide with the projecting edges of improperly placed hooks, and dislodge them from the arms of the rotary plate while the properly placed hooks pass by the shoulder without touching it. This comprises the invention pointed out and described in the first claim of the patent."

"The reservoir, of course, has an opening or orifice through which the lacing hooks can be delivered, and the upper end of the guide or roadway projects into this opening a sufficient distance so that the hooks may readily slide from the end of the arm upon the inclined guide or roadway which conducts the hooks to the setting devices."

"The rotary feeding plate having these arms is rotated step by step by a ratchet and pawl, the ratchet being on the shaft upon which the plate is mounted, and the pawl pivoted to an arm journaled on said shaft, which is connected with an operating lever, by means of which at each step one of the feeding arms is brought into position opposite the end of the inclined guide or roadway, so that the hooks collected upon the arm are caused to slide down said roadway. This is the improvement forming the subject-matter of the third claim of said patent in suit."

"The reservoir or hopper is composed of two parts, held together by screws, one side of which is concave and the other flat. At the margin of the concave side of the reservoir is a groove in which the outer ends of the feeding arms move when the plate is rotated. This groove is for the purpose of preventing any portion of the lacing hooks from lying in such a position that they will get between the outer ends of the arms and the proximate surfaces of the reservoir over which the ends of the arms move when the plate is rotated. This is the improvement forming the subject-matter pointed out in the sixth claim of the patent in suit."

The respondent also suggests that when tubular shanked or eyelet shanked lacing hooks are employed, the shoulder or projection attached to the flat side of the reservoir is not needed and is not used, and only sufficient space is provided between the outer side of the rotating plate and the flat side of the reservoir to properly receive the head or outer portion of the hook; and that means are provided by which the screws fastening the flat side of the reservoir may be tightened or loosened, and washers inserted, so as to make the space between the flat side of the reservoir and the rotating plate adjustable; and that this combination of elements composes the invention referred to in the seventh claim of the patent in suit.

The question, then, is whether the function of the Palmer machine is the same as that of the patented invention of Eppler. The main and broad difference lies in one point. In the patented machine the track over which the hook passes, from the time it is taken up in the hopper until it has already entered on the inclined immovable roadway, is substantially continuous. That part of the track which is formed by the edges of the rotating arms abuts on, or, in the words of the patent, "coincides with," the immovable roadway at the moment when the lacing hook is delivered to the roadway. The rotating arm of the patent, therefore, delivers the hook to the roadway. On the contrary, in the Palmer device, as the arm rotates, the roadway, in effect, lifts the lacing hook from the arm; or, to put it in another way, the arm carries the lacing hook to the roadway, and places it thereon, and, moving downwards, leaves it on the roadway. This movement is the same in effect, as it would be if the roadway moved upward, and lifted the lacing hook from the arm. There is lacking the continuity of movement which results from the continuous track of the patent. The method of operation is different, and herein lies a patentable invention.

These preceding observations relate broadly to the first and third claims of the patent. The Palmer device does not seem to me to anticipate the sixth claim, because the groove does not extend entirely around the circumference described by the ends of the arms of the feeding plate. The groove in the Palmer machine,

indeed, extends over the lower part of the path of the feed arm,—that is, over that part of its path in which it encounters the lacing hooks,—and so prevents them from jamming between the ends of the arms and the periphery of the reservoir; but it does not serve what is evidently a further and subsidiary function of the groove, namely, to hold the arms in one plane as they rotate above the hooks, so as to make certain that they always will run in the groove at the point of operation.

The seventh claim also seems to me not to be anticipated, because the combination of that claim includes the annular groove; and in the adjustment, which is the function of the seventh claim, the groove plays a part. The purpose of the adjustment is to hold the side plate of the reservoir at a certain distance from the feeding plate, and this is aided by holding the feeding plate in substantially the same plane at all points of its circumference. There will therefore be a decree for an injunction and an account as prayed in the bill.

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## MICHIGAN CENT. R. CO. v. CONSOLIDATED CAR-HEATING CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1895.)

No. 250.

### 1. PATENTS—AMENDMENTS TO APPLICATION.

The right to amend the specifications during the pendency of an application in the patent office is limited to the insertion of additional matter which is within the scope of the original application, and no new matter can properly be introduced. *Railway Co. v. Sayles*, 97 U. S. 554, followed.

### 2. SAME—TEST OF NEW MATTER.

In determining whether matter introduced into an application by way of amendment is new matter, it may be that the original drawings are to be understood with such variations in form, shape, and proportions as common sense and mechanical skill in that art would suggest. But this carries the doctrine to its verge, and if the original drawings and specifications fail to indicate to those familiar with the art, and having the mechanical skill peculiar thereto, the device which is introduced by the amendment, then the patent does not include that device.

### 3. SAME—PRESUMPTION ARISING FROM PATENT.

The presumption arising from the issuance of the patent that the patentee was the original inventor does not apply to a case where, by reason of other inventions and public use prior to the date of his application, it is necessary to prove that his invention antedated them. In such case the burden of proof is upon the party claiming under the patent.

### 4. SAME—STEAM CAR HEATERS.

The Cody patent (No. 329,017) for improvements in steam car heaters held void, as to claim 2, for want of invention.

## Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is a suit by a bill in equity filed in the court below against the Michigan Central Railroad Company by the appellee, the Consolidated Car-Heating Company, to restrain the infringement by the railroad company of rights secured to Elmore D. Cody, as inventor, and to John W. Hayes, as assignee of a part interest, by letters patent No. 329,017, for improvements in steam

car heaters, granted October 27, 1885, upon an application filed August 11, 1884. The allegations of the bill are, in substance, that Cody was the first inventor of such improvements; that a patent was issued therefor on the 27th day of October, 1885, to him and to Hayes, to whom he had assigned a half interest in said invention; that the entire interest has come, by mesne assignments, to complainant; that the alleged infringement has, since the date of the patent, been carried on by the defendant, in the using, and selling to others to use, car heaters embodying the same principles of construction and operation as those described in the patent; and that the complainant had reason to fear the continued use and selling of such car heaters; whereupon the complainant prays for an injunction, and for an accounting for profits, and damages. The answer admits the issuance of the patent, and at the time stated in the bill, but denies that Cody was the first inventor of the improvements therein mentioned, and alleges that they were fully shown and patented in letters patent No. 201,061, issued to W. Smith March 5, 1875 (car heater); No. 212,375, issued to S. W. Graydon February 13, 1879 (car heater); No. 265,284, issued to D. D. & J. H. Sewall October 3, 1882 (car heater); No. 284,250, issued to N. Slingland September 4, 1883 (car heater); No. 126,343, issued to G. F. Stone April 30, 1872 (car heater). The answer also sets up the prior public use, for more than two years before Cody's application for the patent, by persons and at places enumerated,—among them, by William Martin, at Dunkirk, N. Y.; that defendant uses a system and apparatus for car heating obtained from the Martin Anti-Fire Heater Company, which was patented to the said William Martin October 25, 1887; and that, when Cody made the application for his patent, he knew of the invention by Martin of the device and system covered by Martin's patent. The answer denies the infringement of the Cody patent: A replication to this answer was filed, and proofs were taken.

Three claims are shown in the Cody patent, as follows: (1) A system of piping for heating railway passenger cars, consisting of a supply pipe extending longitudinally under the central portion of a car, communicating with steam drums or coils inclosed in chambers under the floor of such car, in combination with pipes extending from the central portion of said supply pipe to the upper courses of coils of pipe along the sides of such car, and escape pipes from the central portion of the lower courses of said coils, communicating with and draining into a steam trap under the floor of the car, substantially as and for the purpose set forth. (2) In a railway car heater, side coils, H, H, on either side of the car, substantially as shown, in combination with the continuous steam-supply pipe, A, under the body of the car, between the upper courses of the side coils, H, H, and the supply pipe, A, an automatic steam trap, H, under the central portion of the car, and the intermediate connections between the lower courses of the side coils, H, H, and the steam trap, M, substantially as and for the purpose set forth. (3) The combination, in a railway car heater, of a steam-supply pipe, A, extending under the body of the car, from end to end thereof, and communicating near each end of the car with steam drums, B, B, in chambers under the floor of the car, and communicating near the center of the car with the upper courses of both of the side coils, H, H, with an automatic steam trap, M, communicating near the center of the car with the lower courses of both of the side coils, H, H, substantially as and for the purpose set forth. These claims indicate sufficiently for the purposes of the opinion the general form of the structure and system of the patent. It may be added that it contemplated the connecting of the ends of the supply pipe, and taking steam from the locomotive under all the cars in the train. The principal controversy in this suit is founded on the second claim, and the evidence taken by the parties relates largely to the question whether Cody or Martin first invented the system of car heating covered by the complainant's patent. Cody was in the employment of Martin's company, in the business of heating cars by steam, and in perfecting a system of piping adapted to that purpose, at the time when it is claimed for Cody that he made his invention; and the defendant claims that Cody took the invention from Martin, and afterwards patented it. The complainant put in evidence a certified copy of the file wrapper and contents, showing the proceedings

in the patent office pending Cody's application. The nature of those proceedings is stated in the opinion following. The court below decreed for the complainant, and the defendant brings the case here on appeal.

J. C. Sturgeon (J. B. Foraker, of counsel), for appellant.  
Parker & Burton, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Prior to Cody's application for a patent, a variety of devices had been contrived for heating cars by steam or hot water in pipes, and some of them had been patented. In some there was shown a heater of water or generator of steam under each car, which circulated the water or steam through side coils in the car, and back to the boiler, or, in case of steam, to a trap. Others took steam from the locomotive, and carried it directly through the body of the cars, either entire, or split into divided currents in each car, where it was circulated at the sides in coils of pipe, with incidental arrangements for trapping the water of condensation. Still others, approaching more nearly the system in Cody's patent, taking steam from the locomotive, carried it by a continuous pipe under the whole train, with joints at the end of each car, and with devices for taking off the steam in whole or in part, for the supply of the cars in the train, according to their number. The steam thus taken off was carried up into the car, and there circulated, with more or less efficiency, in coils of pipe variously arranged along the sides of the car, and, after being condensed, was drained into a trap. William Martin had in the year 1883 contrived a system in its general features like the last described, and was then experimenting with it upon the cars of the Dunkirk, Allegheny Valley & Pittsburgh Railroad Company,—a railroad running out of Dunkirk, N. Y., to Pittsburgh, Pa. This system had not yet been perfected. Difficulties were encountered with it, which the author was endeavoring, by study and experiment, to overcome. One of those difficulties, and probably the principal one, was that of so arranging the pipes as to get a continuous flow of steam through the coils of pipes and the drums, unimpeded by pockets of air and water from the condensing steam which would be formed in the circuit by the change in the horizontal plane of the car and pipes in passing over the changing grades of the road. Some other difficulties were to be overcome, which it is not necessary here to dwell upon. This, as we gather from the proof, was the condition of things, with respect to the Martin system, in the latter part of the year 1883. In November of that year, Cody was employed by the company in which Martin was interested, and of which he was manager, to work for it in fitting and putting into cars their steam-heating apparatus, and remained in that employment until the following March. During that time certain improvements were introduced into the Martin system which resulted in removing the principal difficulties which had been en-



countered, and from that time forward that system has been carried into extensive use in heating passenger cars on railroads. These improvements Cody claims to have invented, and they constitute the basis of his patent. The principal question discussed upon the argument was the one fact of whether Cody invented the improvements, or whether Martin invented them, and Cody was a workman simply constructing the apparatus under Martin's directions. But another question arises and is presented upon the appellant's contention that Cody so changed his specifications during the pendency of his application as to show another invention from that originally described, and give to his combination utility and value, and but for which it would be practically valueless. As has been stated, one of the problems which in 1883 confronted those who were seeking to construct an operative system was to devise an arrangement of the steam pipes such as would provide for the ready escape of air and water, so that they would not obstruct the circulation, and thereby prevent the free flow of steam through the pipes. Cody's application was made on the 11th day of August, 1884, and the patent issued to him and Hayes, as assignee, on the 27th day of October, 1885. In his specifications he said nothing about inclining the members of the side coils of his steam pipes, H, H, downward from the center of the car, where steam is taken in, to the end of the car, and also inclining downward the return pipes as they come back to the center and connect with the pipe which carries their contents downward to the trap. And the drawings filed with the specifications, and which, by the provisions of section 4884 of the Revised Statutes, become part thereof, not only fail to show any such inclination, but, on the contrary, show the out-running and returning pipes to be parallel with the floor of the car and with each other. Neither of his claims mentioned any inclination of these pipes. If the specifications had done so, that feature could have been read into the claims, for the claims refer to the specifications, which, as we have already said, include the drawings. But as the specifications give no indication of such feature of construction, but do indicate parallel pipes, the claims must be construed accordingly. Claim 2, as the claims now stand, was originally claim 1, and was rejected at the patent office upon a reference to a patent to Slingland of September 4, 1883, which showed a steam supply extending up through the floor of the car, and connecting with the middle of the upper member of a coil of pipes extending from the middle of the ends of the car, and returning thence to the center, and descending to the bottom of the steam generator, whereby the condensed steam was taken into the generator. On February 7, 1885, Cody's specifications and claims were amended, and the substance of original claim 1 was made claim 2, but nothing was said about inclining the pipes. Claim 2, as it then stood, was again rejected on other references showing certain means for discharging the water of condensation. On the 9th day of March, following, Cody radically amended his specifications in respect to this subject, saying:

"Second. I supply hot steam to the upper courses of coils in the car, at or near the center, longitudinally, on both sides of the car, this steam traveling both ways to the end of the car, in pipes inclined downward toward the ends of the car, and on its return it travels from the ends of the car, in the lower courses of the pipes which incline downward to the center of the car, where they connect with a common waste pipe."

This was but a short time prior to the application of Martin showing a device of similar character to that contained in Cody's amendment, Martin's application having been filed March 30, 1885, and the proof unquestionably shows that the device had been in use a year or two prior to either application. There is no suggestion in the bill that Cody's invention had been made prior to his application, and, upon the face of it, the presumption would be that the invention was contemporaneous with the application. The claim was afterwards further amended, upon objections to its form, so as to stand as it appears in the patent. By the rule of construction to which we have already referred, this second claim, by reference to the specifications as they now stand, is for the invention of a combination which includes, as an element, side coils constructed so as to dip from the center of the car to the ends, and back to the center, whereby effectual drainage and a free flow of steam are secured.

By section 4892 of the Revised Statutes the applicant is required to make oath that he believes himself to be the original inventor of the improvement for which he solicits a patent. Cody made such oath on making his original application, but did not make oath in respect to the matter brought in by the amendment. No doubt, it is competent to amend the specifications while the application is pending, so long as it is done within the scope of the original application; but it is not competent, under color of this privilege, to introduce new matter. Systems of car heating in use at the time of Cody's alleged invention, such as Sewall's and Martin's, showed substantially the same combinations as his, except that they did not contain this characteristic element. It is true, some of the parts of those systems were susceptible of mechanical improvement,—such, for instance, as the substitution of a better kind of trap for discharging the condensed water, but which involved no change in the principle of the combination. We are therefore to inquire whether the matter of the amendment in this case was new. As we have said, this peculiarity of construction did not appear in any part of the application originally. It is admitted by the appellee that it is an essential feature of the patent. It is said by its counsel, in his brief:

"Another element in the problem was caused by the fact that cars seldom stood upon level tracks when cut out from the train, and very frequently were on inclines during the running of the train. In order to meet this condition, it became necessary to permit steam to enter at the highest point in the car system, from the train pipe, and to give it sufficient decline, and trapping it at the lowest point, so as to permit, at all times, all of the water to run out at the trap, and not to accumulate in the pipes at the lower end of the car, or upon the lower side. An incline of only a couple of inches would be sufficient, but would not show in a patent-office drawing, unless greatly proportionally exaggerated."

It may be observed, in passing, that the difficulty incidentally suggested in this last sentence has no foundation. The combination could have been described in the written specifications, and the imperfection of the drawings thus helped out. Besides, the drawings in other patents before us demonstrate that there was no insuperable difficulty in so making them as to show this peculiarity. The experts for the appellee lay stress upon this feature, and Cody himself testifies that without it his system would not be a successful and operative one, and he says:

"The reason is that a pipe that is perfectly level, running from end to end of the car, wouldn't work when one end of the car was lower than the other is. It would form a trap at the lower end of the car, and the condensed steam would not circulate."

The leading case upon this subject is that of *Railway Co. v. Sayles*, 97 U. S. 554. That case involved the validity of Tanner's patent for a brake to apply to double trucks under railroad cars. Prior to the patent, and prior to the application therefor, various devices for the same purpose had been patented, but the desideratum was a system which could be operated from one end of the car. The original application for the Tanner patent did not show an invention which accomplished this, but an amendment made some years later showed such a device. It was held that the patent must be limited to the structure shown by the application. And it was said by Mr. Justice Bradley, delivering the opinion of the court, that, if the amended application and model embodied any material addition to or variance from the original,—anything that was not comprised in that,—such addition or variance could not be sustained on the original application:

"The law does not permit such enlargements of an original specification, which would interfere with other inventors who have entered the field in the meantime, any more than it does in the case of reissues of patents previously granted. Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has in the meantime gone into public use."

In that case five years elapsed after the application was filed before the amendment was made. In this case a much less period intervened, but the length of time is not a controlling consideration, as is shown in the cases hereafter to be referred to.

It will be seen from the opinion in *Railway Co. v. Sayles* that the objection to new matter brought in by amendment of the specifications stands upon the same ground as when it is introduced upon a reissue, and in respect to the latter the statute declares that it shall not be done. Rev. St. § 4916.

Following that case was that of *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.*, in which there was an opinion at the circuit by Judge Wheeler, which is reported in 2 Fed. 774. The substance of his opinion was adopted by the supreme court in the same case (111 U. S. 490, 4 Sup. Ct. 593), and the judgment affirmed. In that case the application for the patent sued on was made in July, 1868. The applicant died in February, 1870. The specifi-

cations were amended in November, 1871, by the attorneys whom the patentee appointed in his lifetime, but without any new oath by his administrators, and the patent finally granted. Originally the application was for a patent on japanned furniture springs. Nothing was suggested in it about tempering the springs by the process of applying heat in japanning. By the amendment that mode of effecting the result was described. The claim was for the japanned springs, as a new article of manufacture, substantially as used for the purpose described. The original application was rejected because japanning was not new. Upon the amendment showing the new matter, whereby the springs were tempered in the japanning process described, the patent was granted. It was held, among other things, that, as the amendment introduced new matter, it should have been sworn to, in that case, by the administrators; that the only invention to which the application and oath of the patentee were referable was that of merely japanning steel furniture springs; that the amendment was not a mere amplification of what had been in the patent before; and that the patent was void.

In the very carefully considered case of *Brush Electric Co. v. Julien Electric Co.*, 41 Fed. 679, was introduced a patent for a secondary battery element or electrode consisting of a plate constructed of materials therein described, and having grooves, receptacles, or perforations therein. When the application was originally filed, neither the specifications, drawings, nor claims mentioned "perforations" extending through the plate. Nearly a year afterwards they were amended by the insertion of that term. Judge Coxe, in discussing the effect of this, said:

"The common meaning of 'perforation' is a hole or aperture passing through a body. It is argued that the patentee intended this meaning should be adopted, for he says, 'Fig. 8 shows a vertical section of a ribbed plate provided with slots or perforations extending through the plate.' And yet other parts of the specifications would indicate that he intended no distinction between perforations and receptacles. As before stated, the language quoted first appeared a year after the original application was filed. The court has grave doubt, therefore, whether these facts do not bring the case within the rule laid down in *Railway Co. v. Sayles*, 97 U. S. 563; *Kittle v. Hall*, 29 Fed. 508, and cases there cited."

Then, after pointing out that the words found in context with it meant cavities or cells, and that this was a sense in which the word "perforations" was sometimes used, he concludes:

"With considerable hesitation, I shall hold that these claims, as thus construed, are valid."

The question was again presented in *Refrigerating Mach. Co. v. Featherstone*, 49 Fed. 916; *Id.*, 147 U. S. 209, 13 Sup. Ct. 283. There the applicant for a patent filed his application on the 24th day of November, 1875, and three days afterwards died. The attorneys whom he had appointed amended the specifications in December following, and the patent was granted on March 21, 1876. Just what the amendment was does not appear; and Judge Blodgett, while expressing great doubt whether the changes made in the specifications did not vitiate the whole proceedings, and

render the patent void, yet placed his decision upon another ground. Upon an appeal from a decree dismissing the bill, the circuit court of appeals certified several questions to the supreme court for decision, among which was one which requested the opinion of that court as to whether the amendment of the specifications rendered the patent void. The certificate stated that it was "within the scope of the original oath and the invention described in said original specification, and by way of limitation of the claims." The supreme court, responding to this question in an opinion by Mr. Chief Justice Fuller, after reciting the certificate as above, said:

"In *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.*, 111 U. S. 490, 498, 4 Sup. Ct. 593, before referred to, the patent was held invalid because the authority given to Eagleton's attorneys ended at his death, and the patent was granted upon amendments made by the attorneys without any new oath by the administratrix. And Mr. Justice Blatchford, speaking for the court, said that the file wrapper showed, 'beyond doubt, that there was no suggestion, in the specification signed and sworn to by Eagleton, of the invention described in the amendment,' and that 'in view of the entire change in the specification, as to the invention described, the patent, to be valid, should have been granted on an application made and sworn to by the administratrix. The specification, as issued, bears the signature of Eagleton, and not of the administratrix; and it is sufficiently shown that the patent was granted on the application and oath of Eagleton, and for an invention which he never made.' In the case at bar there was not only no amplification of the original application by the amendment, but it was within the scope of the original specification, and a limitation and narrowing of the original claim, so that it was the identical invention sworn to by Boyle; and there was no more reason for requiring a new oath from his administratrix than there would have been for requiring it from Boyle himself."

And it was held that the amendment did not render the patent void. From this, it would seem to be the opinion of that court that the statute requiring an oath to an amendment by administrators, etc., does not apply to an amendment which would not require a new oath from the original applicant, if he were still living, and taken in connection with *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.*, above referred to, would seem to indicate the test to be whether the amendment is within the scope of the original application, or introduces new matter. As was said by Judge Woods in delivering the opinion of the circuit court of appeals in *Western Electric Co. v. Sperry Electric Co.*, 7 C. C. A. 164, 58 Fed. 186, 196:

"So long as he [the inventor] did not change the structure of his device or his invention, he had the right to change the specifications."

Robinson on Patents states the law thus:

"Amendments in substance can be made only within certain limits, and under certain prescribed conditions. No new matter can, under any circumstances, be introduced by amendment. New matter is that which is not found in the specification, drawings, or model, as first filed, and which involves a departure from the original invention. Such matter must necessarily be a distinct art or instrument, or a new and separately patentable improvement on the old, and can be now presented only in a separate application. The scope of the amending power is limited to such alterations of description and assertion as do not affect the essential character of the invention or the person of the patentee. For a mistake in these the only

remedy is by the issue of a new, original patent, upon an independent application." Sections 561, 635.

Counsel for the appellee, in discussing this subject, and excusing the insufficiency of the drawings to show this feature of the patented device, urges that they do not prevent "such variations in an apparatus, in form, shape, and proportions, as common sense or mechanical skill in that art would suggest. Rather, they are addressed to persons skilled in the art, who can supplement them with their technical knowledge." Admitting this to be so, and to be applicable to the written specifications also, still it carries the doctrine to its verge; and, if the drawings and specifications fail to indicate the device to those conversant with the art and having the mechanical skill peculiar thereto, they are insufficient, and the patent does not include the device. Applying this as a further test, and bearing in mind what has already been said by us, and claimed by the counsel for the appellee, in respect to the problem of getting rid of pockets of air and the water of condensation, the conclusion is inevitable that the taking into the combination of the element of coils of pipe so arranged as to get rid of the difficulty was something new. Would it naturally occur to one possessing merely mechanical skill to arrange the coils in the effective way shown in the patent? If so, then there was nothing new, in the nature of invention, in the matter covered by the claim, for the obvious hints to the mechanic existed in the systems proposed to be improved upon. If not, it is clear that the invention was that shown by the amendment of the specifications, and only that. The combination is useless without that feature, and the bringing it in would be the last step in reaching success. If it was invention, it was an invention not hinted at in the original application; and, if the patent is to be restricted to the substance of that application, the claim is invalid because the invention was not useful. As has been said, the bill does not allege an invention by Cody prior to the date of his application. And the latter does not carry the invention back to an earlier date. The evidence shows that the device, as patented, had been in public use for some time prior to the date of his application. If it be permissible, as contended, to maintain his patent upon evidence, dehors the proceedings in the patent office, that he had made the invention at an earlier date than is to be presumed from his application and patent, so as to carry it back to antedate the public use, the proof should be clear and unequivocal that he was the original inventor. *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.*, 2 Fed. 774, 777; *Rob. Pat. § 1026*, note 14, and cases cited. There is much evidence in this record upon that subject. Without here going into detail, it suffices to say that we have serious doubt whether Cody was the original inventor of the device represented by this combination of his patent. If the evidence in its favor were fortified by the presumption of validity afforded by the patent in ordinary cases, we might think it right that that should turn the scale, and that this claim in the patent should be held valid. But the presumption does not apply in such circumstances, and the burden of proof is

on the other side. We do not think it is sustained. This defense is not specially pleaded in the answer, but it is not necessary that it should be. *Eagleton Manuf'g Co. v. West, Bradley & Cary Manuf'g Co.*, 2 Fed. 774, 780; *Id.*, 111 U. S. 490, 498, 4 Sup. Ct. 593. In that case, as here, the file wrapper and contents were put in evidence by the plaintiff itself.

We are of opinion that the second claim cannot be supported, in view of the history of that element of the combination, without which the invention is not useful, and that the patent, as to that claim, is therefore void. The decree below should be reversed, and the bill dismissed.

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NATIONAL HARROW CO. v. QUICK et al.<sup>1</sup>

(Circuit Court, D. Indiana. March 23, 1895.)

No. 8,818.

1. MONOPOLIES AND COMBINATIONS — CONTROL OF PATENTS — PUBLIC POLICY—EQUITY.

A corporation organized for the purpose of securing assignments of all patents relating to "spring-tooth harrows," to grant licenses to the assignors to use the patents upon payment of a royalty, to fix and regulate the price at which such harrows shall be sold, and to take charge of all litigation, and prosecute all infringements of such patents, is an illegal combination, whose purposes are contrary to public policy, and which a court of equity should not aid by entertaining infringement suits brought in pursuance thereof.

2. PATENTS—INVENTION—PRIOR ART—SPRING-TOOTH HARROWS.

The Reed patent, No. 201,946, for improvements in spring-tooth harrows, consisting substantially in the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, *held* valid, in deference to prior decisions sustaining the same, although the court was of opinion that, in view of the prior state of the art, no invention was displayed; but *held*, further, that the patent should be limited to the very terms of the specifications and claims, and that it is therefore not infringed by harrows made in accordance with the Miller patent, No. 444,248.

This was a bill by the National Harrow Company against Frank Quick and E. Lindahl for infringement of a patent relating to spring-tooth harrows.

N. H. Stuart and Howard & Roos, for complainant.

V. H. Lockwood, for defendants.

BAKER, District Judge. This is a bill in equity to recover damages, and to restrain the alleged infringement of letters patent No. 201,946, issued April 2, 1878, to Dewitt C. Reed, for alleged new and useful improvements in harrows, which complainant now holds by divers mesne assignments.

The defenses interposed and relied on at the hearing are: (1) That the complainant is a combination or trust attempting to hold and use its naked legal title as assignee for purposes contrary to public

<sup>1</sup> Rehearing denied April 13, 1895.

policy, and that a court of equity ought not to aid its unlawful purposes by entertaining the present bill; (2) that the alleged improvements secured by the patent do not involve invention; (3) that the defendants do not infringe.

The complainant is a corporation purporting to be organized under the laws of the state of New Jersey. The purpose of its organization, as shown by the proofs, is to become the assignee of all the patents held by the different corporations and business firms in the United States which are engaged in the manufacture and sale of spring-tooth harrows; to grant licenses to such corporations and firms to use the patents so assigned upon the payment by them of a royalty of one dollar for each harrow manufactured and sold; to take charge of all litigation of its licensees in relation to such patents, and to prosecute all infringements of any patent so assigned; to pay all costs and expenses of such litigation; and to fix and regulate the price at which such harrows shall be sold by its licensees. The complainant corporation is not organized for the manufacture and sale of harrows under the patents assigned to it, nor has it ever engaged in their manufacture and sale. A majority of all the corporations and firms engaged in the manufacture and sale of spring-tooth harrows in the United States have assigned the patents owned by them, respectively, to the complainant, and have received from it licenses to manufacture and sell harrows under the patents severally assigned by them to it. The patent in suit is one of those so assigned to the complainant by D. C. & H. C. Reed & Co., who have received an exclusive license from the complainant to manufacture and sell harrows under that patent practically in all the territory covered by it. So far as I can perceive, the complainant is organized to receive assignments of the legal title of harrow patents, to grant back licenses to their assignors to use and enjoy the same, to collect from each member of the combination or trust one dollar as a license fee for each harrow manufactured and sold, to regulate and control the price at which harrows may be sold by the members of the combination, and to prosecute and defend all suits involving the alleged infringement of such assigned patents.

It seems to me that such a combination is illegal, and that its purposes are violative of sound public policy. The common law forbids the organization of such combinations, composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and, by their aggregate power and influence, imperil the free and pure administration of justice. *Strait v. Harrow Co.* (Sup.) 18 N. Y. Supp. 224; *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660; *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N. W. 155.

Complainant says that its title to the patent in question is valid, and that it has a lawful right to its protection from invasion by a stranger, regardless of the objects and purposes of the combination which it represents. On the other hand, the defendants contend that to give its title protection would be to give aid to the unlawful pur-



poses of the combination. In suits at law it is doubtless true, as a general proposition, that a wrongdoer will not be permitted to dispute the legal title of one in possession of money or property by showing that the title thereto was unlawfully acquired, or that the owner intends to apply it to an unlawful use. I have strong doubts whether this rule ought to apply to a suit in equity, where nothing but clean hands and a good conscience will move the court to act. The combination represented by the complainant is not illegal in any other sense, except that the law will not lend its aid to the accomplishment of its purposes. The common law does not prohibit the making of such combinations. It merely declines, after they have been made, to recognize their validity, by refusing to make any decree or order which will in any way give aid to the purposes of such combinations. It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies. They have already grown to alarming proportions, and courts, to the full extent of their powers, ought to discountenance and repress them.

Turning to the patent in question, we find that the "Invention relates to improvements in harrows, and more particularly to that class of harrows wherein the teeth are spring teeth or of bow form." It "consists more particularly in a novel means for adjusting the said tooth so as to give to its point a greater or less depth of cut, which is effected by making that portion of the tooth which is adjacent to the frame curved and resting on a curved seat, and securing it thereto by a clip or its equivalent, by the loosening of which the tooth may be thrown forward or pushed back beneath its fastening, thus lowering or raising its point. The crossbar or loop portion of the clip is formed concave upon its underside, and with a concavity greater than the corresponding portion of the harrow tooth; so that, when brought down to a firm bearing upon the tooth, this cross portion of the clip will find a firm bearing at its edges upon its curved seat. Instead of employing a continuous clip, that part resting upon the tooth may be simply a bar or plate perforated at its ends for the passage of bolts, which bolts are drawn snugly by nuts upon the other side of the frame. So, also, a plate might rest upon the harrow tooth, and be held in its place by an ordinary clip, of uniform dimensions throughout, the plate not being perforated, but simply grooved along that portion where the clip passes, in order to hold the clip in its place. Other forms will readily suggest themselves, the principal feature of my invention being that the tooth shall rest upon a curved seat, and be capable of being adjusted longitudinally through its said seat, and thereby either elevate or depress its working point. I am aware that it is not new with me, broadly considered, to adjust a harrow tooth longitudinally upon its frame, so as to vary the depth of the cut thereof, and hence I do not include the same in my invention. What I claim is: (1) The combination, with a harrow frame and harrow tooth secured thereon,

so as to be longitudinally adjusted, of a fastening clip formed as described, whereby only its two transverse edges have a bearing against the tooth, substantially as set forth. (2) The combination, with a harrow frame provided with a curved seat, of a curved tooth and clip or its equivalent, D, substantially as and for the purposes described."

The patentee does not claim the curved tooth, nor the curved seat, nor the curved or concave clip with its biting edges, nor the longitudinal adjustability of the harrow tooth upon its frame, as his invention. Each of these elements was old and well known. The problem which he proposed to himself was to adjust a curved tooth to a harrow beam so that it could be readily moved in the direction of its length, and thus elevate or depress the point of the tooth. The invention consists in resting the harrow tooth upon a curved seat, and fastening it in place with an adjustable curved or concave clip having biting edges. In view of the prior state of the art, disclosed in the record, and which may be found fully set out in *Reed v. Smith*, 40 Fed. 882, I am of the opinion that the adjustment of a curved tooth to a curved seat on the harrow frame, and fastened thereto by a curved clip having biting edges, does not amount to invention. It seems to me that a skillful mechanic, familiar with the construction of harrows, could have devised the method of adjusting and fastening the tooth covered by the patent by the simple exercise of mechanical skill. While such is my opinion, I feel bound to hold this patent to be valid out of deference to many former adjudications in which it has been sustained. It ought not, however, to receive a construction broader than the very terms of the specification and claims require.

As said in *Reed v. Smith*, supra:

"We find it impossible to escape the conclusion that the clip, which lies at the foundation of the plaintiff's patent, is limited to a curved clip with biting edges, designed to hold the tooth rigidly to its seat."

The patent then embraces a curved clip, having biting edges, in connection with a curved tooth and a curved seat for the same. The specification declares that "the principal feature of the invention is that the tooth shall rest upon a curved seat."

The defendants are alleged to have infringed by the sale of harrows manufactured under letters patent No. 444,248, dated January 6, 1891, issued to Huson V. Miller for an alleged improvement in spring-toothed harrows. In this patent the harrow beam has a channel crossing its underface, in which channel a flat metal plate is fastened by a pin, and the tooth is placed in the channel, and rests against the metal plate at its outer edges, and is fastened by an ordinary flat clip, which comes in contact with the tooth at a point situated centrally in relation to the edges of the plate, and upon its convex side. When the clip is drawn down upon the convex side of the tooth, it presses the concave side of the tooth firmly upon the outer edges of the plate, thus holding the tooth in place. The tendency of the pressure of the clip is to slightly elevate the point of the tooth. While the result produced by each device is the same,

the means used to produce it differ. In the defendants' device the tooth does not rest on a curved seat, nor is it held in place by a curved clip having biting edges. The patent office evidently considered the difference between the two devices so substantial that the Miller patent was not regarded as an infringement of the complainant's patent.

In view of the narrow construction which I feel constrained to put upon the complainant's patent, I do not regard the Miller patent as embodying an infringing device; and, as that device is the one used in the harrows sold by the defendants, they cannot be held liable for infringement. The bill is therefore dismissed for want of equity, at complainant's costs.

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TOEPFER et al. v. GALLAND-HENNING MALTING-DRUM MANUFACTURING CO. et al.

(Circuit Court, E. D. Wisconsin. March 16, 1895.)

PATENTS—LIMITATION—PRIOR ART—INFRINGEMENT.

The Toepfer patent (No. 226,890) for an improvement in malt kilns constructed, and, upon reference both to the prior state of the art and an amendment in the patent office, *held* entitled only to a narrow construction; and *held*, further, that it was not infringed by a machine made in accordance with the Giesler patent (No. 483,781). 31 Fed. 913, followed and applied.

This was a suit by Frank Toepfer and Peter G. Toepfer against the Galland-Henning Malting-Drum Manufacturing Company and others for infringement of a patent.

Charles G. Page and J. V. Quarles, for complainants.  
H. G. Underwood, for defendants.

SEAMAN, District Judge. This bill alleges infringement of letters patent No. 226,890, for an improvement in malt kilns, issued to Wenzel Toepfer April 27, 1880. Of the several defenses which are urged, I have only found it necessary to consider that of non-infringement in view of the prior state of the art. All charge of infringement rests upon the first claim of the patent, which reads as follows:

"(1) In a malt dryer, a removable tilting tray, provided with journals having bearings in the end walls of the kiln, and on an intermediate bracket or brackets, the journals of the trays having polygonal openings for the reception of a polygonal tilting shaft, in combination with a corresponding tilting shaft, substantially as and for the purpose specified."

This same patent was before the circuit court for the Northern district of Illinois, and directly involved, in Toepfer v. Goetz, decided July 5, 1887, as reported in 31 Fed. 913. In the opinion there handed down, Judge Blodgett accurately describes the device which the complainants have shown here in the model and designs of their patent, and well defines the limitations which must be placed upon the claims of the patent, in view of the prior state of

the art, and the terms employed. It is there stated that "perforated floors to malt kilns, so arranged that the sections or trays could be tilted or tipped in such manner as to dump the contents, were old at the time this inventor entered the field," and that it was old to make the floors open, by various means, "to allow the free circulation of heated air through the contents of the kiln"; and such state of the art clearly appears in this record. Numerous prior patents are shown which justify the application of the rule of narrow construction there enforced. In the Goetz Case the issue is thus stated:

"The only substantial difference between the trays constructed according to the complainant's patent and those made and used by the defendants is that defendants use a round rock shaft where complainant shows a square or polygonal one, and the ends of defendants' rock shaft form the journals upon which the trays turn. Complainant fastens his rock shaft rigidly to the tray by passing it through square holes, while defendants pass theirs through round holes, and make it rigid with the frames of the tray by pins or set screws."

This difference was held sufficient to avoid infringement, under the rule of construction which governed. The round tilting rod was shown in an old German patent (1867) for a similar purpose; and, if there was invention in substituting the square shaft and square openings in the later design, it was, at best, only a combination of details in construction, without the qualities of a pioneer invention, and the doctrine of mechanical equivalents did not enter in. See *Card v. Colby*, 18 U. S. App. —, 12 C. C. A. 319, 64 Fed. 594. There the round rod, with added set screws, performed every office of the square design, but was held not an infringement, under the special terms of this claim. In the present case there is divergence which saves such strict application of the rule. It is true that the Giesler device employed by these defendants has the square form of rock shaft set in square openings, but in this respect it differs somewhat from that of the complainants, in that it has the trays made in parts or sections, with the rock shaft correspondingly subdivided, each rigidly secured to the tray section, and not removable; the ends of the sections being upset in the journals of the crossbars of trays, and the crossbars bolted together. The trays are then operated together by means of an independent shaft with cams attached. On the other hand, the tray of complainants is integral, with a continuous and removable shaft passing through square openings in the journals of the tray. Also the shaft of the latter is placed at the longitudinal center of the trays for this tilting purpose, while that of the former is expressly placed out of center, so that when the trays are raised they will drop by gravity, when loaded with malt. Whether these variations be deemed more material than those found in the Goetz Case, or whether the proof in this record of analogous tilting device in the early Nott patent, of 1826, for grates, or the Ashcroft patent, of 1879, be regarded as conclusive, it is manifest here that neither experts nor counsel on behalf of complainants place any substantial claim of infringement upon this feature alone, of the square shape

of the shaft, and I am satisfied that infringement could not rest on any similarity in this regard.

The complainants' experts state that the element of intermediate supporting brackets contained in this claim distinguishes it from prior devices, and is infringed by the defendants. There cannot be invention in the idea of intermediate support to obviate a sag or weakness in a long tray, and a bracket support was clearly anticipated for a similar purpose in the Ashcroft improvement in grate bars. The form of bracket provided by the Toepfer patent is mentioned in their testimony as peculiar to accomplish the object in view, but similar forms are well shown by this record to have been long employed for analogous purposes. Aside from the fact that there may be a want of identity between the defendants' supporting brackets and those of the patent in question, and aside from any question of want of novelty, either in idea or form, it is here shown that in the Goetz and Brada device, which was involved in the former suit, there was "practically the same intermediate supporting bracket as in the Toepfer patent"; and Judge Blodgett found that the claims of the patent did not cover that feature, and that, "if there was any invention involved in the construction of the supporting frame or the bracket, it has been abandoned to the public." I am satisfied with that conclusion as applicable to this supporting bracket as well.

There is an element of this first claim of the complainants' patent which I think is made distinguishing, namely, the removability of the tray in its entirety. The certified copy of the file wrapper and contents shows that the original application was made broadly for a malt dryer, upon claims which are, in effect, the same contained in this first claim, with the exception that the removable feature was not stated. The patent office then rejected the claims on several prior patents, and the applicant amended by substituting the present claim: "In a malt dryer, a removable tilting tray," etc. The patent was thereupon granted, with this feature regarded and accepted as the saving one for patentability, and should be construed accordingly. The complainants' trays are bodily removable from the kiln, as described by one of their experts. Their shafts are supported on the brackets in open bearings; the bearings made in boxes with removable covers. The cover at the inner end can be taken off, the shaft lifted out of its bearings, and withdrawn endwise, leaving the tray free to be lifted out. No such provision is made by the defendants, and their trays are not removable, except by taking the structure apart, as their bearing plates are anchored in the wall. The design of removability is entirely absent. In my opinion, there is no infringement here.

The defendants are operating under letters patent No. 483,781, granted to F. B. Giesler October 4, 1892 (after the commencement of this action, but upon application filed in June, 1891). Finding no grounds for conflict between the patents, it is not necessary to consider questions affecting the validity of either. The arguments urged in behalf of complainants, of utility and of great

benefit conferred by the Toepfer invention, cannot weigh against the well-settled rules which must govern in construction of the patent. The complainants' bill must be dismissed for want of equity. So ordered.

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SMITH v. MACBETH.

(Circuit Court of Appeals, Second Circuit. February 14, 1895.)

No. 35.

1. PATENTS—LIMITATION OF CLAIM—REJECTION AND AMENDMENT.

An applicant who, after rejection of a claim upon reference to an anticipating device, amends the same by adopting language narrower than the reference required, is nevertheless bound by the limitations thus adopted.

2. SAME—INTERPRETATION OF CLAIM—INFRINGEMENT.

In a patent for a magneto-electric machine operated by a rack bar, a claim for a switch arranged in the condensing circuit in the path of the "operating device," and adapted to be opened "by direct impingement of said device thereupon," *held* to cover a construction in which a shaft attached to the rack bar carried a rigid arm having a stud which impinged upon a latch, and thereby released a spring which then opened the circuit. 64 Fed. 797, reversed.

3. SAME.

The Smith patent (No. 201,296) for improvements in magneto-electric machines construed, as to the first claim, and *held* infringed. 64 Fed. 797, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was an action by H. Julius Smith against James Macbeth for infringement of a patent relating to magneto-electric machines. The circuit court dismissed the bill on the ground that there was no infringement in the use of defendant's machine. 64 Fed. 797. Complainant appealed.

Leonard E. Curtis and Thomas B. Kerr, for complainant.

James A. Hudson and Arthur S. Browne, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill in equity in this cause was based upon the alleged infringement of the first claim of letters patent No. 201,296, dated March 12, 1878, and issued to H. Julius Smith, for improvements in magneto-electric machines. The defendant principally relied upon the proposition that this claim was limited by the proceedings in the patent office to such arrangement or construction of the elements of the combination as to exclude his machine from a just charge of infringement. The circuit court consented to this conclusion, and dismissed the bill. From its decree the complainant appealed to this court.

The object and the details of the alleged invention are described in the specification as follows:

"This invention relates to certain improvements in that class of magneto-electric machines used chiefly for developing an intense current of electricity for firing fuses in blasting, or igniting gas jets, and known as 'dynamo-

magnetic machines.' It is well known that in a machine of this class the electricity is developed and accumulated in the electro-magnets until a sufficient charge to effect the desired purpose has been obtained, the current being automatically shifted at the proper moment from the condensing circuit to a circuit through which the effect intended is to be produced. The intensity of the electric current produced by this and other magneto-electric machines depends upon the rapidity with which the armature is rotated, and the motion has heretofore been obtained by devices giving a uniform motion; but I have found that in order to obtain the best effect, especially in a machine used for firing blast fuses, the armature should have an accelerated velocity of rotation; its speed increasing from the beginning of its movement to the instant of discharge or shifting of the current from the condensing to the working circuit, and it is important that this shifting should occur promptly at the instant the rotating device has reached the limit of play arranged for its assigned culmination of speed. The shifting of the current in machines heretofore constructed has been performed by hand, and by an automatic switch governed and operated by the electric current, the latter means being preferable; but I have still found such switches rather objectionable in use, owing to the complication of the apparatus, and liability to derangement of the parts. It is the object of my invention to overcome the objections which I have mentioned. To this end it consists—First, in the combination, with the operating device of the rotary armature of a dynamo-magneto-electric machine, of a bridge or switch arranged in the condensing circuit of said machine, and in the path of said operating device, and adapted to be opened by direct impingement of said device thereupon; second, in the combination, with the operating rack bar of the rotary armature of a dynamo-magneto-electric machine, of a shunt or bridge consisting of a spring-bar terminal of the condensing circuit and a rigid terminal plate, with which said spring bar is kept in contact by its elasticity, said spring bar being arranged in the path of the rack bar, so as to be struck and moved from the rigid terminal by said rack bar at or near the completion of its armature operating stroke, whereby the condensing circuit of the machine is broken by the displacement of the shunt or bridge, and the whole developed current of electricity required to pass to a working circuit for application, substantially as above set forth; third, in the combination, with the rotating armature of a dynamo-magneto-electric machine, of a loose pinion arranged upon the arbor of said armature, a rack bar gearing with said pinion, and a clutch for engaging with and disengaging from said pinion, causing the arbor and armature to revolve therewith when rotated in one direction, but which disengages therefrom, and permits said pinion to revolve in the opposite direction, independently of the arbor and armature, whereby is secured a rotation of the armature in one direction only, and depolarization of the magnet or magnets prevented."

The patentee also says in the specification that, while he has shown a rack and pinion for operating the armature, it is obvious that the same result can be accomplished by the use of levers, segments of circles, or other devices for producing reciprocating motion.

The first claim is as follows:

"(1) The combination, with the operating device of the rotary armature of a dynamo-magneto-electric machine, of a bridge or switch arranged in the condensing circuit of said machine, and in the path of said operating device, and adapted to be opened by direct impingement of said device thereupon, substantially as and for the purpose set forth."

The predecessor of this improved machine, and the one which most nearly resembled it, was the Siemens and Halske machine for blasting mines, which was described in 1868 in English and Austrian publications, and which was also used in this country to a limited extent. Its operating device was a crank, which

must have two dead centers where the application of force is stopped, and as a consequence the speed of the machine could not be continuously accelerated. The gist of the invention of the patentee was the constantly "accelerated velocity of rotation" of the armature from the beginning of its movement to the instant when the current was shifted, and the mechanical connection of the switch with the operating device by which the switch was opened by direct impingement of such device at the time when the armature was at its highest speed.

The defendant's theory is not that this invention was anticipated by any one pre-existing machine, taken by itself, but that its important features were separately found in two older machines, and could have been combined without the exercise of inventive skill. It is said that anybody could have taken the rack bar of the English patent of 1871, to Geminiano Zanni, for an improvement in magnetic bells, and have substituted it for the crank of the Siemens and Halske machine, and have produced the Smith invention. It is true that anybody could have done this, if he had ascertained the cause of the defect in the Siemens machine, and the kind of motion, and the proper means of applying it, which would obviate the defect; but the defendant's theory, like many theories of a similar character, assumes, what is not apparent, that the cause of the pre-existing defect, and its remedy, were open to the discernment of the skilled mechanic.

Turning now to the question of infringement, the simple mechanism by which the rack bar is made to break the condensing circuit is described in the specification as follows:

"When the rack bar has nearly reached the downward limit of its movement, its lower end strikes upon the free end of the spring bar, H, removing said spring from contact with the bridge or loop, G, and breaking the condensing circuit, upon which, as will be readily understood, the whole current will flow over the working circuit or circuit of application."

The defendant's device is described in Judge Wheeler's opinion as follows:

"In the defendant's machine the armatures are rotated by pulling upward with increased velocity a bar attached to the end of a lever pivoted on a shaft, and moving a toothed segment meshed in the pinion. The switch in the condensing circuit is opened by a stud on a cam pivoted on the same shaft with the lever, which lifts a latch, and lets a spring move it, as the operating bar reaches its upward limit, and the electricity is accumulated to its greatest intensity, and the current is thereby sent by the working circuit to the fuses."

The defendant's rack is segmental, and the handle is not directly attached to it, but is connected with it by a link pivoted on the shaft which is attached to the rack. The handle is pulled up, instead of being pushed down, as in the patented device. The rack bar of the patent directly impinges upon the switch. The shaft of the defendant's machine does not impinge upon the switch, but the arm or cam rigidly attached to it has a rigidly attached stud which strikes and opens a part of the switch. The circuit court was of opinion that this construction did not infringe the first claim, because:



"The switch in the defendant's condensing circuit is not in the path of the operating device, which consists of the bar lever and toothed segment extending from the handle to the shaft on which the lever is pivoted, but is situated beyond the shaft, and outside of the movement of those parts, and it is not opened by the direct impingement of any of those parts constituting the operating device, but indirectly by the shaft moving the cam which carries the stud that lifts the latch."

The first claim requires the switch to be in the path of the operating device, and to be opened by the direct impingement of the device thereon, and was a substitute for a claim rejected by the patent office on account of its vagueness, and because, being vaguely expressed, it was deemed to be anticipated by the general terms of a pre-existing patent to Edward Weston (No. 183,977), dated October 3, 1876, which was for an improvement in dynamo-electric machines to overcome a difficulty when they were used for the purpose of electro-depositions. Although the patentee might have made the language of his claim more broad, and yet have clearly differentiated his invention from that of Weston, he is bound by the terms of limitation which he adopted, and there can be no infringement unless the switch is in the path of the operating device, and is opened by its direct impingement. The question of most importance in this case is in regard to the meaning of the term "operating device." Should it be limited to the rack bar, or to the rack bar and a shaft attached thereto, or can it properly be extended to an arm rigidly attached to the shaft? The circuit court considered the device to be the bar lever, toothed segment, and shaft on which the lever was pivoted, and therefore found that the movements created by the arm were not in the path of the device, and were only indirectly communicated by the shaft. In our opinion the arm was a part of the shaft, and a part of the operating device, and that whatever was in its path was in the path of the device, and that, therefore, its movement was the movement of the shaft. It is less clear that the switch is opened by the direct impingement upon it of the operating device. The stud which opens the latch is rigidly carried upon the arm, but the circuit court evidently did not regard the latch as a part of the switch. Its use is to keep the switch closed, and, when the latch is lifted and the spring is released, the switch is opened. The arm directly impinges upon, and thereby opens, the latch, which is a part of the switch, whereas, in the patented device, the rack bar directly impinges upon and opens the elastic spring-bar terminal of the circuit. We are of opinion that by the defendant's mechanism there is not a substantial departure from the terms of the first claim, and that infringement should have been found by the circuit court. The decree of the circuit court is reversed, with costs, and the cause is remanded to that court, with instruction to enter a decree for the complainant, with costs, in accordance with the foregoing opinion.

## DRAINAGE CONSTRUCTION CO. v. ENGLEWOOD SEWER CO.

(Circuit Court, D. New Jersey. March 27, 1894.)

## 1. PLEADING IN PATENT CASES—DEMURRER FOR WANT OF INVENTION.

Where a patent sued on states that it is predicated upon an improvement set forth in a certain prior patent to the same inventor, this does not bring such former patent into the bill, so as to enable the court to make comparisons between the two upon a demurrer alleging want of invention shown upon the face of the patent. Such prior patent, as part of the prior state of the art, must be proved by legal testimony at the hearing.

## 2. SAME.

When a bill for infringement is demurred to for want of invention, appearing upon the face of the patent, every doubt should be resolved against the demurrer.

## 3. SAME—SEWAGE SYSTEM.

The Waring patent (No. 278,839) for an improvement in sewerage and draining towns held not void, upon its face, for want of patentable invention.

This was a bill by the Drainage Construction Company against the Englewood Sewer Company for infringement of a patent relating to sewage and drainage of towns. Defendant demurred to the bill on the ground that the patent, on its face, disclosed no patentable invention.

John G. Milburn, James Buchanan, and George O. G. Coale, for complainant.

Samuel A. Duncan, for defendant.

GREEN, District Judge. The bill of complaint in this case is filed to restrain the alleged infringement by the defendant of letters patent No. 278,839, granted June 5, 1883, to the plaintiff, as assignee of George E. Waring, Jr., for an "improvement in sewerage and draining towns." The bill is in the usual form of such bills, and sets out the invention, the issuing of letters patent to the inventor, the infringement by the defendant, and the other formal parts of a bill for injunction and account. To this bill the defendant has interposed a demurrer, and for cause thereof alleges that "it abundantly appears on the face of the said patent, and from the earlier patent, No. 236,740, referred to and made a part of the specification of said letters patent No. 278,839, that the last-named patent does not disclose any patentable invention." In the specifications of the letters patent which are the subject of the present suit is a reference to a former patent, in these words:

"The Improvement hereinafter described has reference to, and is predicated upon, the improvement in sewerage and draining cities set forth in letters patent No. 236,740, dated January 18, 1881, heretofore granted to me, and to which reference may be had."

And the contention of the defendant is that, if reference be had to the former patent, it will become evident that the present improvement has no patentability, for want of invention. It is settled that such want of patentable invention may be objected by way

of demurrer. But it is equally well settled that on demurrer the court will not consider any question which requires the support of evidence. The defect in the alleged invention must appear either upon the face of the letters patent under criticism, or spring from those matters of which the court must take judicial notice. Such is not this case. So far as the bill itself is concerned, it is certainly not demurrable as a pleading. So far as the letters patent in question go, there appears, upon their face, to have been an invention made by Mr. Waring which justifies their issue. It may be that, when carefully compared with some other invention, this alleged improvement may not reach the dignity of invention, but such comparison can be based only upon evidence disclosing what the anticipating or prior invention was. The mere fact that reference is made to a former invention in the letters patent, as in this case, does not bring that invention to the knowledge of the court, or spread its claims or description upon the record. As a part of the state of the art, it must be proved by legal testimony. *Fibre Industries Co. v. Grace*, 52 Fed. 124.

It was also insisted by counsel for defendant that, without reference to the former patent, there was disclosed upon the present patent a want of patentable invention. I am not willing to assent to this, although I may say that the argument addressed to the court upon this contention was exceedingly persuasive. Yet upon demurrer for want of patentability, if a doubt remains, such doubt should be resolved against the demurrant. Nice questions should not be decided until the complainant has had ample opportunity to present his case in the clearest form. The demurrer is overruled.

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PAGE v. BUCKLEY.

(Circuit Court, N. D. Illinois. January 7, 1895.)

**PATENTS—PNEUMATIC TESTERS FOR CANS—PRELIMINARY INJUNCTION REFUSED.**

Application for preliminary injunction on reissue patent No. 11,443, reissued September 25, 1894, to William B. Page, for an improvement in pneumatic testers for cans, refused on the ground that there had been no adjudication of the patent and nothing that amounted to public acquiescence.

This was an application for a preliminary injunction to restrain infringement of the reissued letters patent No. 11,443, dated September 25, 1894, to William B. Page, for an improvement in pneumatic testers for cans.

Walter H. Chamberlin, for complainant.  
Banning & Banning, for defendant.

GROSSCUP, District Judge. There has been no adjudication of the validity of complainant's patent outside of the finding of the patent office in an interference hearing, and nothing that amounts to public acquiescence. The decision of the patent office deter-

mined that the complainant's and defendant's inventions were the same, and that complainant's, in point of time, was prior; but its validity, in view of the state of the art, was not inquired into, much less determined. The issuance of a patent, in this circuit at least, is not sufficient *prima facie* evidence of the novelty of the invention as justifies an injunction.

Neither is defendant, by the fact of having presented a claim for a patent for the same invention, barred from denying novelty. The right against monopoly is a general right, in which defendant shares, until it is adjudicated in a real contest that the invention has not been anticipated and the patent is in other respects valid.

Injunction denied.

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CHRISTMAN et al. v. BERTELS et al.

(Circuit Court of Appeals, Third Circuit. April 17, 1895.)

No. 21.

**PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—BAIL EAR FOR PAILS.**

The claim of the McDonnell patent, No. 344,667, for a bail ear for pails, if valid at all, is limited, both by its language and by the prior state of the art, to an ear in which the lug and the spring are not separated entities, but constitute one integral thing, and hence is not infringed by a device in which the spring is not attached to the groove of the ball, but passes through and extends below it, and is there fastened to the body of the pail itself.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit by Charles E. Christman and Enoch E. Christman against William B. Bertels, Charles E. Bertels, and Hayden U. Merithew, partners as W. B. Bertels, Son & Co., for the alleged infringement of a patent. The circuit court dismissed the bill, and complainants appealed.

James I. Kay, for appellants.

John H. Roney, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

**DALLAS, Circuit Judge.** This suit was brought to restrain the alleged infringement by the appellees of the third claim of patent No. 344,667, dated June 29, 1886, granted to James McDonnell for "Bail Ear for Pails." That claim is as follows:

"(3) The combination, with the pail, of the ears or lugs secured on each side thereof for the attachment of the ball or handle, each having the groove therein, and the spring secured in said groove, and having a projection or shoulder for engaging with the lid of the pail and locking it in position."

The court below pointed out that the specification describes, and the drawings exhibit, the lug and the spring of the patent, not as separate entities, but as together and unitedly constituting one integral thing; and, construing the claim with reference to

these other portions of the instrument, interpreted the words, "spring secured in said groove," as meaning a spring attached to or fastened in the groove. The spring of the appellees is not attached to or fastened in the groove of the bail ear, but passes through it and extends to a point below the lower extremity of the ear, and is there fastened to the body of the pail itself. Consequently, and in accordance with his restrictive understanding of the scope of the claim, the learned judge held that the contrivance of the appellees does not infringe. In our opinion, it would be impossible to hold otherwise, without so expanding the claim as to render it invalid. Similar springs, not fastened to, but brought in contact with, similar lugs, by being passed through grooves therein, were old. This is shown by, at least, the patent (No. 163,598) granted to Robert B. Kepner, dated May 18, 1875. McDonnell merely substituted the existing bail ear lugs for the separate, but, for this purpose, substantially identical lugs which Kepner had employed. This substitution did not amount to invention, and therefore the utmost which, with any show of reason, McDonnell can be said to have originated—and even this, in view of the Bligh patent, No. 27,265, is not unquestionable—consisted in fastening the spring, not to the body of the pail, but to the lug itself, and this the appellees have not done. The decree is affirmed.

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#### THE BEACONSFIELD.

#### HEIN v. THE BEACONSFIELD.

(District Court, S. D. Alabama. April 8, 1895.)

No. 708.

##### 1. SALVAGE SERVICES.

Towing into the port of Mobile, a distance of 52 miles, a ship which had been partly dismantled, and had lost overboard a portion of her crew, but which at the time was in no danger, and was proceeding under partially rigged sails, held to be a salvage service, though of inferior merit, being rendered in a smooth sea, without danger to the towing vessel.

##### 2. SAME—COMPENSATION.

\$650 awarded to a steamer, delayed 28 hours on her regular trip, by towing into port, in a smooth sea and without danger, a partially dismantled vessel, in no danger when found, valued at \$8,000.

This was a libel by Louis H. Hein, charterer of the Norwegian steamship Jarl, against the ship Beaconsfield, to recover compensation for alleged salvage services.

Mr. Gregory, L. Smith, and H. T. Smith, for libellant.  
Pillans, Torrey & Hanaw, for claimants.

TOULMIN, District Judge. This is an action to recover for salvage service alleged to have been rendered by the steamer Jarl to the ship Beaconsfield, on the 13th of October, 1894. The

service consisted in towing the ship about 52 miles from off the bar of Mobile Bay into anchorage at Ft. Morgan, inside the bay. The time occupied in the tow was some 9 or 10 hours, and involved no risk or extra labor on the part of the steamer. The weather was good and the sea smooth. The master of the steamer says that "the wind was northeast, but was not blowing too much, and the sea was from the northeast, but was not much." On the 6th and 7th of October the ship had encountered a storm in which it was partly dismasted, and also lost five of the crew overboard. At the time she was taken in tow by the steamer, she had on her in use the mizzenmast, upper and lower top foresail, and a foresail, but the foresail was not full size. From the point where she lost her rigging to the point where she was picked up by the steamer she had proceeded 342 miles. She was not in any immediate danger when taken in tow by the steamer. She had sufficient crew to handle her with such sails as she then had on her. She had aboard plenty of provisions and water to last several weeks, and her hull was in good condition, tight and stanch. She was at that time making but little headway, because of the adverse wind then blowing. There is some conflict in the evidence as to whether she was under command or could have been handled in the condition she was in. But a preponderance of the evidence shows that she could handle herself, and could have come into port without assistance, except with a considerable adverse wind blowing; and that, at the time she was taken in tow by the steamer, she was making some, but slow, headway. The evidence satisfies me that the danger to which she was exposed was very slight. She had been in peril during a hurricane, and had been partly dismasted, and had lost five of her crew, but she had passed through her peril, and had proceeded some 340 miles on her voyage towards the port of Mobile, whither she was destined, and when taken hold of by the steamer was within about 52 miles of that port. The value of the steamer was about \$32,000. The value of the ship does not clearly or very satisfactorily appear from the evidence, but I should judge it was about \$8,000.

"It is the value of the property which is restored to the owners that is to be considered, and of which a proportion is to be awarded as salvage in salvage cases, and not the original value imperiled." *Compagnie Commerciale de Transport à Vapeur Française v. Charente Steamship Co.*, 9 C. C. A. 292, 60 Fed. 921. The steamer was engaged in the fruit-transporting trade between Mobile and Bocas Del Toro, and was proceeding on one of her regular trips from Mobile out when spoken by the ship and asked to give her a tow. She promptly responded, and, without danger or difficulty, rendered the desired assistance. While the actual service rendered occupied only 9 or 10 hours, the actual time lost by the steamer's deviation and subsequent delay was 28 hours. A deviation is a proper and important element to be considered in rendering a salvage award, and the nature of the salving ves-

sel's employment, the inconvenience, expense, and loss that arise from leaving a regular trip, are things, I think, to be noticed in determining the amount of her award. The Bay of Naples, 44 Fed. 90. The ship was not without the prospect of other efficient means of assistance. She was in or near the usual track of vessels going in and out of the ports of Mobile and Pensacola, and was within 10 to 20 miles of Mobile tugs seeking towage employment in and out of Mobile Bay. The case is one of salvage service, but its circumstances are wholly devoid of those elements which go to make up a highly meritorious service in the salvors. The Carondelet, 36 Fed. 714; The Jarlen, 43 Fed. 176; The Emily B. Souder, 15 Blatchf. 185, Fed. Cas. No. 4,458. Six hundred and fifty dollars is, in my opinion, a sufficient salvage compensation to be awarded in this case. A decree will be entered accordingly.

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THE S. OTERI

UNITED STATES v. VALENSONA.

SAME v. OTERI et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1894.)

Nos. 259 and 260.

1. SHIPPING—OMISSION OF CARGO FROM MANIFEST—PENALTY.

A propeller wheel and a case of ferrules were laden upon a steamship at New Orleans for export to Truxillo, Honduras, but the ship instead of going to Truxillo went into dry dock on the opposite side of the river, where the wheel and ferrules were placed upon the vessel as part of her machinery and motive power, and still remain there. The trip to Truxillo was abandoned, and the vessel afterwards cleared for La Ceiba, no mention being made in her manifest of the propeller wheel and ferrules. *Held*, that this omission was proper, and the ship was not liable for the penalty of \$500 prescribed by Rev. St. § 4197, for omitting the cargo from the manifest.

2. CUSTOMS DUTIES—WITHDRAWAL FOR EXPORT—BREACH OF EXPORT BOND—AMOUNT RECOVERABLE.

Rev. St. § 2979, requires an importer, on withdrawing goods for re-export, to give to the collector "satisfactory security" that the merchandise shall be landed out of the United States. The treasury department regulations (article 537) provide that, in cases of withdrawal for export, the exporter shall give bond "with satisfactory security in a penal sum equal to double the amount of the estimated duty on the goods." *Held*, that an export bond given in the sum of \$1,000, without containing any reference to the amount of estimated duties on the goods withdrawn, was valid; and that the government was entitled, upon breach of the condition, to recover the whole amount of the bond, and was not limited to a judgment for double the amount of duties as subsequently estimated. *Speake v. U. S.*, 9 Cranch, 28, applied.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Error to the District Court of the United States for the Eastern District of Louisiana.

These were two suits growing out of an alleged violation of the shipping and customs laws. No. 259 was a libel in admiralty, filed by the United States against the steamship S. Oteri, Mrs. Valensona claimant, to recover a penalty of \$500 for an alleged violation of Rev. St. § 4197, by the omission from her manifest of a propeller wheel and a case of ferrules, which were withdrawn from warehouse at New Orleans for re-export under the customs laws and regulations. In this case the district court held that the omission was a proper one, and therefore dismissed the libel. The United States appealed. No. 260 was an action at law against Salvador Oteri and D. R. Noble, upon a bond given under Rev. St. § 2979, in the penal sum of \$1,000, to secure the export and landing, outside of the United States, of the propeller wheel and case of ferrules above mentioned. A jury was waived, and the case tried to the court, which found that the condition of the bond had been broken, and entered judgment against defendants for \$180.39, with interest, being the amount of duties estimated to be due upon those articles. From this judgment the United States bring error, claiming that it should have been for the full amount of the bond. The bond is here set out in full:

"\$500.00

Exportation Bond.

No. 1,329

"Know all men by these presents that we, Salvador Oteri, of the city of New Orleans, merchant, as principals, and D. R. Noble, as sureties, are held and firmly bound unto the United States of America in the sum of one thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Witness our hands and seals, at the port of New Orleans, this first day of April, eighteen hundred and ninety-two. Whereas, the following described merchandise having been heretofore duly imported into the United States, and entered for warehousing in bond, and having been so warehoused at the above-named port, according to law, hath been this day entered for withdrawal and exportation in bonds, viz.:

'Marks.	Numbers.	Description of Packages and Merchandise.
H	1	1 propeller wheel.
Oteri	2	1 case ferrules.

"District and port of New Orleans.

"Collector's office, March 7th, 1893.

"I hereby certify the foregoing to be a true copy of the record on file at this office.

"[Signed]

J. D. Crawford,

"Dy. Collector, S-S Astronomer, L'pool."

—Which said merchandise is also described in an export entry of this date, numbered 2273, and is to be exported in the S-S S. Oteri, whereof De Luca is at present master, now lying in the above named port, and bound for the port of Truxillo, Hond.; and whereas, it is intended that the said merchandise shall be exported as aforesaid, under and by virtue of the several laws of the United States relating to the exportation of imported goods without the payment of duties thereon. Now, therefore, the condition of this obligation is such that if the aforesaid merchandise shall, in good faith, be actually exported and landed abroad, according to the true intent and meaning of these presents, and shall not, nor any part thereof, be relanded at any port or place within the limits of the United States; and if the certificates and other proofs required by law and the regulations of the secretary



of the treasury, showing the delivery of the same at the said port of destination, or any other port or place without the limits of the United States, shall be produced and deposited with the collector of customs for the time being at the said port of withdrawal within twelve months from the date hereof, —then this obligation to be void; otherwise to remain in full force and virtue.

"[Signed]

"[Signed]

"[Signed]

pp. S. Oteri,

E. M. Stella, 23 Front St.

D. R. Noble, Washington House, N. O.

"Signed, sealed, and delivered in the presence of

"[Signed]

S. Livaudais."

Further facts are stated by the court as follows:

The above-entitled cases, the first being a suit in admiralty to recover a penalty for failure to place certain exported goods on the manifest of the steamship S. Oteri, and the second an action at law to recover the amount stipulated as a penalty in an exportation bond, were both tried in the district court, jury being waived, on the following admitted state of facts:

"It is admitted, as shown by the evidence filed in the record in both cases 13,021, United States v. Steamship S. Oteri, and in No. 13,026, United States v. Salvador Oteri, that the propeller wheel and a case of ferrules were laden on board the steamship S. Oteri for export to Truxillo, Honduras, April 4, 1892; that on the production of the bill of lading in the record, and the certificate of lading by the customs inspector, the export bond was canceled under the regulations then existing. It is admitted that the steamship S. Oteri, instead of going to Truxillo, went over the river from her wharf to the dock on the Algiers side of the city and port of New Orleans; that said vessel went on the dock April 8, 1892, and came off April 12, 1892, abandoning her trip to Truxillo. During this time the propeller wheel and ferrules had been placed on said vessel as a part of her machinery and motive power, and still remain there. That same were not exported, notwithstanding the bill of lading and cancellation of the bond. It is admitted that the invoice in the records shows that the wheel was made under contract for this S. S. S. Oteri, and imported for the use of said vessel, and is now so used; never having been placed on said vessel in a foreign port, or never having paid the duties, never having been exported in bond. It is admitted that \$500 is deposited with the collector of port of New Orleans, under protest, to cover the penalty. It is admitted that after the said vessel came from the dock said vessel cleared May 6, 1892, for La Ceiba, in ballast and ship stores, no mention being made of the propeller wheel and ferrules. It is admitted that this manifest was correct, in so far as it made no mention of said wheel and ferrules as freight, for the reason that said wheel and ferrules were placed on said vessel while in the dock as stated above, as a part of her motive power. It is admitted that the said steamship S. Oteri is a foreign-built vessel, and that all the patterns of her machinery and pieces of her machinery are held at the place of her construction, viz. a foreign port or place. It is agreed that the record evidence in both cases shall apply and be used in either."

"No. 13,026 v. Salvador Oteri. District Court.

"Duties on one propeller shaft, value £95, \$462, weight three tons, 16 cwt., or 8,512 lbs.

"Valued four cents, and not above seven cents, say two cents per lb.

"Duty, \$170.24.

On ferrules, wood.....[in pencil].....\$170 24

£6-29, 35 per cent., \$10.15..... 10 15

\$180 39"

"It is agreed by F. B. Earhart, United States attorney, and Gurley & Mel-  
len, attorneys and proctors for defendants in the above entitled and num-

bered case, that the foregoing is a correct estimate of the customs duties which could be imposed on the propeller shaft and ferrules described in the record herein, if same were imported in the United States."

F. B. Earhart, U. S. Atty.

J. Ward Gurley, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge (after stating the facts). As these cases were tried in the district court on the same state of facts, and were heard together in this court, we dispose of them together. The admitted facts show that the propeller and box of ferrules, which it is alleged were omitted from the manifest of the Oteri, formed no part of the cargo on the voyage of that ship as actually made; the contemplated voyage to Truxillo—for which, by the way, the record shows neither clearance nor manifest—having been abandoned, and before another voyage was made the said propeller and box of ferrules were, in the port of New Orleans, applied to the purpose for which originally intended, and thereafter and on the voyage to Ceiba actually made and formed part and parcel of the ship itself. If, on the clearance of the ship for Ceiba, the propeller and box of ferrules had been placed upon the manifest as part of the cargo, as it is claimed by the United States should have been done, the manifest would have been false and untrue.

In the suit for the amount of the penalty in the export bond the answer of the defendants should be noted. It is a general denial, except as therein admitted, to wit, the giving and signing of the bond substantially set forth in the petition, and "averring that the defendants have kept and complied with all the conditions and obligations thereof, and that the same has long since been discharged, and that the said bond was duly canceled according to law on the 31st day of May, 1892, and that said bond has no longer any force or effect, and the conditions thereof are fully satisfied." And it is to be further noted that no suggestion of duties due the United States secured by the export bond in question comes into the case until on the trial a supplementary agreement of facts is filed, showing what would be a correct estimate of the customs duties which could be imposed on the propeller shaft and the ferrules described in the record, if the same were imported into the United States.

In this court the first question presented is as to the real amount of the bond sued on, if valid at all. Section 2979 of the Revised Statutes of the United States provides:

"That the owner, importer, consignee or agent \* \* \* shall give to the collector satisfactory security that the merchandise shall be landed out of the jurisdiction of the United States in the manner required by law relating to exportations for the benefit of drawbacks."

See, also, Rev. St. § 3043.

The regulations of the treasury department, in force at the time the bond in the suit was executed, direct that:

"In cases of withdrawal for export, the exporter shall give bond, with satisfactory security, in a penal sum equal to double the amount of the estimated duties on the goods, to produce the proof required by law of the landing of the same beyond the limits of the United States." Treasury Regulations, art. 587.

Under the statute cited, and the regulation in pursuance thereof, it is suggested that the amount of the penalty in the case in hand must be taken as not in excess of double the amount of the estimated duties on the goods exported, and that in no event can a larger sum be recovered as penalty in this suit.

The contention of the appellee in this behalf seems to be disposed of by *Speake v. U. S.*, 9 Cranch, 28-36, which was a suit on an embargo bond, where the statute required that the amount of the bond should be in a sum double the value of the vessel and cargo, and the court says:

"The second joint plea of the defendants alleges that the bond was not taken pursuant to the act of congress, but contrary thereto, in this: that the bond was taken in a sum more than double the value of the vessel and cargo, whereby the bond became void. On demurrer to this plea and joinder in demurrer, the court below gave judgment for the United States, and we are of opinion that the judgment so given ought to be affirmed. There is no allegation or pretense that the bond was unduly obtained by the collector, *colore officii*, by fraud, oppression, or circumvention. It must therefore be taken to have been a voluntary bona fide bond. The value was a matter of uncertainty, and the ascertaining of that value was the joint act and duty of both parties. When once that value was ascertained and agreed to by the parties, and a bond executed in conformity to such agreement, the parties were estopped to deny that it was not the true value. If an issue had been taken upon the fact, the evidence on the face of the bond would have been conclusive to the jury; and, if so, it is not less conclusive upon demurrer. It would be dangerous in the extreme to admit the parties to avoid a sealed instrument, by averring that there was an error in the value, by an innocent mistake, or by accident, or by circumstances against which no human foresight could guard. A mistake of one dollar would be as fatal as of ten thousand dollars. Suppose the double value were underrated, could the United States avoid the bond, and thereby subject the party to the penalties of the third section? Where the law provides that the penal sum of a bond shall be equal to the double value, and the parties, voluntarily, and without fraud, assent to the insertion of a given sum, it is as much an estoppel as if the bond had specially recited that such sum was the double value."

The validity and penal amount of the bond in this case being beyond question, our next inquiry is as to the amount of damages the United States is entitled to recover upon the breach thereof.

In the twenty-sixth section of the judiciary act of 1789 (now section 961, Rev. St.) it is provided:

"That in all causes before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond or other speciality, where the forfeiture, breach or nonperformance shall appear by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the

sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

The rule declared by this statute is to be generally applied in proper cases in the courts of the United States. If applied here, the question is, how much is due, according to equity, under the conceded breach of the bond? An examination of the bond shows that it is not a bond to secure the payment of any sum for duties or otherwise. The only reference in the bond to the subject of duties is the recital:

"It is intended that said merchandise shall be exported as aforesaid, under and by virtue of the laws of the United States relating to the exportation of imported goods without the payment of duties thereon."

The record as made by the bond shows only a description of the packages of merchandise withdrawn, without any statement of value or any estimate of duties due, or, in any event, to become due. The bond is conditioned to secure the exportation of the merchandise in question beyond the United States, and its evident purpose, under the statute and the treasury regulations, is to prevent frauds upon the revenue. The admitted facts of this case show that the obligors did not export the merchandise beyond the United States, but permitted the same to be landed in the United States, and thereby a fraud on the government revenues resulted; and this not by mistake or error, for nearly 60 days after the merchandise was landed in the United States, and when the parties well knew that the bond had been breached, the nonaccomplished export bill of lading was produced to the collector of customs, and under an erroneous interpretation of a treasury regulation, that officer was induced to enter a cancellation of the bond, and nearly one year seems to have elapsed before the government agents discovered that in the transaction the revenues had been defrauded.

If we are correct in treating the bond sued on as one in no respect given to secure the payment of duties or any other debt due the United States, but as a bond authorized and required by the statute and the treasury regulations for the purpose of preventing fraud on the revenues,—and we are unable to discover any other purpose for it,—we are of opinion that the said bond is not one in which equity, under the facts admitted, can relieve the obligors from payment of the full penalty stipulated. This conclusion is warranted by the opinion of the supreme court of the United States in *Clark v. Barnard*, 108 U. S. 436 et seq., 2 Sup. Ct. 878, in which the authorities are fully reviewed.

The defendants in error contend that this case is identical with, and governed by, the same principles as *U. S. v. Cutajar*, 59 Fed. 1002, decided by Judge Brown in the Southern district of New York, and now said to be on appeal in the United States circuit court of appeals, Second circuit. In that case the learned judge in his opinion says:

"This case is distinguishable from the considerably large class of cases to which the counsel for the government has directed my attention, and

which he has so clearly presented, namely, those in which the amount named in the bond is treated as a liquidated sum, to be paid in lieu of damages which are incapable of exact estimate. This case does not fall within that class. The context of the bond, the general purpose for which it was given, and the way in which the amount of the bond in such cases is fixed, are such as, taken together, require the amount named in the bond to be regarded as fixing, not an amount of liquidated damages, but only the extent of the importer's liability."

So we distinguish this case from the Cutajar Case in this: That the bond there sued on was a bond for the evident purpose of securing the full payment of duties on imported goods, and only incidentally, if at all, for the purpose of preventing frauds on the revenue, while here the purpose of the bond was not to secure the payment of duties or any other sum, but was to prevent frauds on the revenue. The decree of the district court in the first-entitled case, United States, Appellants, v. Mrs. Valensona, Claimant, Appellee, should be affirmed; and the judgment of the district court in the second-entitled case, United States, Plaintiffs in Error, v. Salvador Oteri and D. R. Noble, Defendants in Error, should be reversed, and said cause remanded, with instructions to enter a judgment in favor of the United States for the full amount of the penalty of the bond sued on; and it is so ordered.

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#### THE JAVIRENA.

#### GONZALES v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 335.

#### SHIPPING—VIOLATION OF CUSTOMS LAWS — DEPARTURE FROM COLLECTION DISTRICT WITHOUT ENTRY.

A Spanish fishing smack from Havana, which anchored within five miles of the mainland of Florida for the purpose of repairing a disabled mast, and was not bound to, and did not enter, any port of the United States, is not within the provisions of Rev. St. § 2773, and is not liable to a penalty for departing from the collection district without making report or entry. The Apollon, 9 Wheat. 362, followed.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This was a libel of information filed by the United States against the schooner Javirena (Severo Gonzales, claimant) for violation of the customs laws. In the district court a decree was entered condemning the vessel, in the sum of \$400, for violating the provisions of Rev. St. § 2773. The claimant appealed.

E. R. Gunby, for appellant.

Frank Clarke, for the United States.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PARDEE, Circuit Judge. In July, 1894, the small Spanish schooner Javirena, ordinarily known as a fishing smack, sailed from Havana, in the island of Cuba, bound for no foreign port, but with a clearance to permit her to fish in Spanish waters and in the open seas. She was without cargo, and carried on board only the stores and fishing appliances supposed to be necessary for a fishing trip of two or three weeks. On the 24th of July, 1894, she was found at anchor by the United States revenue cutter McLane in the open waters off the coast of Florida, about 5 or 6 miles from the mainland, and 2½ miles from North Anclote Key, which is an uninhabited sand key about four miles off the main coast of Florida, near to the Anclote Key, another sand key, on which is a lighthouse, and to the eastward of which is an anchorage. Upon the approach of the revenue cutter the Javirena got under way, apparently to go further out to sea, or on her regular fishing business. The commanding officer of the revenue cutter seized the Javirena, and carried her 80 miles, to the port of Tampa, and there turned her over to the collector of that port for violations of sections 2773-2775, 2811 of the Revised Statutes of the United States, all of which are found in that chapter of the Revised Statutes relating to the "Entry of Merchandise." At the time the Javirena was seized, she had on board about two-thirds of a full cargo of fish, lately caught, and among her stores 20 to 30 gallons of wine, and about as much more of aguadiente. There was no charge made against the Javirena for smuggling, or even for communicating or attempting to communicate with the mainland for any purpose whatever. The collector of the port of Tampa imposed fines on the Javirena, in the total sum of \$1,900, for violation of sections 2773-2775, Id., and announced to the master of the vessel that the vessel was also reported for violation of section 2811, Id., which requires the master of any vessel laden with merchandise, and bound to any port of the United States, to deliver manifest when boarded within four leagues of the coast, and also the first and second sections of the act of congress approved February 15, 1893, in not having the health certificate required thereby. The fines not being paid, an information was filed in the district court for the Southern district of Florida against the Javirena, to recover the amount of said fines, alleging them to have been imposed on the master, and to be due from him, under the sections 2773-2775, aforesaid, and alleging that the Javirena had arrived within the limits of the collection district of Tampa, Fla., and had attempted to depart from said collection district without entry made with the collector of the port of said district. When the evidence was produced in the district court, it was found that the Javirena was not arrested within the limits of the collection district of Tampa, but in limits of the collection district of St. Marks; and thereupon it appears that the libel was amended, without objection, so as to charge the Javirena with having arrived within the limits of the collection district of

St. Marks, and with having attempted to depart therefrom without entry made with the collector thereof.

The master of the *Javirena* testified that at the time and place of seizure his vessel had been at anchor about eight hours; that the cause of his anchoring was that he had some damages on the schooner to be repaired, one of the stays or shrouds of the foremast having been broken; and that he could not make his repairs without coming to anchor; and this evidence does not appear to have been disputed. The court found that the master of the schooner *Javirena* had not violated sections 2774, 2775, Rev. St. U. S., because the *Javirena* had not arrived at any port of the United States, and had not violated the act of 1893, because she had not attempted to enter any port, but had violated section 2773, because she had arrived within the limits of a collection district of the United States, and had attempted to depart therefrom without making entry, and thereupon condemned the *Javirena* and her claimant in the sum of \$400, together with costs, expenses, and charges, to be taxed. From this decree an appeal is prosecuted in this court, with errors assigned as follows:

"(1) That the court erred in finding from the evidence that the defendant vessel was subject to a lien for the violation by the master of section 2773, Rev. St. U. S. (2) That the court erred in permitting the information to be amended so as to show that a fine had been incurred by the vessel after the case had been tried on an information charging that a fine had been imposed on the master."

Section 2773, Rev. St. U. S., is as follows:

"If any vessel, having arrived within the limits of any collection-district, from any foreign port, departs, or attempts to depart from the same, unless to proceed on her way to some more interior district to which she may be bound, before report or entry shall have been made by the master with the collector of some district, the master shall be liable to a penalty of four hundred dollars; and any collector, naval officer, surveyor, or commander of any revenue-cutter may cause such vessel to be arrested and brought back to the most convenient port of the United States. If, however, it is made to appear by the oath of the master, and of the person next in command, or by other sufficient proof to the satisfaction of the collector of the district within which such vessel shall afterward come, or to the satisfaction of the court in which the prosecution for such penalty may be had, that the departure or attempt to depart was occasioned by stress of weather, pursuit or duress of enemies, or other necessity, the penalty imposed by this section shall not be incurred."

Under the facts of this case, it is by no means clear that the *Javirena* arrived within the limits of the collection district of St. Marks, within the meaning and purview of this section. It may be conceded that the territorial and jurisdictional limits of the district of St. Marks extended beyond and included the place where the *Javirena* anchored; but if the evidence of the master is considered, in connection with the conceded facts, the *Javirena* did not arrive within the limits of the said collection district for any purpose of business with the mainland, nor as one of the termini of her voyage. Under other sections of the Revised Statutes, where duties in

regard to entry and register are required of vessels arriving in districts or ports, the arrival has generally been construed to mean something more than a putting into port from stress of weather or circumstances. In *U. S. v. Shackford*, 5 Mason, 445, Fed. Cas. No. 16,262, affirming the same case in 1 Ware, 177, Fed. Cas. No. 16,263, Justice Story held that, "to affect the master of a vessel with the penalty provided for his nondelivery of a temporary register granted under the third section of the coasting act of 1793, there must not only be an arrival at the port to which the vessel belongs, but it must be an arrival there, not by accident or from necessity, but intentionally, as one of the termini of the voyage." See, also, *Harrison v. Vose*, 9 How. 372; *Toler v. White*, 1 Ware, 277, Fed. Cas. No. 14,079. In *Parsons v. Hunter*, 2 Sumn. 419, Fed. Cas. No. 10,778, Mr. Justice Story, in citing with approval *U. S. v. Shackford*, supra, holds that under section 2 of the act of 1803, requiring the master of a United States ship, on its arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport, that the term "arrival" means arrival at a voluntary port of destination, for the purposes of trade. See, also, Treasury Regulations 1892, art. 48.

Under these decisions, can it be said that the *Javirena*, in coming to anchor within five miles of the mainland of Florida, in what was apparently otherwise the open sea, at a place 85 miles from the port of entry of the district, and for the purpose of repairing a disabled mast, and not for any purposes of trade or business, arrived within the limits of the collection district of St. Marks, so as to require an entry at the customhouse of said district before continuing her voyage? Section 2773, supra, is substantially the same as section 29 of the act of congress entitled "An act to regulate the collection of duties on imports and tonnage," approved March 2, 1799. 1 Stat. 627-648. This section was before the supreme court of the United States in *The Apollon*, 9 Wheat. 362. That case was a suit for damages occasioned by an asserted illegal seizure of the French ship *Apollon* and cargo, and the construction of the twenty-ninth section of the act of 1799 was directly before the court. After discussing its bearing upon the case in hand, the court says:

"The true exposition of the twenty-ninth section is that it means to compel an entry of all vessels coming into our waters, being bound to our ports; and the very exception of vessels bound to some interior district demonstrates the sense of the legislature, by indicating the entire stress laid upon the destination of the vessel."

The *Apollon* has been cited many times with approval by the supreme court, on other points than the one here in question; but, in respect to the construction of the twenty-ninth section, it has never been questioned or doubted. It appears to control this case. Laying aside all question as to whether the *Javirena* arrived within the actual territorial limits of the collection district of St. Marks, and whether she was there for the mere temporary purpose of repair, it is clear that as the *Javirena* was not a vessel bound for



any port of the United States, and as she had not entered any port of the United States, under a proper construction of section 2773, she was not bound to make an entry at any customhouse before attempting to depart from the place where she was anchored. The decree of the district court is reversed, and the cause is remanded, with instructions to dismiss the libel of information.

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**THE MONTCLAIR.**

**HOBOKEN FERRY CO. v. EASTON & AMBOY R. CO.**

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

No. 71.

**COLLISION — FERRY BOAT WITH LIGHTER AT PIER — WEIGHT OF EVIDENCE ON APPEAL.**

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by the Easton & Amboy Railroad Company against the ferry boat Montclair (the Hoboken Ferry Company, claimants) to recover damages resulting from a collision. The district court rendered a decree for the libelant, and the claimant appealed.

Franklin A. Wilcox and George Bethune Adams, for appellant.  
Henry W. Goodrich, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Easton & Amboy Railroad Company, owner of the steam lighter Cement Rock, brought its libel against the ferry boat Montclair, owned by the Hoboken Ferry Company, and running from Hoboken to the foot of Barclay street, in New York, to recover damages sustained by the collision of the Montclair with said lighter at the outer end of pier 15, in the North river. From the decree of the circuit court in favor of the libelant, the claimant appealed to this court.

The collision happened about 3:30 p. m. on January 3, 1893, as the Montclair was making a trip from Hoboken to her New York ferry slip; the tide being strong ebb, and the wind blowing strongly from the northwest. The theory of the libelant is that the Cement Rock was lying at the outer end of pier 15, which is the pier just below the ferry rack of the Hoboken ferry, was securely fastened, and had commenced to unload her cargo, when the ferry boat, which was then below her slip, turned to go in, sagged, by the force of the tide, upon the lighter, and struck her a blow on the port side, about 15 feet from the stem; that the paddle wheel of the

ferry boat, which was still moving, ran up upon the deck of the lighter, and caused the injury, after which the ferry boat made her slip. The theory of the claimant is that for some time previous to the collision the Cement Rock had lain at the end of pier 15, with her stem projecting into and obstructing the ferry slip, and extending beyond the clump of piles which had been placed on the outer end of the rack, at the entrance into the slip; that she disregarded the Montclair's signals to her to move back, and, although due precautions were observed by the pilot of the ferry boat, her star-board side, in consequence of the tide and the counter-set of the current along the shore at that point, came into contact with the stern of the Cement Rock.

The questions are entirely of fact. The leading and most important one is as to the position of the lighter. If her stem projected beyond the end of pier 15, and obstructed the entrance into the ferry slip, it is conceded that her position was not only dangerous, but one which she had no right to maintain, and that she must be regarded as the author of her injuries. Another question upon which the witnesses were at variance is as to the position of the Montclair immediately before the collision. Two of the libelant's witnesses say that she was below her slip, and was heading up the river, and was turning to go into the slip sidewise, whereas the Montclair's testimony is that she was going straight in, but that the tide was too strong, and carried her down a little lower than her pilot expected, but that she would simply have touched the rack if the Cement Rock had not been in the way. The libelant finds confirmation for its theory of the position of the Montclair just before the collision in the fact that the planks of the lighter were broken 21 or 22 feet from her stem by the paddle wheel of the ferry boat, and says that if she had been going straight in the breakage would not have extended back so far, because the lighter was only a few feet above the piles, upon the Montclair's testimony, whereas the place of the injury was the natural one, if the ferry boat was going in at an angle. On the other hand, the claimant insists that from the dimensions of the boats, the pier and the slips, and from the fact that the upper side of the slips is 100 feet shorter than the lower side, the ferry boat could not have collided, and inflicted the damage which existed, if the lighter had been moored below the slip. The district judge, after remarking upon the direct conflict in the oral testimony of witnesses equally competent and honest, came to the following conclusion:

"Considering the nature of the blow, the character of the injuries received by the Cement Rock from the contact of the ferry boat, together with the improbability that the Cement Rock would have moored in the position described by the witnesses for the claimant, it seems to me that the weight of the evidence goes to show that the collision was not caused by the fault of the Cement Rock, but was caused by negligence in the navigation of the ferry boat in not avoiding the Cement Rock."

We are led to concur with the district judge by the following considerations: Five of the claimants' witnesses substantially agree

that after the collision the bow of the lighter was below the clump of piles, and that she had changed her position about four feet, and had sagged down, because she was moved, or the lines had parted, while the testimony of the libellant strongly convinces us that her lines had not parted, and had not been changed. In addition, there is an obvious improbability that the Cement Rock selected a position which projected beyond the slip, and in which she was exposed to danger; and there is a probability, from the nature of the blow and of the injuries to the lighter, that she was struck by the Montclair when the latter was going into the slip at an angle from a point below the pier. If the weight of the circumstances in the case do not positively compel a concurrence with the district judge, it must at least be manifest that upon the sole questions in the case there is no such preponderance of evidence as should lead us to overrule his findings of fact. The decree of the district court is affirmed, with costs of this court.

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THE P. I. NEVIUS.

THE WIDE AWAKE.

DAY v. ALBERTSON et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

**COLLISION—DRIFTING TOW WITH ANCHORED SCHOONER—INSECURE FASTENINGS—LIABILITY OF TUG.**

Where three loaded scows broke loose from their fastenings, and were driven before a gale into collision with an anchored vessel, and damaged her, *held*, that the tug having the scows in charge was solely liable, because she had so disposed of the tow that the headlines of one of the scows was required to bear the strain of all three of them, and of the tug herself, without any adequate additional fastenings.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William Albertson and others, owners of the schooner Ella Snedeker, against the steam tug P. I. Nevius (Winfield S. Day, claimant) and the schooner Wide Awake (Thomas Mad-dock and others, claimants), to recover damages for a collision. The circuit court held the tug solely liable, and accordingly entered a decree against her, and dismissing the libel as against the Wide Awake. The claimant of the tug appealed.

On October 22, 1891, the tug P. I. Nevius was bound on a voyage from New York City to Haverstraw, on the Hudson river, with three scows loaded with garbage. In the afternoon the tow arrived at Hastings, where the tug put in for water, and to wait for the flood tide. There were at the time two vessels made fast to the bulkhead or river front of the dock. These were the schooner Wide Awake and the scow Jessie Clark. The Wide Awake was lying with her starboard side to the dock, headed up stream; and the Jessie Clark was made fast just ahead of her, and close to her bows.

The scows composing the tow of the Nevius were named, respectively, the Cleary, Oneida, and Lizzie D. In making fast her tow, the tug placed the Cleary outside of the Jessie Clark, and the Oneida outside of the Wide Awake, while the Lizzie D. was tailed on, and made fast to the Oneida. In the evening the libelants' schooner, Ella Snedeker, came to anchor about half a mile further down the river. In the afternoon the wind had begun to rise, and towards evening there were indications of a hard blow. The master of the Jessie Clark therefore requested the master of the Nevius to remove the scow Cleary from alongside his vessel. This was done by dropping the Cleary back, and making her fast to the outside of the scow Oneida. The tug then went astern and made fast to the scow Lizzie D. Thus the Cleary, the Lizzie D., and the tug were all held by the lines of the Oneida, except that the Lizzie D. had breast and stern lines,—one to the Wide Awake, and one to the dock. The Oneida had a headline to the dock, and two lines to the Wide Awake. Not long after the tow had been thus arranged, the line from the Oneida to the dock parted, or, as was claimed in behalf of the tug, was cut by the captain of the Wide Awake, thus throwing the whole strain upon the two lines running to the Wide Awake. These either parted, or were cut in succession, and the tow drifted rapidly down the river until it brought up across the bows of the schooner Ella Snedeker, and caused the damages which the suit was brought to recover.

In the district court the following opinion was delivered by BROWN, District Judge, May 13, 1892:

"The evidence, I think, leaves no reasonable doubt that the canal boats broke loose from alongside the Wide Awake at Hastings from the lack of sufficient lines from the Oneida to the Wide Awake and to the bulkhead alongside of which she lay, after the Cleary had been moved from her previous position to a place alongside and outside of the Oneida. No lines were run from the Cleary to the bulkhead; and no additional line was run from the Oneida to the Wide Awake or to the bulkhead after the Cleary was thus brought and made fast to the Oneida. I have no doubt that it was the additional weight of the Cleary and the tug upon the headline of the Oneida in the rising wind and sea, that caused them to break loose by the parting of the headline of the Oneida within a few minutes after the Cleary came alongside. The removal of the Cleary to a place alongside of the Oneida was the act of the tug. The tug had the care of all the boats, and was responsible for imposing this additional and unreasonable strain on the Oneida's headline without any sufficient additional fastenings. Upon this ground I must hold the tug in fault for the subsequent collision with the Snedeker, against which the boats, after breaking loose, drifted by the force of the northeasterly gale. It is not necessary to consider the further question whether the tug was not also in fault for not maintaining a proper lookout and taking proper care to avoid the libelant's schooner Snedeker which was at anchor in a proper place and ought to have been seen.

"The schooner Wide Awake also is sought to be held liable on the ground that the headline of the Oneida to the bulkhead did not part, but was wrongfully cut by the captain of the Wide Awake, as well as a line made fast to the Wide Awake. Her captain testifies very positively that the line to the bulkhead was not cut by him nor by any one on the schooner, and that it parted. Others say it was chafed. He says that the forward line to his boat was cut by him, but in compliance with the urgent orders of some one on the Oneida to cast it off; this being after the bow of the Oneida had already swung loose from the dock by the parting of the headline. The witnesses for the Nevius testify that no such order was given from the Oneida. The captain of the tug gave orders that the line to the tug should be cast off from the Lizzie D. close by; and it is possible that it was the latter order that the captain of the Wide Awake understood as designed for him. The claim that the Oneida's headline to the dock was cut by some one on the Wide Awake is not, I think, sustained by sufficient evidence, in the face of the opposing testimony, and of the improbability that an act so outrageous would be committed without previous expostulation or notice.

After that line parted, the others were insufficient; and the mistake in cutting them, if it was a mistake, and not ordered, was an excusable one, and was, I think, a harmless and probably a fortunate one.

"Decree for the libellant against the tug with costs; and for the dismissal of the libel as against the Wide Awake, with costs."

Benedict & Benedict, for the P. I. Nevius.

Goodrich, Deady & Goodrich, for the Wide Awake.

Stewart & Macklin, for W. S. Day.

Alexander & Ash, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** This appeal involves questions of fact only. The testimony in the record is extremely conflicting, and inasmuch as the witnesses were examined in the presence of the district judge, and the value of their testimony depends wholly upon their credibility, and there is no decided preponderance upon either side, we should not be justified in disturbing his conclusions. After a careful examination of the testimony, we are satisfied that the dock line of the Oneida was not cut by the master of the Wide Awake, but parted because it was unable to resist the extraordinary tension of the Oneida and the other boats of the tow, to which it ought not to have been exposed. After this line parted one of the two lines by which the Oneida was made fast to the Wide Awake also parted; and it was then, in a time of great excitement, and when there was danger that the Wide Awake herself would be injured unless she was detached from the Oneida, that the captain of the Wide Awake cut the remaining line. We are not entirely satisfied that he did this pursuant to any supposed request from the master of the tug or of the Oneida; but, however this may be, it was not a wanton or a negligent act upon his part, but one which he believed, and had a right to believe was necessary for the safety of his own vessel. The master of the tug was responsible for the whole situation. The decree of the court below properly exonerated the Wide Awake, and adjudged the tug solely in fault for the injuries to the libellants' schooner. Accordingly, it is affirmed, with interest and costs.

## BUTLER v. SHAFER et al.

(Circuit Court, D. Oregon. April 2, 1895.)

**COURTS—JURISDICTION—FEDERAL QUESTION.**

A bill for possession of lands claimed under the homestead laws, and for an injunction against interference by defendants, alleged that, at the time of complainant's entry, defendants were in actual possession, claiming the right to purchase the land from the United States under Act Sept. 29, 1890, providing for the forfeiture of lands granted the Northern Pacific Railroad Company, but that those in possession under "deed, written contract, or license from" the corporation, executed prior to January 1, 1888, or who had entered such land with bona fide intent to secure title from the corporation, should be entitled to purchase it from the United States, and that defendants were not within the description of those entitled to purchase under said act, but nevertheless threatened to prevent complainant, by force, from entering on his homestead and complying with the homestead laws. *Held*, that no federal question was presented, so as to give the court jurisdiction, as the decision did not depend on the construction of a law of the United States, but upon a question of fact.

Action by one Butler against one Shafer and others for possession of certain homestead land, and for an injunction. Defendants demurred on the ground that no federal question was involved, and the court was therefore without jurisdiction.

R. J. Slater and A. L. Frazer, for complainant.  
Bailey & Balleray, for defendants.

GILBERT, Circuit Judge. The jurisdiction of this court is invoked on the ground that a federal question is involved in a case where the bill of complaint alleges, in substance, that on January 25, 1892, the complainant, who was qualified to enter land under the homestead laws of the United States, made due entry upon a certain quarter section of land in Umatilla county, Or., which was then unappropriated public land, and subject to such entry, and that he filed in the proper land office, with the register and receiver, his affidavit as required by law, and paid the lawful fees of such entry, and received from the said officer a receiver's homestead receipt; that at the time of making such entry the defendants were in the actual possession of the said land, but that their possession was and is without any legal or equitable right; that the defendants claimed to have settled thereon June 2, 1890, with the intent to secure title by purchase from the Northern Pacific Railroad Company, when it should have earned the same by compliance with the terms of the act of congress granting it the said land, and that by reason of such settlement the defendants now claim the right to purchase said land under the act of congress approved September 29, 1890; that at the time said act took effect the defendants were not in the possession of said land under any deed, written contract, or license from said railroad company, and they had not, prior to January 1, 1888, settled said lands with a bona fide intent, or any intent, to secure title, and had not, prior to the taking effect of the act of September 29, 1890, settled on said land, and that they have not since that date settled or resided thereon, but during all said time, and up to

the 30th day of July, 1891, they were settlers and residents upon other lands, not contiguous to the land in dispute, claiming the same under the homestead laws of the United States; that the defendants threaten and intend by force to prevent the complainant from entering upon his said homestead claim, and from complying with the terms of the homestead laws, whereby he may acquire title thereto. The complainant prays for a decree awarding him the possession of said land and enjoining the defendants from interfering therewith.

The act of September 29, 1890, provides for the forfeiture of certain lands granted to the Northern Pacific Railroad Company. Section 3 protects the rights of citizens and those who have declared their intention to become such, who were in the possession of any such lands "under deed, written contract, or license from" the corporation executed prior to January 1, 1888, or who may have entered said lands with bona fide intent to secure title thereto by purchase from the corporation, when earned by it; and it provides that such persons shall be entitled to purchase such lands, not to exceed 320 acres, from the United States, upon terms therein provided. In the complainant's statement of his controversy with the defendants, as set forth in the bill, it does not appear that a dispute exists as to the meaning of the homestead laws or of the act of congress of September 29, 1890. It is not shown that the complainant contends for one construction of a law of the United States and the defendants for another. It does not follow from any of the averments of the bill, that the court will be required to give interpretation to said laws or to said act, or to any of the terms thereof. The substance of the bill is that the complainant has duly entered land under the homestead laws, and is entitled to the possession thereof, and that the defendants are in the possession of the same, claiming right of possession under the act of September 29, 1890, and that their possession is wrongful, for the reason that they are not within the description of those whose rights are conserved by the provisions of the third section of the act; that is to say, the defendants had no deed, written contract, or license from the railroad company, and they never were actual settlers upon the land. The trial of these questions involves only an investigation of the facts. It is contended by the complainant that the court will be called upon to decide what is the nature of the settlement upon railroad lands which is intended to be protected by the act. This does not appear from the allegations of the bill. On the contrary, the statement of the facts distinctly negatives such a conclusion. If it is true that the defendants are not in privity with the railroad company by deed, contract, or license, and were not settlers upon the land, but resided elsewhere, the conclusion follows that their possession is without right; but in arriving at that conclusion there is not necessarily involved a construction of the language of the act. In order that the court may have jurisdiction, it is essential, not that the complainant shall state that a federal question exists, or that it will become necessary to construe a law of the United States, but that he shall state

facts from which the court may see that such a question will be presented. In *Water Co. v. Keyes*, 96 U. S. 199, it was held that there was no federal question "simply because, in the progress of the litigation, it may become necessary to construe the constitution or the laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved." *Traffon v. Nougues*, 4 Sawy. 183, Fed. Cas. No. 14,134; *Austin v. Gagan*, 39 Fed. 626; *Railroad Co. v. Whittaker*, 47 Fed. 529; *Milling Co. v. Hoff*, 48 Fed. 340. The demurrer to the bill must be sustained.

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GOULD et al. v. SESSIONS.

(Circuit Court of Appeals, Second Circuit. April 22, 1895.)

No. 123.

1. WRIT OF ERROR—REVIEW—JUDGMENT IN CONTEMPT PROCEEDINGS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT OF PATENT.

An order imposing a fine for contempt for violation of an injunction against infringing a patent is to be regarded, when the contempt proceedings are had upon a motion entirely disconnected from the proceedings upon final hearing, as a judgment in a criminal case, which is reviewable upon writ of error, and not by an appeal. 11 C. C. A. 550, 63 Fed. 1001, reaffirmed; *New Orleans v. Steamship Co.*, 20 Wall. 387, followed; *Worden v. Searls*, 7 Sup. Ct. 814, 121 U. S. 14, distinguished.

2. PATENTS—VIOLATION OF INJUNCTION—SALE OF PATENTED ARTICLES IN CANADA.

After the granting of a preliminary injunction, defendants, without any previous negotiations for a sale, shipped patented articles, made by them before the granting of the injunction, to Canada, and afterwards sold them to a dealer there, to be used in Canada. *Held* that, as Canada was a territory in which the patentee had no exclusive right, the sale there was not a violation of the injunction.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was a motion by the complainant in the suit of John H. Sessions against William B. Gould and others, for infringement of a patent, to have defendants punished for contempt for alleged violation of an injunction. The circuit court, having found defendants guilty, ordered them to pay a fine of \$500. Defendants brought error.

Arthur v. Briesen, for plaintiffs in error.

John P. Bartlett and Charles E. Mitchell, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and BROWN, District Judge.

SHIPMAN, Circuit Judge. Upon a motion for preliminary injunction by John H. Sessions, complainant in a bill in equity against William B. Gould and others, defendants, for an infringement of letters patent in regard to trunk fasteners, the circuit court for



the Southern district of New York granted a temporary injunction. 49 Fed. 855. The complainant, thereafter claiming that the defendants had violated the injunction order, proceeded, by motion in the cause, to have them punished for contempt. The circuit court, upon hearing the parties, found that the defendants were guilty of contempt, and ordered them to pay a fine of \$500. Upon the appeal of the defendants from the order, this court held that, if it was to be treated as part of the original suit, it was interlocutory in its character, and could only be corrected by an appeal from the final decree, and, if it was an independent proceeding, it was a judgment in a criminal case, and could be reviewed only upon a writ of error. 63 Fed. 1001, 11 C. C. A. 550. The interlocutory decree of the circuit court upon final hearing in favor of the complainant in the bill in equity (60 Fed. 753) has been affirmed by this court upon appeal. 63 Fed. 1001, 11 C. C. A. 546. The defendants have now brought a writ of error to obtain a reversal of the order, and the first question is whether it was in effect a judgment in a criminal case. The motion for attachment for contempt was entirely disconnected from the proceeding upon final hearing, which took place before another judge than the one who heard the preliminary motion, and the fine was imposed as a fine to be paid to the government, and not to inure to the benefit of the plaintiff. In such a case the positive statement of the supreme court in *New Orleans v. Steamship Co.*, 20 Wall. 387, seems to be decisive in regard to the character of the order: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case." The facts in the case are unlike those in *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, in which, though the proceedings were nominally those of contempt, the supreme court deemed them to be intermingled with proceedings for damages and costs, and, being a part of the record sent from the circuit court with the appeal from the final decree, to be reviewable under that appeal. The record, which consists of the affidavits, without a finding of facts, shows that, after the injunction order had been served upon the plaintiffs in error, they shipped to Canada a quantity of the infringing articles, which had been made before the injunction, without previously offering them for sale, or notifying any one of their wish to sell. The goods were followed by one of the defendants, who sold them to a trunk dealer in Montreal, who had been a customer of Sessions, and had been in the habit of buying the noninfringing articles. Upon this naked state of facts, we are of opinion that there was no violation of the injunction order. The sale was made in Canada, of trunk catches then in Canada, to a Canadian trunk manufacturer, to be there placed upon trunks in the ordinary course of business, and, so far as is known, no one of the articles was thereafter used in the United States. If the sale, which was the subject of *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, in Michigan, of patented articles by the assignee of a patent for Michigan, knowing that they were to be used in Connecticut, a territory the right for which the seller did not own, and where they were used, did not constitute an infringement of the

patent, a sale in Canada, to be there used, of articles patented by letters patent of the United States, Canada being a territory in which the patentee had no exclusive right, cannot be regarded as in contempt of the injunction not in future to make or sell in violation of the patent. Inasmuch as the articles were made before the injunction, the manufacturer was not in contempt of the court's order; and, as no preliminary arrangements for the sale were made in the United States, the sale did not come within the prohibition. It is probable that the circuit court had misgivings in regard to the good faith of the affiants, but, as there is no contradiction of their statements, we regard the question as one of law, upon a state of facts not in substantial controversy. The order of the circuit court is reversed, with costs of this court.

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**BOSTON SAFE-DEPOSIT & TRUST CO. v. AMERICAN RAPID TEL. CO.**

(Circuit Court, D. Connecticut. April 27, 1895.)

No. 481.

**LACHES, WHAT CONSTITUTES—DELAY OF STOCKHOLDER TO INTERVENE IN FORECLOSURE SUIT.**

In a suit to foreclose a mortgage on corporate property, a stockholder appeared for the first time when the cause was pending before a master on the application of the receiver for the distribution of the fund and a settlement of his accounts, and objected to the distribution of any money to the holders of the mortgage bonds on the ground that the mortgage was invalid. The suit had then been pending over nine years, and the corporation itself had previously set up the same defenses. A supplementary suit had also been brought, in which the validity of the mortgage had been thoroughly contested. Prior to the commencement of the foreclosure suit, the stockholder himself had brought a suit to cancel the mortgage; but, upon the denial of his motion for the appointment of a receiver, had taken no further action therein. *Held*, that he was guilty of laches, and could not maintain his objections.

This was a suit by the Boston Safe-Deposit & Trust Company against the American Rapid Telegraph Company for the foreclosure of a mortgage, and the appointment of a receiver and other relief. The cause was heard upon exceptions to the master's report upon the settlements of the accounts of the receiver.

Edward Harland, in pro. per.

Wilson & Wallis, in support of master's report.

James H. Maccreary, for D. F. Robeson.

**SHIPMAN**, Circuit Judge. To the report of William Waldo Hyde, Esq., appointed master in chancery to receive and ascertain the amount of claims against the funds now in the receiver's hands for distribution, and to ascertain the parties to whom said fund should be distributed, and the amount due to each, respectively, Daniel F. Robeson and the receiver, Gen. Edward Harland, have each filed exceptions.

Mr. Robeson, being the holder of 10 shares of the stock of the American Rapid Telegraph Company, objected before the master

to the distribution of any of the money in the hands of the receiver to any bondholders secured by the foreclosed mortgage, on the grounds: First, that the bonds were issued without warrant of law; and, second, that they were illegally and improperly used in the exchange for purchase of stock of the same company, and that the holders of said bonds are not entitled to participate in the distribution of the fund or to receive any portion thereof. The master disallowed his claim, but allowed his right to share in the distribution as the holder of 10 shares, or \$1,000 of the stock, to the same extent as if he were the holder of a bond for that amount.

The three points made by Mr. Robeson before the master were as follows:

"Point 1. The contract entered into on the 26th day of August, 1883, between the American Rapid Telegraph Co. and the Bankers' and Merchants' Telegraph Co., and the contract dated the 29th day of August, 1883, entered into between the Bankers' and Merchants' Telegraph Co. and George S. Bullens, were not made in good faith, and hence were not binding on the minority stockholders of the American Rapid Telegraph Company, who did not ratify it.

"Point 2. The use to which the three million dollars of bonds issued out of agreement of August 28, 1883, between the American Rapid Telegraph Co. and the Bankers' and Merchants' Telegraph Co., were put, was illegal.

"Point 3. Mr. Robeson has an undoubted right to appear and object to the distribution of proceeds ordered by the decree herein, in his own name, in case of the absence of corporate action or of the disability of the corporation to act in his behalf."

The claim was treated by the master in his report as follows:

"Each of these points was argued at considerable length, but as, in my opinion, the questions suggested under the third point are decisive of Mr. Robeson's rights, and as the questions suggested by points one and two have already been fully presented to this court in the present litigation, and decided adversely to the claims now made in Mr. Robeson's behalf, I will confine myself simply to point three. I find that, shortly before the bill was filed in this foreclosure suit, Mr. Robeson filed a bill in the circuit court for this circuit, in the Southern district of New York, and moved for the appointment of a receiver for the American Rapid Telegraph Company. In that bill he raised the same objections which he suggests and raises here, and asks that the mortgage be canceled, and that the Boston Safe-Deposit and Trust Company, as trustee therein, be enjoined from taking any proceedings. I find also that in this present litigation the American Rapid Telegraph Company itself, by its directors and officers, defended against the foreclosure suit, and also against the relief claimed in the supplementary suit in New York state, and raised these very questions; that in these suits the issues were fully presented and thoroughly tried, and decided adversely to the claims set up here. I find, therefore, that Mr. Robeson had full opportunity, had he so desired, to have secured a legal determination of these claims in the first instance, in his own suit; that he had full knowledge of the pendency of this foreclosure suit, and could, if he had seen fit, have intervened for the protection of his interests during the progress of the litigation therein. And I further find that, having thus slept on his claimed rights during all this period, he has now no right in equity or in law to set up these claims in the manner in which he has attempted to do so, and that he is bound by the decision of the courts in this suit. I therefore disallow in the whole his claim."

To the bill of foreclosure in this case against the American Rapid Telegraph Company, divers parties were made defendants, among them the Bankers' & Merchants' Telegraph Company. These two corporations, or the parties who controlled their action as corpora-

tions, vigorously opposed the foreclosure. The Rapid Company filed an answer, setting forth, with great minuteness, the particulars of illegality and fraudulent conduct in the scheme of the mortgage, upon which Mr. Robeson also relies. When the receiver was appointed, no property was in the possession of the Rapid Company, but was entirely in the possession of the Bankers' & Merchants' Company, or the purchasers therefrom under a claim of ownership and of freedom from any lien in favor of the complainant. The property in New York was put into the possession of the receiver of the Rapid Company, leaving the various questions of title to be thereafter settled; and the active litigation was thereupon conducted with great vigor on both sides in the circuit court for the Southern district of New York, in a suit in aid of the foreclosure suit, between the present plaintiff and the Bankers' & Merchants' Telegraph Company and divers other defendants, including the Rapid Company, to determine the title to the property claimed by the receiver. A lengthy opinion was given by Judge Wallace (36 Fed. 288), in which the good faith of the trustees to the mortgage was sustained against the objections of the Bankers' & Merchants' Company and its successors, and upon appeal the decree of the circuit court was affirmed by the supreme court of the United States at the October term, 1892 (147 U. S. 431, 13 Sup. Ct. 396). After this affirmance, the validity of the mortgage was apparently considered by the parties to the Connecticut foreclosure suit to be at rest. A decree for the sale of the mortgaged property had been entered in 1890. The property was sold about March, 1891, but no deed was given until 1894. When the receiver, having received about \$911,000, and having in his hands, after his payments, a fund of about \$694,000, brought his application for a settlement of his account and a distribution of the fund, which application was granted by order dated August 9, 1894, Mr. Robeson appeared, for the first time, as a litigant in this suit, before the master, on September 28, 1894. The original bill was filed March 23, 1885. It further appears that, before this time, Robeson had filed a bill in the circuit court for the Southern district of New York, in which he prayed for the cancellation of the mortgage, and that the present complainant, as trustee under the mortgage, be enjoined from taking proceedings to enforce it, and moved for the appointment of a receiver of the Rapid Company. His motion was denied. Since this litigation commenced, his suit appears to have slept.

It thus appears that the objections which Mr. Robeson now urges against the validity of this mortgage were presented in the answer of the Rapid Company, in which he was a shareholder; were made the vital questions in the supplementary suit in New York; and that he never intervened in this suit, or made any application therein, until after the deed of the property had been given, and more than nine years after the litigation commenced. It is idle to contend that Robeson was ignorant of the existence of this suit. It seems unnecessary to pursue the subject further. The exceptions of Robeson are overruled.

Gen. Harland, having presented his bill as receiver at the rate of \$6,000 per annum, of which he had received \$44,000, excepts to the finding of the master allowing him for his services the sum of \$45,000. The receiver was appointed on account of his fitness for the perplexing work of establishing the complainant's title to the mortgaged premises, and making the bonds of pecuniary value. I think that during the early years of his service he was entitled to compensation at the rate of \$6,000 per annum, but that during the later years, while his time has been at the command of the complainant in this litigation, he ought not to receive at the same rate, because the labor and responsibility and amount of thought to be given to the subject had diminished.

There being no exception by any person to the allowance of as much as \$45,000, no useful purpose would be served by going into the details of the legal contest in various states, as to title, which finally came to a close with the affirmance by the supreme court of the circuit court's decree. The receiver's exception is overruled, and the report of the master is confirmed.

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**TOLER et al. v. EAST TENNESSEE, V. & G. RY. CO. et al.**

(Circuit Court, E. D. Tennessee. November 26, 1894.)

**1. RAILROAD MORTGAGE—FORECLOSURE — RIGHTS OF BONDHOLDERS TO BE ADMITTED AS DEFENDANTS—COLLUSION OF TRUSTEE.**

Where, in a suit by minority railroad bondholders to foreclose the mortgage, the trustees of the bondholders file a cross bill for the same purpose, it is not such evidence of collusion by the trustee with the minority holders that the court will, on that ground, permit the majority of the bondholders, who oppose foreclosure, to be admitted as defendants.

**2. SAME—CONTENTION AS TO POWER OF MAJORITY OF BONDHOLDERS.**

It being contended, however, by the majority of the bondholders, that under a proper interpretation of the mortgage there can be no foreclosure without permission of a majority of the holders, they should be permitted to come in, as defendants, to maintain this contention.

**3. SAME—PETITION TO BE ADMITTED TO ANSWER—USE AS ANSWER.**

A petition to be admitted as defendants in a suit should be accompanied by the proposed answer, but, not being so accompanied, the petition may be allowed to stand as the answer, all impertinent matters being stricken therefrom.

**4. SAME—DEFENSES TO FORECLOSURE SUIT.**

In an action to foreclose a mortgage on the stock of a railroad, given to secure bonds, the allegations of the answer of a majority of the bondholders, who are opposed to foreclosure, that the value of the stock is abnormally depressed by the unusual financial condition; that there is good ground to anticipate substantial enhancement of the value; that complainants have tried to depress the price of the shares by false reports and harassing suits, and are bringing the suit in the interest of a rival railroad, that it may purchase the shares while the price is depressed,—present no defense.

**5. SAME—CONSTRUCTION—RIGHT TO FORECLOSE.**

Under the provisions of a mortgage that after default in interest for six months the trustee may, and, on demand of a majority of the bonds secured, shall, declare the principal of the bonds due and payable; that in either of such cases the trustee may, and on request of such majority shall, proceed to sell the mortgaged stock at public auction; pro-

vided, however, that at any time prior to the sale of said securities the holders of a majority of the bonds may notify the trustee that they desire to revoke the declaration that the principal is due, and he shall take no further steps to sell said securities unless and until another default, and that such provision shall relate to and govern any succeeding default,—it is only a summary sale by the trustee, under the power given by the mortgage, that can be prevented by a majority of the bondholders, and a suit to foreclose for default in interest may be maintained notwithstanding the opposition of such majority.

6. SAME—DUTY OF TRUSTEE.

Under the provision of a mortgage of railroad stock, for the equal pro rata benefit of all the holders of bonds secured thereby, that the voting power of the shares shall, after default in interest for three months, be exercised by the trustee, it being preserved to the mortgagors till that time, the trustee is not bound to vote according to the wishes of the majority of the bondholders, but he is to exercise his judgment and discretion for the interest of all the bondholders.

7. SAME—PLEADING—ALLEGATIONS OF OWNERSHIP.

In a suit to foreclose a mortgage, for default in payment of interest coupons on the bonds secured, the allegation that the coupons maturing at a certain time are "due and wholly unpaid, together with interest thereon, to your orator and other holders of said bonds," is a sufficient allegation of ownership.

8. SAME—DECREE NISI.

In a suit to foreclose for default in payment of interest coupons, it is not necessary, before a nisi foreclosure decree, that the bonds, with coupons, be produced, or that each claimant of a bond or of unpaid interest should identify himself as the owner of bonds or unpaid coupons, but it is only necessary that a default, and the amount thereof, appear.

Suit by Devereux Toler and others against the East Tennessee, Virginia & Georgia Railway Company and others, for foreclosure of a mortgage.

The complainant Toler is the holder of 5 bonds, of \$1,000 each, issued by the East Tennessee, Virginia & Georgia Railway Company, the Richmond & Danville Railroad Company joining as co-obligor. These bonds are part of a series of 6,000, each for \$1,000, and are known as the "East Tennessee, Virginia & Georgia Railway Company's Extension Five per Cent. Mortgage Bonds." They bear date as of February 1, 1890, and mature in 50 years, and bear interest at 5 per cent., payable semiannually, for which interest the usual coupons are attached. The bill alleges that the coupons maturing August 1, 1893, February 1, 1894, and August 1, 1894, have not been paid; that the total amount of interest in default is \$450,000, which sum he alleges is due to the holders of said bonds. To secure these bonds the East Tennessee, Virginia & Georgia Railway Company and the Richmond & Danville Company executed an indenture conveying in trust to the Central Trust Company of New York 112,301 shares of the capital stock of the Alabama Great Southern Railway Company, Limited, and 5,001 shares of the Cincinnati, New Orleans & Texas Pacific Railway Company. Toler's bill was filed for a foreclosure of said mortgage, and is for the equal benefit of all holders of bonds, similarly situated, who may join in the bill as complainants. The defendants to this bill were the two obligated corporations and the Central Trust Company. He charges that both of the said railroad corporations are wholly and utterly insolvent, that neither is now operating any railroad nor engaged in any business, that the most of the property of each company has been sold by judicial foreclosure of mortgages upon their several lines of railroad, and that the remaining assets of the East Tennessee Company are in the hands of receivers of this court, awaiting final decree. He also alleges that the shares held by said trustee are wholly inadequate in value to pay off the said bonds, and that the income upon said shares is wholly insufficient to pay off the arrearages of interest, or provide for future installments. He charges that the Central Trust Company has

been requested to file a bill for the foreclosure of said trust, and has failed to bring such suit. The two railroad corporations made defendants filed separate answers, confessing the charges of the bill in all particulars. The trust company likewise answered, admitting the trust, the insolvency of the debtor companies, the default in interest, and the inadequacy of the trust to secure the bonds. Subsequently John Greenough, James Swan, and George Coppel and Frederick Taylor, claiming to own or represent more than 2,000 of said bonds, were permitted to join as complainants. After filing its answer the Central Trust Company, by leave of the court, filed a cross bill, making substantially the same allegations as to the trust, the default in interest, the insolvency of the obligors to the bonds, the inadequacy of the shares held by it to pay off and satisfy the principal of the bonds, and praying a foreclosure of the mortgage by sale of the shares assigned for the security of the bondholders. To this cross bill the complainant Toler and the two obligated railroad companies were made defendants. Answers were filed, and the case, as to the parties on the record, stood ready for a decree. At this stage of the cause, Henry A. Taylor, claiming to own and hold more than a majority of the bonds secured by said indenture, filed a petition in the pending case, setting out his interest under the mortgage, and praying to be admitted as a defendant to both the original and cross bill, with leave to answer and file a cross bill. Before this application had been disposed of the complainants and cross complainants each moved for a decree of foreclosure. The application of Taylor and others to be admitted as defendants, and the motion for a decree of foreclosure, came on and were heard together.

Henry Crawford and Humphrey & Davie, for complainants.

Butler, Stillman & Hubbard (A. H. Joline, of counsel), for the Central Trust Co.

Lawrence Maxwell, Mr. Kittridge, and J. M. Dickinson, for Taylor and others.

LURTON, Circuit Judge (after stating the facts as above). The primary question for decision arises upon the application of Henry A. Taylor, who claims to be the owner of a majority of the bonds secured by the mortgage sought to be foreclosed, to be made a defendant to both the original and cross bill. To this application the complainants object, and insist that he ought not to be allowed to intrude himself into the litigation, over their objection. If Taylor sought to become a party complainant for the purpose of aiding in the foreclosure, it would be difficult to see how he could be denied, inasmuch as the bill is filed for the benefit of all holders of bonds, "similarly situated, and who may choose to join herein, and take the benefit of this suit, and contribute to the expenses thereof." But this is not the purpose of petitioner. His object, as declared on the face of his petition, is to resist foreclosure, and to set up rights, as the holder of a majority in amount of said bonds, inconsistent with the relief which the complainants ask. If he is to become an actual party to the suit, it must be as a defendant. That a stranger to a suit will not be permitted, on his own application, and over the objection of the defendant, to become a defendant, is a well-established general rule, to which there are but few exceptions. Such a practice is unknown to courts of equity. *Shields v. Barrow*, 17 How. 145; *Stretch v. Stretch*, 2 Coop. Ch. 140; *Anderson v. Railroad Co.*, 1 Fed. Cas. p. 842; *Chester v. Association*, 4 Fed. 489; *Ex parte Printup*, 87 Ala. 148,

6 South. 418; *Fost. Fed. Prac.* § 201. In the exceptional cases a defendant can only be added to those named as such in the bill by consent of the complainant, or upon order of the court requiring the bill to be so amended on penalty of dismissal for want of proper parties. *Payne v. Parker*, 1 Ch. App. 327. When the suit is conducted by some of a class for the benefit of all having identical interests, or by a trustee under a trust or mortgage for the equal security of a number of unnamed beneficiaries, all who have such common interests and rights are parties by representation; and as quasi parties are bound, in the absence of fraud, by the decree rendered in the cause. Where the trustee is vested with the legal title, and is given the usual powers incident to modern railway mortgages, those for whom he holds will be bound by what is done against him as well as by what is done by him. Where such a trustee is made a party to a foreclosure suit by bondholders suing in behalf of themselves and others similarly situated, the bondholders who do not join in the suit are not necessary parties. So, if such trustee files a foreclosure suit, whether it be by an original or a cross bill, it is not necessary that the beneficiaries should be made defendants. Indeed, such a practice would in most cases be absolutely impracticable, by reason of the impossibility of bringing all such holders of bonds before the court. In all such cases, whether the trustee be a complainant or a defendant, he stands for and represents all the beneficiaries who, though not actual parties, will be concluded by the decree, unless it is impeached for fraud or collusion between him and the adverse party. These principles are well settled. *Kerrison v. Stewart*, 93 U. S. 155; *Shaw v. Railroad Co.*, 5 Gray, 171; *Campbell v. Railroad Co.*, 1 Woods, 376, Fed. Cas. No. 2,366; *Campbell v. Watson*, 8 Ohio, 500; *Shaw v. Railroad Co.*, 100 U. S. 605; *Clyde v. Railroad Co.*, 55 Fed. 446; *Forbes v. Railroad Co.*, 2 Woods, 334, Fed. Cas. No. 4,926.

But it must be obvious that one who is a party by representation, and therefore a quasi party, is not a stranger, in the sense of the rule I have stated. If he is to be bound and concluded by the decree, he is not a stranger to the proceedings. What, then, is the rule where one who is a quasi party asks to be made a defendant to a proceeding nominally conducted for his benefit, as one of the common beneficiaries? In *Kerrison v. Stewart*, cited above, Chief Justice Waite, after laying down the general rule that the trustee is in court for and on behalf of all the beneficiaries, and they, though not parties, are bound by the judgment, added:

"Undoubtedly cases may arise in which it would be proper to have before the court the beneficiaries themselves, or some one other than the trustees, to represent their interests. They then become proper parties, and may be brought in or not, as the court, in the exercise of its judicial discretion, may determine." 93 U. S. 160.

The problem to be solved, then, is to determine under what circumstances such a quasi party should be permitted to actively intervene. Where the purpose is to come in solely to participate in the benefits of the decree, there is little difficulty. Such inter-



veners are admitted, as a matter of course, in all cases where the court has jurisdiction of the res, or where a fund is to be distributed, or where the claims enforced must be proven, or where one beneficiary, to increase his own share, wishes to contest the claim of another upon the fund. Where the suit is by some of a class for the benefit of all similarly situated, and the common trustee is a defendant, or where the suit is by the common trustee, and relates to the mortgage or trust deed, the separate beneficiary or bondholder will not be suffered to intervene for the purpose of defending the common interests unless he alleges and shows that the trustee is incompetent, or for some cause cannot and is not faithfully representing the cestui que trust. The rule, as stated in Foster's Federal Practice, at section 201, is this:

"In suits brought by or against trustees, or otherwise affecting trust property, the beneficiaries of the trust, such as bondholders, will frequently be allowed to intervene for the purpose of protecting their interests; but ordinarily the right to intervene will be denied them, in the absence of fraud, neglect, inability, collusion, or bad faith by the trustee."

This rule is well supported by authority. *Williams v. Morgan*, 111 U. S. 698, 699, 4 Sup. Ct. 638; *Richards v. Railroad Co.*, 1 Hughes, 28-36, Fed. Cas. No. 11,771; *Anderson v. Railroad*, Fed. Cas. No. 358; *Clyde v. Railroad Co.*, 55 Fed. 446; *Richter v. Jerome*, 123 U. S. 233, 8 Sup. Ct. 106; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182; *Skiddy v. Railroad Co.*, 3 Hughes, 320, Fed. Cas. No. 12,922; *Jones, Corp. Bonds*, § 398; *Beech*, Mod. Eq. Prac. § 574. Now, the petitioner here does not show any fraudulent, collusive, or wrongful conduct upon the part of the trustee. Upon the contrary, the conduct of the trustee, as exhibited on the pleadings and through the filed exhibits, indicates the most thorough impartiality between contending factions of bondholders. I cannot shut my eyes to the fact, which appears throughout these pleadings, that the nominal parties to this controversy are not the real parties in interest. Behind the complainants and the minority of bondholders, who desire a foreclosure of this mortgage, is a great and powerful railroad corporation, who, for a purpose of its own, may, and doubtless does, desire, through ownership of the mortgaged shares, to control the operation of the two lines of railway dominated by the shares held now by the trustee. Behind the petitioner, Taylor, is another powerful railway corporation, which, through the ownership of a bare majority of the bonds secured by this trust, seeks to dominate the same two lines of railway by means of the voting power vested in the trustee. The original bill of complaint was framed so as to apply for interlocutory relief to restrain, pending the litigation, any exercise of the voting power by the trustee which would operate to change the status or the management of the two dominated companies; it being alleged that the trustee had given its proxy, to vote the trust shares, to persons indicated by the holders of the majority in amount of the bonds. The bill contains many allegations affecting the title, purpose, conduct, and motives of the person or persons holding such majority, and the injurious character of the plans of

such holders upon the interest of the minority. Upon application for a temporary injunction, the holders of a majority of the bonds and the trustee appeared by counsel, and were fully heard in argument. I then declined to interfere with the discretion of the trustee as to how it should exercise the voting power, which all the beneficiaries had agreed should be lodged with it upon a default in payment of interest. I was not at all satisfied that a *prima facie* case was made which would justify me in substituting my judgment for the judgment of the trustee as to how that voting power should be exercised. That the trustee, on demand of a large minority of bondholders, should have filed a cross bill asking foreclosure, seems to me no evidence whatever of collusion, in the fraudulent sense of the term, with the minority holders. Whether it was entitled to foreclose or not, it should not have discharged its duty to the minority demanding foreclosure without submitting to a court of equity the question of foreclosure. For its own protection it could not have done less. It did not and does not seek to exclude Taylor, as a claimant of peculiar rights under the mortgage, from becoming a party. It perhaps could not have made him a party to its cross bill, because that would be to bring in a new party. Whether, under any circumstances, it is admissible to bring in a new party by cross bill, is possibly an unsettled question, though Mr. Justice Curtis, in *Shields v. Barrow*, 17 How. 145, expressed a very decided opinion that such practice was unknown and indefensible. Whether that point was authoritatively decided in that case is debatable, and there are reputable authorities which take a contrary view. *Beech*, Eq. Prac. § 436, and authorities cited. But, however that may be, the trustee, in its answer to the original bill, asked that Taylor and his associates might be made defendants, and it has filed its written consent that he shall now be added as a defendant. The conduct of the trustee, as shown by the record, utterly contradicts the bare intimation of collusion found in the petition of Taylor, unsupported by any statement of facts from which fraudulent collusion could be inferred. Neither fraud, collusion, neglect, nor bad faith being sufficiently charged on the part of the trustee, Taylor should not be permitted to become a defendant unless some further reason is shown. The strength of his application lies in the fact that he sets up rights under the mortgage, accruing to him as a holder of a majority in amount of these bonds, which are inconsistent with the right of foreclosure presented by bill and cross bill. His insistence, in substance, is that there can be no foreclosure until a majority of the beneficiaries demand it; that the indenture in question created a peculiar trust, under which peculiar rights and powers are vested in the holders of a majority of the bonds secured thereunder. He also insists that the trustee has no authority, without his consent, as the holder of a majority of the bonds, to foreclose under the powers contained in the mortgage, nor any duty, power, or right to apply to a court of equity for a foreclosure. I am, as will hereafter be more fully disclosed, utterly unable to attach any great weight to this interpretation of the mortgage. But the question is not

whether the mortgage will or will not bear the interpretation which the intervener wishes to support. If this position is right, then there ought not to be a foreclosure against his will, for that would operate to destroy a most valuable property right. This contention between the bondholders, as to their rights under the common trust, is one which the trustee cannot and ought not to undertake to represent. It is a contention *inter se*. The trustee cannot fairly represent both parties, and should not undertake to represent either. In such case it is proper that the *cestuis que trustent*, or a sufficient number of them, should be made parties. *Payne v. Parker*, 1 Ch. App. 327.

The majority assert an interpretation of this deed which, if sound, will prevent foreclosure under the present proceedings. Where there are differences between beneficiaries with respect to their rights, arising from different interpretations of the instrument under which all claim, the trustee should bring before the court representatives of each of the contending factions, that the views of each may be fairly presented and regularly adjudged. Neither will one set of the beneficiaries be permitted to maintain a bill for the interpretation of the trust without bringing before the court some of the class who assert rights inconsistent with the relief sought by the complainant. All have common interests under such a deed, but, if some of the *cestuis que trustent* claim rights inconsistent with the common interests of all, it would be grossly inequitable that they should be concluded by the decree, without opportunity to be heard. These principles are too obviously sound to need support of direct authority. With respect to this controversy the intervener is not, and cannot be, represented by the common trustee. He asked to be allowed to intervene that he may represent himself and his interests, as involved in the interpretation of this deed. I think that he should be made a defendant, under these circumstances, and that it would be flagrant injustice to exclude him, however lightly I might regard his contention. I may be wholly in error as to the proper interpretation of his rights. If so, he should be placed in a situation where my action can be reviewed by the court of appeals. To exclude him upon the ground that the deed will not bear the interpretation upon which he insists would leave him no right of review or appeal. It is true, he might present his question by an original bill, and thus obtain a standing. That would operate only to still longer delay the settlement of this question, and, unless he could obtain an injunction, might leave him nothing to litigate over after he had successfully asserted his view.

Another difficulty confronts me. It is this: Taylor has not accompanied his application with a copy of his proposed answer. He has had abundant time to do this, as his petition was filed more than a month before his application came on to be heard. An application to be allowed to answer and defend and to file a cross bill should be accompanied by the proposed pleading. The analogy between such an application and an application to file an amended or supplemented answer, or to set aside a *pro confesso*

and be allowed to answer, is most obvious. In either of the analogous cases the application should be by petition accompanied by a full copy of the proposed pleadings. 1 Daniell, Ch. Pl. (4th Am. Ed.) 781; Beech, Mod. Eq. Prac. § 394. The object in requiring an application of this nature to be accompanied by a full answer is—First, not to delay the complainant in his suit; and, second, that the court may see that a real defense is presented. The second purpose is probably obviated by the statements of the petition as to the proposed defense. The first objection can only be overlooked by permitting the petition to stand for an answer to both the original and cross bill. To permit the petitioner to be made a defendant is not a matter of strict right. It rests upon the judicial discretion of the court, and that discretion should only be exercised when thereby no substantial injury is done the complainant, and no unreasonable delay will result. The answer should not be one subject to exception for impertinence. Any issue tendered or irrelevant matter stated in a pleading, which is immaterial, is impertinent, and, as such, should be stricken out. Such an application should be accompanied by an answer showing circumstances which repel the notion of any attempt to evade the justice of the case, or to set up immaterial or ingeniously contrived defenses. “Nothing should be permitted to remain in an answer which is neither called for by the bill nor material to the defense.” Beech, Eq. Prac. § 408; *Stafford v. Brown*, 4 Paige, 88. In the case last cited, Chancellor Walworth said “that when new matter not responsive to the bill was stated in the answer, if such matter was wholly irrelevant, and formed no sufficient ground of defense, the complainant might except to the answer, for impertinence, or might raise the question on the hearing.” “Facts not material to the decision are impertinent, and, if reproachful, they are scandalous. The best rule to ascertain whether matter be impertinent,” said Chancellor Kent, “is to see whether the subject of the allegation could be put in issue or be given in evidence between the parties.” He adds: “The court will always feel disposed to give the answer a liberal consideration on this point of matter irrelevant, and to consider whether it can have any real or proper influence upon the suit, having regard to the nature of it, as made by the bill.” *Woods v. Morrell*, 1 Johns. Ch. 105. The court may disregard on the hearing all impertinent matters presented in a pleading, and all the evidence relating to such immaterial matters, where it has not been excepted to and stricken out. *Putnam v. Ritchie*, 6 Paige, 397. It is obvious that, when an appeal is made to the judicial discretion of the court to be admitted as a defendant, the court may scan the pleading presented, and strike from it all impertinent and scandalous averments. Applying the test for impertinence stated by Chancellor Kent to the petition which is suffered to stand for an answer, it becomes most evident that much contained in it should be stricken out as furnishing no ground of defense, having regard to the nature of the case made by the bill. The averments contained in the original petition are legitimate considerations to be urged upon the court. They

present questions arising upon the face of the trust deed for interpretation.

The impertinent matter is found in an amended petition filed by Taylor on the hearing, and after complainants had, by leave of the court, stricken out of their bill many immaterial and irrelevant averments of fact touching the title, purposes, and motives of the holders of a majority in amount of said bonds. The abandoned parts of the original bill bore mainly upon an application for an interlocutory injunction, which has been refused. Taylor's original petition took issue upon the averments thus abandoned and stricken out. The effect of this action by the complainants was to leave their bill a simple bill for foreclosure by reason of defaulted interest. No issues of fact were left, upon which Taylor proposed to take issue. Under these circumstances he asked leave to file an amended petition, which, upon examination, presents numerous questions of fact, which, if material and relevant, will undoubtedly elicit a vast amount of evidence. But for the very high character of the counsel, and their very eminent abilities, one might suspect that time was of the essence of the application, and delay desired as a result of such amendments. This amended petition alleges, and offers to show: (1) That the trust estate has been abnormally depressed by the unusual financial depression which is alleged to exist, and by former mismanagement of the railroad properties it represents. (2) That there is good ground to anticipate that under proper management a substantial enhancement of the value of said trust shares will be the result. (3) Taylor alleges and proposes to show that complainants are not seeking a sale in good faith, or to realize on any investment, but that the suit is brought in the interest of the Southern Railway Company, alleged to be a rival line to the line composed of the two companies, whose management is controlled by the voting power of the trust shares; that the suit is controlled by said Southern Railway, and conducted by its counsel, and that its object is to bring the trust shares to a speedy sale in bulk, for cash, on a depressed market, that it may acquire the shares at a low price, and thereby dominate the said controlled lines. It charges that it (the Southern Railway Company) has endeavored to depress the price of said shares by spreading through the public press and otherwise the report that all questions in this case have been decided, and that a speedy sale of the trust estate would be had. (4) That complainants have caused certain alleged frivolous and harassing injunction suits to be filed for the purpose of interfering with the management of the Alabama Great Southern Railway Company, and had not, in said suits, properly and fully stated all the facts appertaining to the controversy, and had thereby secured injunctions restraining the railway company behind the intervener from securing possession of the management of said road. Now, it is manifest that, if the minority bondholders have a legal right to have a mortgage foreclosed, which is hopelessly in default, none of these matters offer a material defense. On petitioner's own showing, there is a struggle between those who hold a bare majority of these bonds

and those who hold somewhat less than a majority. The majority in the interest of one railroad company which wishes to control property represented by the trust shares seem to be satisfied with the status of the trust, inasmuch as the trustee has deemed it most prudent to allow the majority to exercise the voting power of the trust shares. The minority, receiving no interest and exercising no control, naturally seek relief through foreclosure. That they have found, or expect to find, a customer in another company, for the trust shares, is most likely. If their motive is to sell to such customer, it is, in a legal sense, unimportant. If they have sought to depress the market by the means described, their conduct is reprehensible; but I know of no authority for saying that thereby they have deprived themselves of their right of foreclosure, if any they have. Like defenses were interposed in *Morris v. Tuthill*, 72 N. Y. 575. The suit was one to foreclose a mortgage. The court held that:

"The facts that the assignor of a mortgage and his assignee acted in concert with the view, unnecessarily to harass and oppress the mortgagor, and with intent to prevent payment, to the end that the equity of redemption might be foreclosed, and they become purchasers for less than the value, do not constitute a defense to an action to foreclose a mortgage. So, also, the facts that the assignee took title from motives of malice, and solely with the view to bring an action, and that the assignor assigned from a like motive, and without consideration, furnish no defense, and do not impeach plaintiff's title. It is sufficient to sustain the action, that the mortgage debt is due, has been transferred to, and is owned by, plaintiff; and the mortgagor can only arrest the action by paying or tendering the amount due."

See, also, *Davis v. Flagg*, 35 N. J. Eq. 493.

Whether complainants are conducting this suit from good or bad motives, for their own benefit or for the benefit of another, is immaterial. "It is no defense to a legal demand instituted in the mode and according to the practice of this court that the complainant is actuated by personal or improper motives." *McMullen v. Ritchie*, 64 Fed. 253; *Forrest v. Railroad Co.*, 4 De Gex, F. & J. 131; *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 319. The motive of a suitor cannot be inquired into. *Ex parte Wilbran*, 5 Madd. 2; *Thornton v. Thornton*, 63 N. C. 212. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings. *Macey v. Childress*, 2 Coop. Ch. 442. The general character of these averments seems to come within the ruling of *Judge Hammond in Lafayette Co. v. Neely*, 21 Fed. 744, where he decided that "epithetic" fraud is not sufficient to ground an action upon. Like defenses were set up in *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 6 Fed. 110, 111, and in *County of Leavenworth v. Chicago, R. I. & P. R. Co.*, 25 Fed. 229. In the first case cited the court used the following language, which is applicable to much of the complaint made by Taylor:

"There are allegations to the effect that the object of Blair and Dodge and their associates was to obtain ultimate control of the mortgaged property, but the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public, and open to all bidders. Confirmation of the sale by the court must, of necessity, also be open

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to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as might involve a sacrifice of the property, or injury to the parties interested."

The conclusion on this aspect of the case is that all those parts of the amended petition indicated by the foregoing observations afford no defense to the bill of complainants, and none to the cross bill of the trustee. They will therefore be stricken out as impertinent. The petition will then be filed, and stand for an answer to both the original and cross bill. No ground has been stated for a cross bill, and application to file one is refused.

This brings me to the motion of the complainants and cross complainant for a decree of foreclosure nisi. It has been suggested by counsel for Taylor that the indenture in question constitutes a pledge, and is not technically a mortgage. The shares held by the trustee to secure these bonds are not held in pledge. To constitute a pledge, in the legal sense, the thing pledged must be delivered to the pledgee. *Christian v. Railroad Co.*, 133 U. S. 241, 10 Sup. Ct. 260. Here the creditors are not in possession of the shares. They are held by a third person, who is vested with the legal title, and holds under an instrument executed solely as a security for the bonds, containing power of sale and the other incidents of a mortgage. The indenture is styled a mortgage, and the bonds are called "Gold Mortgage Bonds." Whether a deed of trust, or technically a mortgage, is immaterial. The rights and remedies of the bondholders secured thereby are substantially the same. The contention of Taylor is that the remedy of foreclosure vested in the trustee by the instrument is subject to the absolute control of the holders of a majority in amount of the bonds secured, and is exclusive of any remedy through a court of chancery. With all due respect to the learned counsel, I must say that this position is wholly untenable. By article second of the mortgage it is provided: (1) That, after a default in interest continued for more than six months, the trustee may, and, upon demand of not less than a majority in amount of said bonds, shall, declare the principal of said bonds due and payable. (2) That "in either of such cases" the trustee may, and, upon request of a majority in amount of said bonds, shall, proceed to sell the said stocks, or any part he may select, at public auction. (3) The deed then proceeded as follows:

"It is expressly provided, however, that at any time prior to the sale of said securities, as hereinbefore set forth, the holders of a majority in amount of all the bonds secured by this indenture, at the time outstanding, may notify the said trustee, in writing, that they desire to revoke the declaration that the principal of said bonds is due, and shall take no further steps to sell said securities unless and until another default by the said parties of the first part; and all the provisions of this article shall relate to and govern any succeeding default by said parties of the first part."

The instrument contains no other provisions concerning a sale by the trustee, or through a judicial proceeding. A majority in amount of said bonds did demand that the trustee should declare the principal of said bonds to be due and payable, a default in payment of interest having continued for more than six months,

and the same majority also demanded that the trustee should proceed to foreclose by a sale of the shares. To this demand the trustee yielded, and published a declaration of maturity, and advertised a sale. Subsequently, and before the sale had been made, the same majority, under the express power conferred in the mortgage, required the trustee to revoke the declaration of maturity, and to proceed no further with the sale. In compliance, the trustee revoked the declaration that the principal of said bonds was due and payable, and abandoned the foreclosure sale. Thereupon the minority, through complainants, demanded that the trustee should file a bill in equity for a foreclosure, on account of default in interest. The trustee not at once complying, complainants filed the present bill.

If there is any proposition well settled in the courts of the United States, it is that limitations contained in a mortgage, restricting the right of foreclosure, must be strictly construed. The provisions of the second article, which have been substantially recited, apply only to the exercise of the summary power of sale vested in the trustee, and do not purport to be exclusive of all other remedy. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512; *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10; *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61; *Alexander v. Central R. Co.*, 3 Dill. 487, Fed. Cas. No. 166; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. 46; *Farmers' Loan & Trust Co. v. Winona & S. W. R. Co.*, 59 Fed. 957; *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221. If the provisions of the mortgage concerning foreclosure were subject to the construction that they are exclusive of all right to resort to a court of equity, then they would be invalid, as intended to oust the jurisdiction of the courts, which, by the uniform current of authority, cannot be done. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 143, 11 Sup. Ct. 512. Under the rule of strict construction, the provision requiring the trustee to "take no further steps to sell said securities" applies only to a summary sale under the power vested in it by the mortgage. It has no application to a proceeding begun by it in a court of equity to secure a judicial foreclosure. *Gurnee v. Patrick Co.*, 137 U. S. 141, 11 Sup. Ct. 34; *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 142, 11 Sup. Ct. 512. This mortgage was made to secure principal and interest, equally. It recites as its purpose that it is "for the equal, pro rata benefit of all the holders of the bonds secured thereby, without any preference or priority of one bond over another by reason of priority in time of issue or negotiation thereof, or for other cause, or of principal over interest, or of interest over principal." A default in the payment of interest is a breach of the obligation. The trustee and the complainants join in the averment that the coupons falling due August 1, 1893, February 1, 1894, and August 1, 1894, are due and unpaid. This default the two obligated railroad companies confess. Taylor does not deny the default, nor the insolvency of the mortgagor, nor the



inadequacy of the trust estate to fully secure the bondholders. He denies no single fact material to relief under the original or cross bill. His defense that no right of sale exists in favor of the defaulted interest, unless he shall consent, is without merit. The provisions which enable him to prevent a declaration of maturity as to the principal of the bonds is valid and clearly expressed, and he is entitled to its full benefit. His right to prevent a sale by the trustee to make good interest in default is valid, and his right is indisputable. Thus he can and has prevented any summary sale because of defaulted interest. More than that; if the mortgagors shall pay off and discharge the interest in default, there can be no foreclosure until further default. The full effect will thus be given to the provisions which are favorable to the holders of a majority of said bonds. The voting power of the trust shares was preserved to the mortgagors until there should be a default in interest, continuing for three months. After such default the mortgage provides that the "voting power shall be exercised by said trustee." That this voting power shall be exercised at the dictation of the holder or holders of a majority of said bonds has no foundation. The trustee must exercise judgment and discretion, having regard to the general interests of the trust. Where there are differences of opinion among the bondholders as to what their interests require, the trustee must judge between them. In such case "it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of the trust." *Shaw v. Railroad Co.*, 100 U. S. 612; *Bank v. Shedd*, 121 U. S. 86, 7 Sup. Ct. 807. But the trustee cannot blindly submit to the domination of the majority. He should be reasonably satisfied that the general interests of the trust will be best subserved by acting with the majority of the beneficiaries. In my opinion, this voting power is an element of value attached to the trust estate. It is not the peculiar property of any bondholder, or set of bondholders. Whatever value it has is for the equal benefit of all the beneficiaries, and any claim that it is exclusively for the benefit of the holders of a majority of the bonds has no foundation whatever. Its exercise was intrusted to the judgment and discretion of the trustee, and not to the will of one or many who may happen to own a majority of the bonds. The majority have no right to appropriate that power exclusively to themselves, or to require the trustee to exercise the power without regard to the interests of the minority. The majority have no right to employ the voting power as an instrument by which the rights of the minority shall be injuriously affected. "Where two or more persons have a common interest in a security, equity will not allow one or more to appropriate it exclusively to himself, or to impair its worth to others. Community of interest involves mutual obligation." *Jackson v. Ludeling*, 21 Wall. 622.

The point has been made that it has not been alleged or shown that complainants own any of the defaulted coupons. Complainants claim to own or represent more than \$2,000,000; par value, of

bonds. They allege that the coupons maturing August 1, 1893, February 1, 1894, and August 1, 1894, aggregating \$450,000, "are due and wholly unpaid, together with interest thereon, to your orator and other holders of said bonds." This is a sufficient allegation of ownership. The cross bill of the trustee seeks the same relief in behalf of all unpaid interest. A decree finding unpaid interest is justified by the allegations of either bill. It is not necessary that each claimant of a bond or of unpaid interest should, at this stage of a foreclosure case, identify himself as the owner of bonds or unpaid coupons. It is not necessary that the bonds with coupons should be produced before a nisi foreclosure decree. It is only necessary that it shall, at this stage of the cause, appear that there has been a default, and the amount of that default. This showing has been made. Should a decree of sale be made absolute, the holders of bonds can then be required to produce their bonds and coupons before a master, and all questions connected with the amount due each, and of ownership, can then be determined. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 150, 151, 11 Sup. Ct. 512. Such a decree is not to be regarded as final as to the debts entitled to share in the distribution, for any other creditor may challenge the debt when the claims are produced in the master's office for ascertainment and classification. The decree for a foreclosure only establishes that there has been a default in the payment of the three last installments of interest. It does not establish that that interest is due to any particular person. The debtor can prevent a sale by paying into the master's office the amount necessary to pay the interest in default. All proceedings will then be stayed until another default. *Railroad Co. v. Cowdrey*, 11 Wall. 479; *Whitaker v. Wright*, 2 Hare, 310; *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 150, 151, 11 Sup. Ct. 512. The right to a decree for unpaid interest is clear. The question has been fully discussed, and is emphatically decided in *Railroad Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. 10.

A decree nisi will be drawn as here indicated, requiring the mortgagors to pay into the registry of the court the amount of the defaulted interest, with interest from maturity of each installment. Such payment will be made on or before the expiration of 90 days from date of decree. In default of such payment, the shares held in trust will be sold for the foreclosure of the mortgage, principal and interest. I have no doubt but that the trust share should be held together, and sold as a block. The power of the shares, as a controlling majority, is clearly an element of great value. This, however, can be determined by offering the shares in small blocks, and then as a whole, and taking the bid which aggregates the larger sum. In case a sale is made, it must be a final foreclosure of the whole property, the purchase money taking the place of the trust shares. The distribution will be in satisfaction, pro rata, of all the bonds, principal and interest. This seems to be the practice, as settled in *Howell v. Railroad Co.*, 94 U. S. 466, and *Railroad Co. v. Fosdick*, 106 U. S. 68, 69, 1 Sup. Ct. 10. If the interest in

default is not paid by the day named, then each beneficiary will be entitled to a ratable proportion of the value of the whole trust estate,—that value to be ascertained by a public sale. No beneficiary can be required to submit to a partition. The general principles governing are fully elaborated in *Mason v. Mining Co.*, 25 Fed. 882. The case of *Swasey v. Railroad Co.*, 1 Hughes, 17, Fed. Cas. No. 13,679, was quite exceptional in its facts, and the partition there ordered was doubtless due to the necessities of the situation, owing to the fact that the state of North Carolina was not, and could not be, made a party defendant. This defect of jurisdiction, in an identical case, proved fatal to the case of the creditors in *Christian v. Railroad Co.*, 133 U. S. 241, 10 Sup. Ct. 260.

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FLORA v. ANDERSON et al.

(Circuit Court, S. D. Ohio, W. D. April 6, 1895.)

No. 4,770.

1. WILLS—CONSTRUCTION—POSSIBILITY OF ISSUE.

One L. devised a part of his estate in trust for his daughter E., for life, with remainder to the issue of her body surviving her. At the time the will was made E. was nearly 50 years of age, and had no legitimate issue. After E.'s death, one F., alleged to be an illegitimate child of E., claimed the remainder. *Held*, that it was conclusively presumed to be possible that E. might have issue at any time during her life, and it was not competent to prove that she was past the age of child-bearing, when L.'s will was made, for the purpose of showing that L. must have had in view an illegitimate child in creating the remainder to E.'s issue.

2. SAME—MEANING OF "ISSUE."

*Held*, further, that the devise to "issue" meant prima facie legitimate issue, and an intention to include illegitimate issue must be deduced from the language of the will itself, without resort to extrinsic evidence.

This was a suit by John W. Flora against John L. Stettinius, trustee under the will of Nicholas Longworth, Sr., and Larz Anderson and others, devisees of Joseph Longworth, for an accounting. The defendants excepted to a part of the bill for scandal and impertinency.

John W. Menzies, E. W. Hawkins, L. H. Swormstedt, and Foraker & Prior, for plaintiff.

William Worthington and Thomas McDougall, contra.

SAGE, District Judge. Nicholas Longworth, Sr., by his last will and by codicil devised two-twelfths of his estate in trust for the benefit of his daughter, Eliza L. Flagg, during her life, with remainder to the issue of her body surviving her; and, in default of such issue, to Joseph Longworth and John L. Stettinius. Eliza L. Flagg was married in 1850, in her forty-first year. At the date of the will she was 48 years and 3 months old; at the date of the codicil, 51 years and 1 month. The disposing language in the will with reference to the estates in remainder is not altered by the codicil, excepting as to the shares taken by the remainder-men in default of issue. The testator died on or about the 17th of February,

1863. The will was executed on the 25th of March, 1859, and the codicil on the 15th of January, 1862. Eliza L. Flagg died in 1891, not having had issue after her marriage. Her husband survived her. The plaintiff, claiming that he is the child of Eliza L. Flagg, born out of wedlock, before her marriage, and entitled to the above estate in remainder as "issue of her body surviving her," has brought this suit against John L. Stettinius, the trustee under the will, and the devisees of Joseph Longworth, seeking an accounting, etc. The case is now before the court upon an exception filed by Larz Anderson, executor and trustee under the will of Longworth, and by other defendants. The exception is for scandal and impertinency, and is directed against the part of the bill found in paragraph No. 6, and referring to Eliza L. Flagg, reading as follows: "And it was also well known to the said Nicholas Longworth, Sr., at the time of making said will and codicil, that she was past the age of child-bearing, and that she never could thereafter have issue of her body." In support of the exception the point is made that in matters relating to the character and devolution of estates there is a conclusive presumption of law that there is no limitation during life to the possibility of issue, and that the question whether a particular person was in fact incapable of having issue when an instrument was made or took effect is not open to investigation. The reasons stated by counsel for the proposition are: First, that light upon the subject can be obtained only by investigations of the most private and delicate character, and of a kind which can be tolerated in a court of justice only under stress of overwhelming necessity; second, that such light as could be so obtained would be uncertain and unreliable; that the argument of the complainant, indicated by the passage in the bill excepted to, will be that it must be predicated of all women that at a certain age, to wit, before they have completed their 50th year (for Mrs. Flagg was not 50 years of age when this will was made), they have ceased to have capacity to bear children. That this proposition is untrue is supported by the following citations: 2 Tayl. Med. Jur. (3d Ed.) pp. 294-300, c. 73; Whart. & S. Med. Jur. §§ 199, 200; Beck, Med. Jur. (12th Ed.) pp. 294-299, 668-672. In support of the proposition that the presumption of law is conclusive, reference is made to the following citations: Section 34 of Littleton on Tenures, where, treating of an estate tail after possibility of issue extinct, it is said (Co. Litt. 28b; 1 Thom. Co. Litt. 550):

"And note that no one can be tenant in tail after possibility of issue extinct but one of the donees, or the donee in special tail. For the donee in general tail cannot be said to be tenant in tail after possibility of issue extinct, because always during life he may by possibility have issue which may inherit by force of the same in tail."

Commenting upon the preceding section, relating to the same subject, Lord Coke says (Co. Litt. 28a; 1 Thom. Co. Litt. 551):

"But if a man giveth land to a man and his wife, and to the heirs of their bodies, and they live until each of them be an hundred years old, and have no issue, yet do they continue tenant in tail, for that the law seeth no impossibility of having children."

So, also, Littleton, in section 36 (Co. Litt. 30b; 1 Thom. Co. Litt. 569), says, concerning the right of dower, which the wife could have only in those lands of her husband which could be inherited by her issue, if any, born of him, that this right exists where a man seised in fee simple of fee tail general or as heir in special tail marries, and his wife survives him, "whether she has issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband." See, also, Litt. Ten. § 53, and Co. Litt. 40a; 1 Thom. Co. Litt. 579,—where it is said:

"Albeit the wife be an hundred years old, or that the husband at his death was but four or seven years old, so that she had no possibility to have issue by him, yet, seeing the law sayeth that if the wife be above the age of nine years at the death of her husband she shall be endowed, and that women in ancient times have had children at that time, whereunto no woman doth now attain, the law cannot judge that impossible which by nature was possible. And in my time a woman above three score years old hath had a child, and 'Ideo non definitur in jure.' And for the husband's being of such tender years he hath habitum, though he hath not potentiam at that time; and therefore his wife shall be endowed."

In *Jee v. Audley*, 1 Cox, Ch. 324, the testator bequeathed £1,000, to be invested, and the income paid to his wife for life, and at her death the principal to be paid to Mary Hall and the issue of her body, begotten and to be begotten, and in default of such issue to the daughters then living of John Jee and his wife, Elizabeth. The testator survived his wife. At his death John Jee and his wife were each over 70 years of age, and Mary Hall was over 40 years of age and unmarried. It was contended under these circumstances that the testator must have contemplated the daughters then living of John Jee and his wife, and therefore the bequest was good. But Lord Kenyon, M. R., held that the bequest could not be sustained, unless the law could conclusively presume that no more daughters could be born to the Jees; that no such presumption could be made; and that the bequest was therefore void. Vice Chancellor Malins, in *Re Sayer's Trusts*, L. R. 6 Eq. 319, where the same question arose, refused to receive evidence as to the age of the woman as bearing upon the possibility of her becoming the mother of a child. To the same effect was the ruling made by Chitty, J., in 1888, in *Re Dawson*, 39 Ch. Div. 155. *List v. Rodney*, 83 Pa. St. 483, was a suit to enforce specific performance of a contract for the sale of real estate, where the title was good except for the possibility that a woman over 80 years of age might have children. The court refused to force the title upon the purchaser. In *Macomb v. Miller*, 9 Paige, 265, under similar facts, specific performance was decreed, but only because the parties to the suit had stipulated upon the record, as matter of fact, that the woman could not by possibility have other children. This case was affirmed in 26 Wend. 229, where, on page 234, is to be found a note giving an account of sundry cases of births late in life. See, also, *Lawson on Presumptive Evidence* (sections 302, 303), where it is stated that no case can be found in America wherein a court has presumed a woman to be past the age of child-bearing. See, also, 1 Jarm. Wills, \*292 et seq.; 2 Jarm. Wills, \*223.

Counsel in argument state another consideration to show how impossible the law should be otherwise. Suppose it be established by evidence that a testator, who has used language like that here in question, believed when he made his will that the life tenant never could have issue. Suppose, also, that the testator was wrong in his belief, and that the life tenant afterwards did have issue. What meaning then is to be given to the will? If the belief of the testator can be ascertained by such inquiry outside of the will, and is to control, the words of the will would be given an effect exactly contrary to their natural and only ostensible meaning on the face of the will. Again, wills take effect only upon the death of the testator. Suppose, when a testator makes his will, he believes that the life tenant may have issue, but that afterwards this belief was reversed, and continued to be reversed until his death, and these facts were proven, what construction should the will receive? Or suppose these conditions reversed, what would be the effect? What security could there be in dealing with titles if estates apparently given by the words of the will could be divested or diverted by extraneous proof of a contrary intention on the part of the testator?

The next proposition is that the intent to include illegitimate children in a gift to "issue" generally must be gathered from the will itself. In *Cartwright v. Vawdry*, 5 Ves. 530, it was held that it is impossible in a court of justice to hold that an illegitimate child can take equally with lawful children upon a devise to children. This case was followed in *Wilkinson v. Adam*, 1 Ves. & B. 422, where the court said:

"The rule cannot be stated too broadly that the description 'child,' 'son,' 'issue,' every word of that species, must be taken *prima facie* to mean legitimate child, son, issue."

In that case, Lord Eldon, who prepared the opinion, further said:

"In all the cases that I have seen, having relation to this question, the illegitimate children that were to take must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence dehors, read or attempted to be read with a view to establish, not out of the contents of the will, but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case is supposed to rest upon any evidence out of the will, except that which establishes that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed; my opinion being that, taking the fact as established that there were children who had gained the reputation of being his children, it does not necessarily appear in the will itself that he intended these children. We may conjecture that he meant illegitimate children if he did not marry, yet, notwithstanding that may be conjectured, the opinion of the court was, as mine is, that where an unmarried man, describing an unmarried woman as being dearly beloved by him, does no more than make a provision for her and her children, he must be considered as intending legitimate children, as there is not enough upon the will itself to show that he meant illegitimate children; and my opinion is that such intention must appear by necessary implication upon the will itself. With regard to that expression, 'necessary implication,' I will repeat what I have before stated, \* \* \* that in construing a will conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention that an intention

contrary to that which is imputed to the testator cannot be supposed. \* \* \* The description of a son, child, etc., means *prima facie* legitimate son, etc.; and all the cases from the passage in Lord Coke, establishing that a bastard may take by purchase, if sufficiently described, amount to no more than that he must make that out upon the will itself."

To the same effect, see *Shearman v. Angel*, Bailey, Eq. 351; *Warner v. Warner*, 15 Jur. 141; *Harris v. Lloyd*, Turn. & R. 310.

In *Harris v. Lloyd*, Lord Eldon said that illegitimate children were entitled under the description of "children" in the will, the intention not being sufficiently apparent upon the face of the will; and added:

"I have not the least doubt that the testator meant illegitimate children, but I am clearly of the opinion that there is not enough upon the face of this will to authorize me to carry that intention into effect."

See, also, *Bagley v. Mollard*, 1 Russ. & M. 581; *Brower v. Bowers*, 1 Abb. Dec. 226.

The question has been directly decided in the same way by the supreme court of Ohio in the case of *Gibson v. McNeely*, 11 Ohio St. 131. There the testator devised property to the issue of Nancy Wilson, his niece. At the date of the will (1844) she was a woman of advanced age, unmarried, and had living an illegitimate daughter, 28 years of age, who was reputed her child. The court held that that child could not take under the term "issue." Judge Scott, who announced the opinion, said:

"It is clear that, according to the rule of the common law, a gift to children, sons, daughters, or issue, imports *prima facie* legitimate children or issue, excluding those who are illegitimate; and that, 'in order to let in the illegitimate children under a gift to children, it must be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken.' 2 Jarm. Wills, 140; *Cartwright v. Vawdry*, 5 Ves. 530. There is nothing apparent on the face of the will, in this case, or in the facts existing at the time it was made, to rebut this *prima facie* presumption of law. The mother of Mrs. Gibson was then in full life, and the testator might well have contemplated her subsequent marriage."

The court held, as the result of the application of the doctrines stated in the opinion in the case, that Mary Ann Gibson, being the illegitimate daughter of Nancy Wilson, took nothing under the will as the "issue" of her mother, and that under the Ohio statute of descent then in force she could not inherit from her mother's brother, nor from his daughter.

Counsel appeal to the expression in the opinion that there was nothing apparent on the face of the will, nor in the facts existing when it was made, to rebut the *prima facie* presumption of law, as warranting the inquiry they would base upon the passage in Longworth's will, to which the defendants except. There are two answers to this proposition, each conclusive. First. The authoritative statement of the decision is, under the rule of the supreme court of Ohio, to be found in the syllabus,—which is critically examined and formally passed upon by the court,—while the judge who prepares the opinion is alone responsible for what it contains; and the syllabus states clearly and without qualification the point

decided to be that the illegitimate daughter could not inherit under the will as the "issue" of her mother, nor could she inherit collaterally from her mother's niece. Second. The construction of words used in a will cannot be varied by evidence of actual intention. 1 Jarm. Wills, 726, and citations. The state of facts—that is, the circumstances—existing at the date of the will is proper to be regarded, and evidence as to the condition of the testator's property, family, etc., is admissible, but only to explain a latent ambiguity. *Id.* 733, 734, and cases cited. In this case there is not the slightest ambiguity; the true interpretation of the words of the will, and the rule as to its application, having, when the will was executed, been explicitly and authoritatively laid down in *Gibson v. McNeely*. There is, therefore, neither occasion nor room for explanation by parol evidence, or for the introduction of existing circumstances to aid in construction. *Gibson v. McNeely* was followed by the supreme court in *Hawkins v. Jones*, 19 Ohio St. 22, where the court said that the construction of the statute in *Gibson v. McNeely* had been acted upon as a rule of real property in Ohio for over 30 years; and, whatever might be the views of the court as to the correctness of the holding were the question presented as an original one, it did not at that late day feel at liberty to disturb it. This is referred to by counsel for the complainant as an intimation that the court would have decided otherwise if the question had then been presented for the first time. However that may be, it is much more important in this case, for the reason that the declaration by the supreme court that the decision in *Gibson v. McNeely* had, in 1869, when *Hawkins v. Jones* was decided, been recognized over 30 years as a rule of real property, makes it necessary for this court to follow it, because under section 721, Rev. St. U. S., where the construction of a will by the supreme court of a state has been so long acquiesced in as to become a rule of property, it is a rule of decision for the courts of the United States. *Lane v. Vick*, 3 How. 464; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10. In *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, the supreme court affirmed *Burgess v. Seligman*, and again recognized the proposition that rules of property established by the decision of the supreme court of a state are always to be followed by federal courts.

Attention is also called by counsel for the complainant to the fact that the legislature of Ohio appears to have been dissatisfied with the construction given to the statute in *Gibson v. McNeely*, and as a result passed the act of April 3, 1867 (64 Ohio Laws, 105), which enacts that "bastards shall be capable of inheriting from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance in like manner as if born in lawful wedlock." But that statute was passed four years after the death of Longworth, and after all rights under his will had vested. Particular attention is called by counsel for the complainant to the case of *Bennett v. Toler*, 15 Grat. 588, decided by the supreme court of Virginia in the same year that *Gibson v. McNeely* was decided by the supreme court of Ohio. In that case



the law was held to be as claimed for the defendant, but that ruling was made expressly upon the statute of Virginia, and therefore is not to be regarded as applicable in this case.

Attention is called to the difference between the provision made by the will for Eliza Flagg and the provisions for the other children. Her estate was put in trust. As to the other children the estate was to go to their children or heirs; as to her, to the "issue of her body." It is pointed out that this phrase, "issue of her body," is used in every instance, both in the will and in the codicil, when the testator refers to her, and not in any instance where the reference is to any of his other children. This proposition, analyzed, implies that the testator intended to make provision under cover of that phrase for the illegitimate issue of the body of Eliza Flagg, preferring not to disclose the fact publicly. Now, if there were any such illegitimate issue, and such intention on the part of the testator, this is to be said: Mr. Longworth was a lawyer. If surrounding and existing facts and circumstances, including those above referred to, could be taken into account, is it not strange, if not incredible, that he did not make the provision that, if there was no issue of the marriage of Eliza J. Flagg, her share of his estate at her death should go to the complainant, naming him, thereby avoiding scandal, and stating his intent beyond a peradventure or doubt? Such a provision might have caused comment, but it could not have suggested the fact which he wished to conceal. As to the difference in the language applied by the testator to her interest and to that of the interests of his other children, it may further be said that she alone was childless. But, independently of any of these or the like considerations, the rule of the supreme court laid down in *Gibson v. McNeely*, that a gift to issue, or to issue of the body, generally, in a will, is limited to legitimate issue, is decisive and controlling.

Lastly, it is urged that the testator expressly provided in his will that its language should be taken in its ordinary sense or meaning, which was equivalent to directing that technical rules should be disregarded. In answer to this, the second proposition of Vice Chancellor Wigram (*Wig. Ev.* p. 55) is quite sufficient. It is as follows:

"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words, so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

Counsel appeal to the provision that the language of the will should be taken in its ordinary sense or meaning, not in support of the construction which is according to the ordinary meaning, but in support of a construction which gives to the language a meaning not only extraordinary, but contrary to the express rulings of the highest judicial tribunal of the state. It is to be noticed in

this connection that the testator did not provide that the language should be taken in its popular sense or meaning, but in its ordinary sense or meaning; that is to say, in the sense in which it was generally used. There is another reason for limiting the inquiry as to the meaning of the testator to the language of the will. The only method by which the owner of property can make disposition of it to take effect after his death is by will, which must be made in writing, and executed according to the requirements of the statute. It is not possible, therefore, to import into a will any intent manifested otherwise than in the manner required by law to effectuate a testamentary disposition. The exception will be sustained.

Counsel for complainant called attention to the fact that two of the defendants (Susan W. Longworth and John L. Stettinius) have answered denying the averment to which the exception was taken, as well as the averment that the complainant is the child of Eliza J. Flagg, and claimed that as to them the exception could not be sustained, no matter what the court might see fit to do as to the excepting defendants. In support of this proposition they cited 1 Post. Fed. Prac. § 68, and Story, Eq. Pl. 270. The court said that it was true that exceptions must be taken before answer. The defendants who have answered have not joined in the exceptions; but the exceptions having been taken by defendants who have not answered, and having been sustained, the averment excepted to goes out of the bill, and cannot be relied on against any of the defendants. The rule referred to is a rule of practice, but it is not to be so applied as to retain in the bill, for any purpose, averments which the court has held, upon proper exceptions, to be scandalous and impertinent.

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ROBINSON v. ALABAMA & G. MANUF'G CO. et al

(Circuit Court, N. D. Georgia. September 14, 1894.)

1. FORECLOSURE DECREE—REVERSAL AFTER SALE—PETITION—RIGHTS OF PURCHASER.

Where a foreclosure decree has been reversed upon appeal after sale of the property, it is futile for the purchaser to contend in the lower court, as against a motion for restitution, that the ground upon which the reversal was based would not have been entertained by the appellate court, if certain matters which occurred at the trial, and which were claimed to operate as a waiver of defendants' rights, had been incorporated into the record and brought to the attention of the appellate court; for the reversal must operate to its full extent, irrespective of the grounds upon which it was based.

2. SAME—ESTOPPEL BY CONDUCT OF COUNSEL.

The fact that counsel for the defendant in a foreclosure suit was present at the sale, and gave an opinion that the title thereby acquired would be good, and the further fact that he then represented certain of the mortgage bondholders, and accepted for them the amounts due on their bonds, *held* not to operate as an estoppel against the defendant, whereby the latter would be prevented from claiming a restitution of the property in case the foreclosure decree was subsequently reversed on appeal.

3. SAME—RESTITUTION AS AGAINST ASSIGNEE OF PURCHASER.

A corporation whose property was sold under a foreclosure decree, which was afterwards reversed, *held* entitled to restitution, not only as

against a corporation for which the property was purchased at the sale, but also as against a third corporation, to which the stock of the purchasing corporation was afterwards assigned; it appearing that the principal member of the purchasing committee was the active officer in both of the latter corporations, and in fact represented both of them in all matters occurring subsequent to the sale.

4. SAME—RESTITUTION AND RESALE.

A decree foreclosing a trust deed given to secure bonds was reversed after the property had been sold. The court thereupon ordered a restitution, on condition, however, that defendant should repay the purchase money within a time stated. The condition was not complied with, and the purchasers remained in possession. In the meantime it was ascertained by further proceedings that part of the bondholders were entitled to have their lien enforced. *Held*, that the court could not then make an order confirming the original sale, but that, as the purchasers at that sale must be considered to have taken the property subject to the lien of the bonds last found entitled to enforcement, a resale must be ordered, and that the court would, by proper orders, control the proceedings so as to fully protect the rights of all parties in the distribution of the funds arising from the second sale.

This was a suit by J. J. Robinson, trustee, against the Alabama & Georgia Manufacturing Company, the Huguley Manufacturing Company, and William T. Huguley, to foreclose a trust deed given by the first-named company to secure an issue of bonds. The property covered by the deed was, at the time the suit was brought, owned by the Huguley Manufacturing Company, which had acquired it at a judicial sale under proceedings in a state court, subject to the mortgage above referred to. In the present suit a decree of foreclosure was heretofore entered by this court. 48 Fed. 12. An appeal was allowed, but was not prosecuted, and no supersedeas bond was given within the time allowed by law. Subsequently, however, an appeal was allowed without supersedeas; but between the allowance of the first and second appeals the property was sold under order of this court. Afterwards the circuit court of appeals reversed the decree ordering the foreclosure and sale. 6 C. C. A. 79, 56 Fed. 690. Defendants have now moved for a restitution of the property.

John M. Chilton, Allen Fort, and John C. Reed, for movants.

B. F. Abbott, C. A. Abbott, and Dorsey, Brewster & Howell, contra.

NEWMAN, District Judge. This is a motion for restitution of property sold under a decree of this court, which was subsequently reversed. The sale was under a decree of foreclosure of a mortgage or deed of trust, at the suit of J. J. Robinson, trustee, for certain bondholders, whose bonds were secured by the mortgage or deed of trust. An appeal was allowed on motion of counsel who represented the defendant corporation in the foreclosure proceeding, on the 28th day of July, 1892. This appeal was not prosecuted, and no supersedeas bond was given before the expiration of the time allowed by law for supersedeas. Subsequently, to wit, on November 21, 1892, on motion of other counsel, who came into the case, an appeal was allowed without supersedeas. The assignment of errors was filed, and appeal bond for costs was given.

Between the allowance of the first and second appeals the property was advertised for sale, and was sold by a commissioner appointed by the court, and the property purchased by L. Lanier and others, as trustees for the bondholders. Ten thousand dollars in cash was paid into the hands of the commissioner, being the amount required by the decree to be paid in cash, in the event the property should be purchased by the bondholders. The sale was on the first Tuesday in September, and on the 16th day of September the sale was confirmed. On the hearing in the circuit court of appeals the decree of this court was reversed. 6 C. C. A. 79, 56 Fed. 690. After the reversal, and the receipt of the mandate to this court of the appellate court, motion was made by counsel for the Huguley Company for restitution of the property sold as above set forth. A question of considerable difficulty is presented by this motion, and it has been carefully and fully argued by counsel for the movants and for the purchasers, and has been fully and elaborately discussed in briefs furnished the court since the oral argument.

It is contended, in the first place, that the ground upon which the right to reversal was placed by the appellate court would not have been entertained by that court, if what had occurred in this court as to that matter had appeared in the record. The difficulty about that is that whatever may have occurred in this court, and as to how far it may have operated as a waiver on the part of the defendant company to have an accounting of the bonds which came within the ruling of the court as to nonpayment of interest coupons, it did not appear in the record, and the appellate court knew nothing of it, and the judgment of that court was that by the failure to have such accounting the decree foreclosing the whole issue of the bonds was erroneous. So the argument that this should influence the discretion of the court here in the matter of restitution cannot be considered. The judgment stands reversed, and the reversal is just as effectual for the purposes of the motion now under consideration as if it had been upon the ground that the court erred in not allowing, as a matter of law, the three days of grace claimed by defendants in addition to the six months provided in the contract.

It is next claimed that the action of the Huguley Manufacturing Company, and especially of its counsel of record and in court, was such, in connection with the sale of the property, at the sale, and on the confirmation of the same, as to estop it from claiming restitution of the property sold. Even if counsel for the Huguley Company could bind it by an express agreement that there should be no subsequent appeal and no subsequent effort to recover the property, no act is proven on the part of counsel which goes to this extent. The opinion of the leading counsel for the defendant, given at the sale or about the time of the sale, that the title acquired at the sale would be good, is no more than the opinion of any other lawyer as to the legal effect of the proceedings. His presence at the sale has no greater effect, and certainly his representing there certain bondholders, and accepting for them the amount due on their bonds, cannot in any way operate as an estoppel against

the Huguley Manufacturing Company. On the whole, I see nothing whatever in the facts set up here which is sufficient to operate as an estoppel against the right of the Huguley Manufacturing Company to make and prosecute this motion for restitution.

The next and principal question is as to how far the holders, at present, of this property are protected by the sale and the proceedings with reference to the property which occurred subsequently. It appears that after the purchase of the factory property by Lanier and others, as trustees for the bondholders, certain bondholders were not willing to come into the scheme of reorganization which the bulk of the bondholders had assented to, and it was necessary to pay them, in cash, the pro rata amount which their bonds would be entitled to, from the price realized at the sale. Then a new corporation was organized, called the "Galeton Cotton Mills," and holders of bonds, secured by the mortgage under which the property had been sold, were given stock in the new corporation, the total amount of such stock amounting to \$65,000. Bonds for an equal amount were issued and delivered to such persons by the Galeton Cotton Mills. The stock was all transferred by the various holders of it to the Westpoint Manufacturing Company, which appears to be now the holder of it. The authorities are somewhat in conflict as to how far a sale, by virtue of a judgment which is subsequently reversed, conveys title which will be protected against a motion for restitution after reversal. It is contended here, and mainly on the authority of the case of Marks v. Cowles, 61 Ala. 299, that not only will such restitution be ordered as between the parties to the case, and as against the plaintiff when he purchased, but also as against the assignee of a party who purchases. It is contended, and it is so held in the case named, that the party who purchases at such a sale gets only a defeasible title, and can convey no greater title to the assignee than he himself obtains. The doctrine of this case would unquestionably require an order of restitution here. The correctness of the rule stated in that case is indorsed in Freem. Judgm. § 484. The question of the right to restitution of the property when there has been a reversal of a judgment, by virtue of which a sale is made, has been several times before the supreme court of the United States. The last case to which attention has been called, or which has been found, is the case of Fuel Co. v. Brock, 139 U. S. 216, 11 Sup. Ct. 523; and, while that was a case where it had been held that the judgment was one which the circuit court had no jurisdiction to grant, still former decisions of the supreme court are cited and somewhat discussed. These cases, as well as the cited case by the supreme court, seem unquestionably to hold that restitution will be granted on a reversed judgment as between parties. The conclusion of the opinion is as follows:

"The same doctrine is sustained in the several state courts of the country, all recognizing the power of the court whose judgment is set aside on its own motion, or reversed by order of an appellate tribunal, to direct restitution, so far as practicable, of all property and rights which have been lost by the erroneous judgment."

It is urged on behalf of the purchasers of this property that, where there has been a sale under an execution by a commissioner acting under a judgment valid and subsisting at the time, a good and unassailable title is conveyed thereby to a party who purchases equally with strangers. The principal case relied on in the argument of this contention is the case of *Canal Co. v. Gordon*, 2 Abb. (U. S.) 479-488, Fed. Cas. No. 13,189, decided by Justice Field, and the case to which he refers, and from which he quotes, of *Parker v. Anderson*, 5 T. B. Mon. 455. As to the case decided by Justice Field, it is replied that in *Galpin v. Page*, 18 Wall. 350, Justice Field, in delivering the opinion of the court, by the language he used, showed his own doubt as to the correctness of the views expressed in *Canal Co. v. Gordon*, supra. An examination of the case shows this to be true, and it seems entirely clear that Justice Field did not intend to adhere to the views expressed by him in the *Canal Co. Case*. The other authorities are not in line with what appears to be the great weight of authority on this subject,—indeed, with decisions of the supreme court of the United States, which all seem to be to the effect that, as between parties, restitution will always be awarded where the judgment by virtue of which the sale was made has been reversed. This ruling would unquestionably extend to such beneficiaries as bondholders who are represented in the proceeding by a trustee, where the bondholders are the purchasers. So that it must be taken as established by undoubted authority, and indeed by controlling authority, that restitution would necessarily be directed in this case as against the bondholders who originally purchased the property at the sale.

Now, has there been such change in the title to the property as will protect it against restitution to the Huguley Manufacturing Company, the original owner? There would be no difficulty whatever, as to the *Galeton Cotton Mills* as it was originally organized, with the stock in the hands of the bondholders who purchased at the foreclosure sale. The real trouble is that the holding of the stock is changed from these parties to the *Westpoint Manufacturing Company*. The *Westpoint Company* is not a party here, but the fact of the transfer of the stock has been put in evidence on the hearing of this motion by the *Galeton Cotton Mills* for the purpose of showing that its stock had gone into other hands, and that the parties to this case are not the real owners of the stock, and consequently of the property. *L. Lanier* appears by the evidence to be the president of the *Galeton Cotton Mills*, and secretary and treasurer and active official, so far as this transaction is concerned, of the *Westpoint Manufacturing Company*. He was also the principal member of the purchasing committee for the bondholders, and he is quite a large holder of the stock also of the *Westpoint Company*. It cannot be said, therefore, that there is such alienation of this property to a stranger—to one new to the transaction—as would make it necessary to go in this case to the extent that the supreme court of Alabama went in the case of *Marks v. Cowles*, supra. But the truth seems to be, as is urged, that *L. Lanier*, who was the principal person acting in the purchase,

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was in all subsequent transactions the representative of buyer and seller,—of assignor and assignee. I am not prepared to take issue with the doctrine of *Marks v. Cowles*, supra, but it is unnecessary, in the opinion of the court, to invoke it in this case; as under the peculiar facts shown here, while restitution will involve some complications and some difficulty, perhaps, in its practical enforcement, I feel it my duty, upon the repayment of the cash paid by purchasers, to direct it. Before any order is made in this matter, however, it will be necessary, probably, to hear counsel as to its terms and conditions. It may be proper to add that, in the opinion of the appellate court directing a reversal of this case, this language is used: "It is obvious that there was such substantial error in that finding as must, on appeal, vitiate all subsequent proceedings." The record in the appellate court showed the sale and the confirmation of the sale, and the language used clearly indicates that the proceedings, up to the time of the purchase by Lanier and others as representatives of the bondholders, in the opinion of that court, were annulled by its judgment of reversal.

(March 9, 1895.)

In an opinion filed on a motion for restitution in this case on the 14th day of September, 1894, it was stated that it would probably be necessary to hear counsel before framing a decree. Counsel were subsequently heard, and a decree entered as follows:

"The matter of framing the proper order or decree, under the opinion of the court of file in the matter of restitution, came on to be heard by the court, and after argument of counsel thereon, on the various aspects of said matter as suggested by counsel, and on consideration thereof, it is considered, ordered, and decreed: (1) That the motion of defendants that they have restitution of the property described in the petition, and which was sold under the decree of this court, as shown by the record, be granted on condition that they deposit with the register of this court, within thirty days from this date, the sum of ten thousand dollars, the same being the sum paid into this court by L. Lanier, A. T. Dallas, and J. T. Kirby, the purchasers of said property. (2) The motion of said defendants, the Huguley Manufacturing Company et al., to refer the question of mesne profits arising from the use and operation of the property since the sale in connection with the amount to be paid into court as a condition to restitution, in order that the one may be offset against the other in case it shall appear that mesne profits have accrued, is denied. (3) The motion of counsel for complainant, that the condition of restitution should be that defendants asking restitution should give bond and security that the property on a resale should bring as much as it sold for at the first sale, is also denied."

The judgment of the court was that restitution should be made only on condition that the amount of money paid into court by the purchasers should be repaid to them before possession would be restored. As stated in the opinion alluded to, the effect of the judgment of reversal was not only to set aside the decree, but, as it seemed, to annul subsequent proceedings. Still, when the purchasers of the property paid into court the \$10,000, they paid it under a decree valid and subsisting at that time, and they really paid the money for the benefit of the Huguley Manufacturing Company. The money was paid into court, and paid out for costs due by them, and on their debts, and

they received the benefit of it. Certainly not to require repayment to the purchasers of this amount before restitution would seem to be inequitable. This much is stated now, as it was stated orally at the time of rendering the decree for restitution, for the purpose of making understood what is now said on the proceeding at present before the court.

In accordance with the decision of the appellate court, after entry of the mandate, the original suit for a foreclosure, standing open by the reversal for further action, was referred to a master, who made his report, and certain exceptions to it have been overruled; the exceptions really being to the same effect as the questions raised by the Huguley Manufacturing Company, on their application for restitution. The case is now ripe for a decree of foreclosure of the mortgage as to such of the bonds as the master finds did not accept their interest at the time of the default, in January. The Huguley Manufacturing Company failed to comply with the condition in the order for restitution, by paying the \$10,000, and there has consequently been no restitution. As a result, the possession of the purchasers has not been disturbed, and the serious question is as to what decree should now be entered beyond the decree foreclosing the mortgage for the amount of the bonds reported by the master. It is contended for the complainants that there should be a decree confirming the original sale and the title in the purchasers; and, on the other hand, that the only decree the court can enter is a decree for the resale of the property. The argument for the former position is that the court having by its order for restitution provided that such restitution should only be made on condition, and such condition not having been complied with, it leaves the purchasers in the rightful possession of the property, and that no sale of the property which would be effective could now be made. For the latter position the contention is that if, by the decree of reversal of the appellate court, all proceedings subsequent to the rendition of the original decree were annulled, the title to the property in question, as a result, fails, and there is nothing for the court to do but to appoint a commissioner and sell it again. This presents a very difficult question. The case is in an anomalous situation. There is some force in the contention that, in view of the former ruling of the court, restitution could only be had on condition that the noncompliance with that condition left the title to the property in the purchasers, and that they are entitled to a decree confirming such title. On the other hand, the argument is that the motion for restitution is a mere application to have possession of property restored, and does not necessarily affect the title, but is simply to determine the right to possession. But the court is now rendering a decree, giving judgment, and fixing a lien on the property in controversy for the amount of the bonds reported by the master in default, for which the mortgage may be properly foreclosed under the rulings of this court and of the appellate court, with interest thereon. Now, what shall be done with this judgment? That it is necessary that a decree of foreclosure should be rendered all parties to the case agree. It will determine that a lien on this property exists and has existed all along for the amount reported by



the master. Such being the situation, is it material to determine the exact status of the purchasers as to title or possession? In the peculiar condition of the case, they hold it certainly subject to the lien of the mortgage for the amount to be named in this new decree now to be entered. The defendant company claims that it has the right to have this property sold under a valid decree. Perhaps it has. Certainly no harm can accrue to these purchasers if the amount of the debt outstanding, and which they control, is as they state it, and the value of the property such as they contend. All this can be determined, however, and the rights of all parties protected, by the direction which will now be given to the case. There is but one practical course, and that is to provide, in the present decree, for the appointment of a commissioner and resale of the property. The rights of these purchasers, as to the amount heretofore paid into this court, in connection with this proceeding, are still in the entire control of the court, and can be fully protected to any extent that such rights may exist, by proper order, in distributing the funds arising from the sale. Let a decree be framed carrying into effect these views.

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**ILLINOIS TRUST & SAVINGS BANK v. ARKANSAS CITY WATER CO.**  
et al.

(Circuit Court, D. Kansas, Second Division. March 21, 1895.)

No. 314.

**1. MUNICIPAL CORPORATIONS—WATER FRANCHISES—POWER OF COUNCIL.**

A city of the second class, under the laws of Kansas, is without power to grant to a private corporation an exclusive right and franchise to furnish water for public and domestic use for a period of 21 years, for this is an attempt to create a monopoly,—a power which the city council does not possess unless it is delegated in clear and unmistakable terms.

**2. SAME.**

But, while the city would not be bound under such an ordinance to accept the service tendered by the water company for any definite period, it should yet be held to pay the stipulated price for water furnished for public purposes, so long as it accepts the service offered in pursuance of the ordinance.

**3. SAME.**

A proposed ordinance granting water franchises, which fails to receive the requisite number of votes, but which is nevertheless assumed to have been properly passed, both by the city and the water company, and is acted upon accordingly, is to be regarded as a contract binding the city to pay the stipulated price for water furnished for public use pursuant thereto, so long as it accepts the same.

**4. SAME.**

Where additions are made to the original plant of a water company upon mere informal application of its officers, without any ordinance or resolution prescribing terms and conditions, *held*, that the ordinance under which the original plant was constructed should be looked to for such terms and conditions.

This was a suit in equity by the Illinois Trust & Savings Bank against the Arkansas City Water Company and Arkansas City for the foreclosure of a trust deed, and an accounting as to certain

bonds secured thereby, which were issued by the defendant water company.

Rossington, Smith & Dallas, for complainant.

Ady, Peters & Nicholson and Eaton, Pollock & Love, for defendants.

WILLIAMS, District Judge. This is a suit in equity, brought for the purpose of accounting upon certain bonds and coupons issued by the defendant water company, and for the foreclosure of a certain deed of trust given to secure payment of the same. The facts, briefly stated, as gathered from the pleadings and evidence, are as follows:

The defendant the city of Arkansas City is a city of the second class, under the laws of the state of Kansas. The defendant the Arkansas City Water Company is a private corporation organized for the purpose of constructing and operating a system of waterworks in said city. On the 21st day of December, 1885, the defendant city undertook to confer a franchise upon the Interstate Gas Company, also a private corporation, whereby a system of waterworks was to be erected and maintained in said city for a period of 21 years; providing for the construction of a plant, laying of pipes, and the erection of certain fire hydrants thereon, and making of certain extensions from time to time thereon, requiring of the said Interstate Gas Company that all such fire hydrants should have a certain standard of efficiency for the purpose of fire protection. Thereafter the plant was constructed, upon which were located 50 fire hydrants, being the number provided at the time such franchise and privilege were granted. Thereafter the defendant the Arkansas City Water Company succeeded by purchase to all of the rights, franchises, property, and duties belonging to and devolving upon the Interstate Gas Company. At the time of the construction of the original plant of 50 fire hydrants, the Interstate Gas Company issued bonds to the amount of \$200,000, and executed a deed of trust upon the plant, property, and franchise and incomes of the system to secure payment of the same. And, after the transfer of the works to the defendant the Arkansas City Water Company, it executed its bonds in the sum of \$150,000, and the deed of trust upon all of the property, rights, and franchises of said company to secure payment of the same, the said \$150,000 of bonds and deed of trust being the same declared upon by the complainant in this suit. One hundred thousand dollars of such issue was used for the purpose of retiring the \$100,000 in bonds issued by the said Interstate Gas Company. The proceeds of the remaining \$50,000 in bonds was paid over to the defendant water company. Thereafter, from time to time, extensions were made to the original plant, and about 135 fire hydrants were added to the system, which extensions were made of four-inch mains. The said extensions were made upon application of the president of said water company, one J. B. Quigly, and were not made upon any formal resolution or ordinance of the defendant city. Afterwards, on the 16th day of September, 1891, the defendant the city of Arkansas City purchased from the Arkansas City Water Company said entire system of works, and all

the property, rights, and franchise of the defendant the Arkansas City Water Company, taking therefor a deed of general warranty as evidence of said transfer of said property. The deed of trust hereinbefore mentioned was excepted from the covenant against incumbrances in said deed. No hydrant rental has been paid by the defendant city to the complainant or any one else for water furnished through said fire hydrants located upon said system since the 1st day of October, 1891. Upon the purchase of said system of waterworks, the defendant city, by ordinance duly passed and published, repealed the said former so-called ordinance of said city,—No. 27. The complainant on the 18th day of October, 1892, the interest on said bonds being in default at said date, brought this suit for an accounting of the amount due on said bonds and coupons in default, for the purpose of foreclosing said deed of trust, and for the accounting with the defendant city, and also alleging in its bill of complaint that the transfer of said property to the defendant city was fraudulent, and was for the purpose of defeating the security of the complainant for the payment of said bonds and interest thereon, and praying a decree of this court that the defendant the city of Arkansas City, in the purchase of said works, had assumed all the debts, liabilities, and obligations of its grantor, the Arkansas City Water Company, and also asking the appointment of a receiver. The defendant the Arkansas City Water Company was not served with subpoena, and has entered no appearance in this action. The defendant city answered the complainant's bill, alleging that the contract claimed to exist between the city and the Arkansas City Water Company by reason of said Ordinance No. 27 is void, for the reason that it did not have, upon its passage, the number of votes required by law; that the several extensions of the waterworks, and the addition of 135 fire hydrants, and the rental therefor, did not constitute a binding obligation upon the defendant city; that the additional fire hydrants were erected upon a plant originally designed for but 50 fire hydrants; that such extensions were made of small pipe, in long lines, and that the hydrants placed thereon were inefficient for the purpose designed by said contract, and could not be made to comply with the requirements for such fire hydrants; that said extensions were unnecessary; that fire hydrants were located so closely together as to render a large number of them unnecessary for fire protection, or any of the public purposes mentioned in said Ordinance No. 27; that said contract was illegal, unreasonable, and extortionate. The defendant city also denied that it had in any way assumed or become liable for the principal and interest upon the bonds, as alleged in the plaintiff's bill of complaint, or for the interest thereon, or that it had in any way assumed or agreed to pay the indebtedness of the Arkansas City Water Company provided thereby, and prays that the alleged contract between the defendant city and the Arkansas City Water Company provided for by said Ordinance No. 27 be declared null and void, and that the city be relieved from the payment of all hydrant rentals for the extra hydrants placed upon the extensions to said works. The complainant thereafter, by amendment to its bill, avers that, notwithstanding the failure to enact said Ordi-

nance No. 27 as required by law, the defendant city had long used and recognized the same as an existing contract between it and the Arkansas City Water Company; that by reason thereof it became and was a binding contract, notwithstanding the failure of said city to enact the same as required by its charter and the laws of the state,—and also made due replication to the answer of the city. Upon issues so joined, evidence was taken, and the cause heard by the court.

The court having heretofore heard this cause, and decreed that the said city should pay hydrant rental for the original 50 fire hydrants located upon the works, as originally constructed, and should not be required to pay hydrant rental for said additional hydrants as were added thereto, thereupon one George E. Hopper, receiver in charge of said works under order of this court, applied to the court for additional hydrant rental, averring that the said hydrants on said extensions were efficient, and in all respects complied with the conditions and requirements of the provisions of said Ordinance No. 27; and thereon testimony was taken, and submitted to the court, regarding such efficiency. Thereafter, for good cause shown, the decree, as heretofore placed of record in this cause, was set aside, and the case reopened for further consideration and argument, and is now before the court upon the printed briefs of solicitors for complainant and the receiver in charge, and counsel for defendant city.

Upon the trial of this cause it was not seriously contended by counsel for complainant that the defendant city had assumed the payment of, or was in any way personally liable for, the bonds in suit, and there is no evidence to warrant such finding. The evidence also fails to disclose that there was any fraudulent intent or wrongful purpose on the part of the defendant city in the purchase of the works. It does, however, clearly appear from the evidence that the bonds in suit and the trust deed were duly made and executed by the defendant water company, and constitute a valid first lien upon all the property, rights, and franchises of the Arkansas City Water Company, defendant, in said city; that the interest upon said bonds had been defaulted prior to the bringing of this suit, by reason whereof the whole amount of said bonds had become due and payable, and the complainant entitled to a decree of foreclosure thereon.

The serious controversy in this suit arises upon the following propositions: First. Does a city of the second class, under the laws of the state of Kansas, have the power to grant an exclusive right and franchise to a corporation to furnish water for public and domestic use within said city for a period of 21 years? Second. Was the so-called ordinance of defendant city, No. 27, legally enacted; and, if not, what rights, if any, were acquired under the same? Third. Should the defendant city be required to pay a stated hydrant rental upon any or all of the additional fire hydrants placed upon extensions to the original plant? A decision of the foregoing propositions is necessary, to fully determine the matters in controversy in this suit.

Recurring to the first proposition, I cannot give my assent to the doctrine so ably contended for by counsel for complainant in their ex-

haustive brief, that the defendant city had the power to grant an exclusive franchise, and for the period of time as set forth in said Ordinance No. 27 of the defendant city. The right to furnish water for public and domestic use within a city is a public service, and of such high consequence to the public that it should at all times remain open to the control of the city council for the benefit of the public. The contract here insisted upon would place the matter beyond control of the council for a long period of time. This is in the nature of an attempt to create a monopoly,—a power which the city council never possesses, unless it is delegated in clear, unmistakable terms. This view is fully sustained by the following authority: *Jackson County Horse R. Co. v. Interstate Rapid Transit Ry. Co.*, 24 Fed. 306; *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. 324; *Saginaw Gas-Light Co. v. City of Saginaw*, 28 Fed. 529, 540; *Gas-Light Co. v. Middletown*, 59 N. Y. 228; *Chicago v. Kumpff*, 45 Ill. 90; *Gale v. Kalamazoo*, 23 Mich. 344; *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262; *Logan v. Pyne*, 43 Iowa, 524; *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913. As supporting the same doctrine, also: *Minturn v. Larue*, 23 How. 435; *Wright v. Nagle*, 101 U. S. 791. It does not, however, follow, in my judgment, that the attempt to grant such exclusive privilege for a fixed period of time would render the entire ordinance illegal. On the contrary, all that this court now decides is that the city is not bound to accept the service tendered by the water company for any definite and fixed period of time, but, under contract made in pursuance of an ordinance legally adopted, the city should be held to pay the stipulated price, so long as it accepts the service offered in pursuance of the contract.

Whether Ordinance No. 27 was legally adopted, in the opinion of the court, is practically disposed of by the statute and the undisputed evidence in this suit. Section 765, Gen. St. 1889, reads as follows:

"All ordinances of the city shall be read and considered by sections at a public meeting of the council, and a vote on their final passage shall be taken by yeas and nays, which shall be entered on the journal by the clerk, and no ordinance shall be valid, unless a majority of all the members elected, vote in favor thereof; provided, however, that when the council are all present and voting and there shall be a tie, the mayor shall have the power to give the casting vote on the passage of any ordinance."

The evidence shows that, at the time of the consideration of said Ordinance No. 27, the said council of defendant city was composed of eight members, seven of whom were present; four voting in the affirmative, and three in the negative,—the mayor not voting. This being true, the ordinance was thereby rejected. But it appears that the officers of defendant city and the Interstate Gas Company all proceeded upon the idea that said Ordinance No. 27 was duly adopted, and had become a legal ordinance of said city; that the original system of waterworks provided for in said alleged ordinance was put in by the Interstate Gas Company, and accepted by the city, in pursuance of said ordinance, and that there were attached thereto, for public use, 50 public fire hydrants, the efficiency of which was duly accepted by the mayor and council of said city, in pursuance of the terms of said ordinance; and that the city has ever since said time continued to use said 50 fire hydrants for fire protection.

The court therefore holds that the terms of said contract, and the erection and extension of said original system of waterworks under the same, constitute a contract on the part of the city with the owners of said waterworks, and that the city shall continue to pay for the use of said 50 hydrants, at the rate of \$60 a year, so long as said city continues to use the same for fire protection, and that the water company, its successors and assigns, are entitled to the use of the streets, alleys, and public grounds of the city for the purposes of maintaining and operating said system of works. But the obligation of this contract, like that of all others, is mutual, and, to entitle a recovery for hydrant rental, the standard of efficiency must fairly comply with the terms of the contract, and that standard is as follows:

"That the works erected by the Interstate Gas Company, its successors and assigns under this ordinance, are able to throw simultaneously, four (4) streams of water from any four (4) hydrants to be designated by the mayor and city council through one hundred feet of two and a half inch rubber hose, and one inch ring nozzle, at least sixty-five (65) feet high from stand pipe alone and eighty-five feet high by direct pressure from pumps."

The right of the water company, its successors and assigns, to recover from the defendant the said hydrant rentals for the 135 additional fire hydrants shown by the evidence to have been placed upon extensions for the completion of the original system, is the only remaining question. This is a question, I think, important to the parties to this suit, but its determination is necessary from the fact that, in the deed of trust sought to be foreclosed by complainant, such hydrant rentals are assigned as a part of the security for the prompt payment of the bonds and interest thereon; and as the complainant asks a decree of foreclosure and sale of all the property, rights, and franchises and income of the water company, it is important to know what the purchaser at such sale shall acquire by his purchase; and for the further reason, that it appears from the evidence that no hydrant rental has been paid by defendant city since the year 1891, and the complainant prays for an accounting with defendant city as to the amount of hydrant rentals now due, and a decree for the same. Upon this branch of the suit a large number of witnesses were orally examined before the court, and many of the depositions on file bear upon this question. If this claim for hydrant rentals for fire hydrants located upon extensions to the original plant is upheld, it fixes a charge of about \$8,000 annually upon the defendant city. So great a charge upon the revenues of the city must rest upon some well-authenticated enactment of the common council of said city, or upon a binding and subsisting contract, in which the rights, duties, and liabilities of the respective parties are clearly defined and set forth; and even then—such a contract, if found to exist, being in its nature purely executory—the demanding party takes upon himself the burden of proving a substantial compliance with the terms and conditions of such contract before any recovery will be decreed therefor. A careful review of the evidence upon this proposition clearly shows that there is no ordinance or resolution of defendant city authorizing such extensions to be made. The evidence does show such

extensions to have been made upon informal applications of the officers of defendant water company, without any apparent regard to the rights or necessities of the inhabitants of defendant city. In these informal orders for such extensions there is nothing prescribing the efficiency of the service, or the terms and conditions upon which it is to be rendered, and the length of time during which such service shall continue is not specified. Therefore, a test of such efficiency having been once agreed upon between the parties, we must look to the original contract to find what the terms and conditions are upon which such additional service is to be tendered and received. Applying the test fixed in the original contract, I do not hesitate to say that not one of the fire hydrants located upon extensions to the original plant come up to the requirements of such standard of efficiency. The parties to this suit were at great pains to make ample tests of these fire hydrants under the supervision of competent engineers and experts, who have testified to the results. This evidence satisfies my mind that the hydrants located upon such extensions do not afford protection to the portion of the city in which the same are located, and are of no practical utility to the defendant city. It follows that this claim for hydrant rentals must be denied, and is denied. The decree heretofore entered in this suit having been set aside because the same was not in accord with the opinion of the court, a decree will now be entered in conformity with this opinion.

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#### BOARD OF COM'RS OF GRAND COUNTY v. KING.

(Circuit Court of Appeals, Eighth Circuit. February 18, 1895.)

No. 452.

##### 1. POWER TO TAX—LEGISLATIVE FUNCTION.

The power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. A court has no taxing powers, and can impart none to the county authorities. It has no jurisdiction to coerce the levy of a tax, except where the law has made it the clear and absolute duty of the proper authorities of the county to levy such tax.

##### 2. COUNTY WARRANTS.

When a county is authorized to levy a given rate of tax for general county purposes, no holder of county warrants or of a judgment rendered thereon has a right to demand that a special tax shall be carved out of this general rate and levied for the exclusive purpose of paying his warrants or judgment, unless the statute requires it and leaves the county levying board no discretion.

##### 3. MANDAMUS—COMPELLING LEVY OF TAX.

It is not within the power of a court to compel, by mandamus, the levy of a tax to pay a judgment against a county, where no statute expressly makes it obligatory on such county to levy a tax for the purpose, and it does not appear that the judgment was based on a bond or other security, issued under a statute making it obligatory to levy a tax to pay it.

##### 4. SAME—COLORADO STATUTE.

One K., the holder of a judgment against G. county, in the state of Colorado, applied to the United States circuit court for a mandamus to compel the county to levy a tax to pay such judgment. The cause of action on which the judgment was rendered did not appear. The statute of Colorado in force when the judgment was rendered (Gen. St. Colo. c. 28, § 7) provided

that, when a judgment was rendered against a county, the same might be paid by the levy of a tax on the taxable property of the county, or by a warrant drawn upon the ordinary county fund, but the county commissioners should not be required to levy a special tax unless in their discretion they should so determine. *Held*, that the county commissioners could not be deprived of their option to pay the judgment by a warrant drawn on the county fund or of their discretion as to levying a special tax, by a mandamus compelling them to levy a tax to pay the judgment.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a petition by Francis G. King against George Bunto, Thomas E. Pharo, and John Rowen, as members of the board of county commissioners of Grand county, for a peremptory mandamus compelling the respondents to levy a tax to pay a judgment against the county held by the petitioner. The circuit court issued the writ. Respondents bring error.

Francis G. King, the defendant in error, filed in the circuit court of the United States for the district of Colorado his petition against George Bunto, Thomas E. Pharo, and John Rowen, as members of the board of county commissioners of Grand county, Colo., plaintiffs in error, alleging that the petitioner, on the 25th day of July, 1891, recovered a judgment in the circuit court of the United States for the district of Colorado, against the county of Grand, for the sum of \$6,593 and costs of suit, taxed at \$22.95; "that, by the laws of the state of Colorado as they now exist, the said defendants, acting as the board of county commissioners of the county of Grand, have the power and authority, and it is their duty, upon request, to levy or cause to be levied and assessed a tax upon all taxable property in the said county of Grand, sufficient to pay the said judgment, interest, and costs in whole or any part thereof, and to levy such tax or a tax for that purpose from year to year as may be necessary to pay the full amount thereof, together with the interest and costs." The prayer of the petition is "that an alternative writ of mandamus may issue out of and under the seal of this honorable court compelling the said defendants, and each of them, to levy a tax sufficient to pay said judgment, interest and costs, not exceeding the limitation allowed by the statutes in such cases made and provided on the valuation of assessed property for the year 1893, and to make such levy when the annual tax levy for the year 1893 is made, or to show cause before this honorable court, on some day to be fixed and in said writ stated, why they should not make such levy; and that, upon return of the said alternative writ of mandamus, the said defendants be required to answer the allegations in this petition contained; and that, upon a final trial or hearing herein, such writ be made peremptory, and a judgment entered in this court against the said defendants, commanding them, and each of them, to make such levy for the said purposes." The defendants were served with a copy of the petition, which took the place of the alternative writ, and appeared and demurred thereto, which demurrer was overruled. Thereupon the defendants answered, denying that it was their duty under the laws of the state to levy the tax upon the property of the county sufficient to pay the plaintiff's judgment in whole or in part, or to levy a tax for that purpose from year to year or at all. The answer avers that the county is "practically insolvent"; sets out the causes of its insolvency and poverty, and the utter inability of the county to collect, or the taxpayers to pay, taxes in excess of the amount required to pay the ordinary and necessary current expenses of the county; and concludes with this statement: "In view of all which facts, and with careful consideration of all the interests intrusted to their charge, the defendant, the said board of county commissioners of the said county of Grand, believe it to be inexpedient to levy and impossible to collect, in addition to the state and school district taxes, a tax of more than twenty mills on each dollar of valuation, which said tax, since the institution of this action, has been determined upon by the order



of this defendant, and has been divided as follows: For road purposes, three mills; for school purposes, four mills; for the general county fund, ten mills; and for the payment of outstanding indebtedness, three mills. That the said last-mentioned tax, when collected, will be so appropriated and paid to the several creditors of the county as the law shall direct, and as the exigencies of the situation and the equities of the creditors may then seem to require." The case coming on to be heard upon the petition and answer thereto, the court rendered the following judgment: "It is ordered that a peremptory writ of mandamus issue out of this court, directed to the said board of county commissioners of the county of Grand, commanding and enjoining the said board to levy a tax of not less than three mills, for the fiscal year ending November 30, 1893, for the purpose of paying the judgment entered in the above-entitled cause, and the cost and interest thereon accruing, including the costs of this proceeding to obtain a writ of mandamus. And it is further ordered that the said defendants, the board of county commissioners of Grand county, also make a levy of not less than three mills on the assessed value of property in said county for each and every year hereafter until the full amount of said judgment, interest, and costs has been paid, or until the further order of this court in the premises; and that, upon the neglect or refusal of the said board of county commissioners in any year hereafter until said judgment, interest, and costs are fully paid and discharged, to levy a tax of not less than three mills to pay on said judgment, the clerk of this court shall, at the request of said plaintiff, issue a peremptory writ directed to said board, commanding the said board to make such levy for the year for which such application was made,"—and afterwards issued a peremptory writ of mandamus, the material part of which reads as follows: "Now, therefore, we, being willing that full and speedy justice should be done in the premises, do hereby command you, the said board of county commissioners of the county of Grand, to levy a tax of not less than three mills on the assessed value of property in said county, for the fiscal year ending November 30, 1893, for the purpose of paying the judgment entered in the above-entitled cause, and the cost and interest thereon accruing, including the costs of this proceeding to obtain a writ of mandamus; and that in each year hereafter, until full satisfaction of said judgment, with interest thereon, and the costs aforesaid, you levy, assess, and collect the same tax of not less than three mills on the assessed value of property in said county; and that you pay said judgment, interest, and costs in full, lest complaint shall again come to us by your defaults."

Sam W. Jones and L. B. France, for plaintiff in error.

Willard Teller (H. M. Orahoad and E. B. Morgan, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts). The power to raise money by taxation is the highest attribute of sovereignty. It is a power absolutely essential to the existence of civil government. When properly exercised, it is the protection and defense of the state and the security of the citizen; but history shows that it may be converted into the most powerful engine of injustice and oppression, and used to deprive the citizen of his property rather than protect him in its enjoyment. The people of this country have studiously confined the exercise of this delicate and vitally important power to their immediate representatives. Nor have they been willing to entrust their representatives with its unlimited exercise, but have imposed on them constitutional restrictions and limitations in its exercise. They have at all times refused to confer it in any measure or degree on the executive or judicial departments of the govern-

ment. Under our system of government, therefore, the power to tax is a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority. There is no connection between the power to contract debts and the power to levy taxes. The power to contract a debt does not imply the power to levy a tax to pay it. A county may lawfully contract debts which it has no power to levy a tax to pay. And a court may have jurisdiction to render judgment against a county without having the power to coerce the county authorities to levy a tax to pay it. A court has no taxing powers, and can impart none to the county authorities. It has no jurisdiction to coerce the levy of a tax except where the law has made it the clear and absolute duty of the proper authorities of the county to levy such tax. When the law has made it the duty of the levying court or board to levy a tax to pay a specified class of indebtedness, the federal court in which a judgment has been rendered on that class of indebtedness may, by mandamus, compel the assessment, levy, and collection of a tax to pay such judgment; but this, say the supreme court, is the limit of its power. "It cannot make laws when the state refuses to pass them. It is itself but the servant of the law. If the state will not levy a tax or provide for one, the federal judiciary cannot assume the legislative power of the state and proceed to levy the tax." *Meriweather v. Garrett*, 102 U. S. 472.

The case at bar was tried in the lower court on the pleadings. The plaintiff's whole case, as disclosed by his petition, consists in an allegation of the recovery of the judgment, an averment that it is the duty of the board of county commissioners to levy a tax to pay it, and a prayer that a peremptory writ of mandamus may issue commanding the board to make the levy. The nature of the cause of action or the kind of indebtedness upon which the judgment was recovered is not stated. The plaintiff does not rest his right to the writ upon the ground that the judgment was rendered upon the kind of indebtedness which the law makes it the duty of the board of county commissioners to levy a tax to pay. He rests his right to the writ specifically and exclusively on section 8 of chapter 22 of the General Laws of Colorado of 1877 (page 219, § 435), which reads as follows:

"When a judgment shall be rendered against the board of county commissioners of any county, or against any county officer, in an action prosecuted by or against him in his name of office, when the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by the tax as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same shall be adjudged, upon the delivery of a proper voucher therefor: provided, that nothing in this section shall prohibit the county commissioners from paying such judgment by a warrant upon the county treasurer."

In the brief of the learned counsel for the plaintiff, after quoting this section, it is said: "And this is the statute, and the only statute, that covers the case." This section of the statute was amended in some material respects more than four years before the plaintiff recovered his judgment. The section as amended reads as follows:

"Section 1. That section 7 of chapter 23 of the General Statutes of the State of Colorado be and the same is hereby amended so as to read as follows: 'Sec. 7. When a judgment shall be given and rendered against a county of this state in the name of its board of county commissioners, or against any county officer, in an action prosecuted by or against him in his official capacity, or name of office, when the judgment is for money, and is a lawful county charge, no execution shall issue thereon, but the same may be paid by the levy of a tax upon the taxable property of said county, and when the tax shall be collected by the county treasurer, it shall be paid over, as fast as collected by him, to the judgment creditor, or his or her assigns, upon the execution and delivery of proper vouchers therefor; but nothing contained in this section shall operate to prevent the county commissioners from paying all or any part of any such judgment by a warrant drawn by them upon the ordinary county fund in the county treasury: provided, that the power thereby conferred to pay such judgment by a special levy of such tax shall be held to be in addition to the taxing power given and granted to such board, to levy taxes for other county purposes, but the board of county commissioners shall levy under this law only such taxes as they, in their discretion, may deem expedient or necessary, and all taxes levied by authority of this act shall not exceed one and one-half per centum on the dollar of assessed property for any one fiscal year: and, provided, further, that the powers herein given to the board of county commissioners shall not be construed as requiring said board to levy any special tax to pay any judgment, unless in its discretion the said board shall so determine. \* \* \*'" Act approved April 28, 1887.

Touching this amended or substituted section, counsel for the plaintiff in their brief say:

"It is clear, then, that section 7 of the statute as it existed before the amendment of April 28, 1887, is the statute under and upon which the right of the parties hereto must be decided."

The contention of counsel is clearly untenable as applied to the case made by the pleadings. We recognize the well-settled rule that, where negotiable bonds or other like securities are issued by a county under authority of an act of the legislature which makes it obligatory upon the proper county authorities to levy a tax to pay them, the repeal of the act does not affect the power and duty of the county authorities to levy the tax. In such cases the provision of the law making it obligatory upon the county authorities to levy a tax to pay the indebtedness enters into and becomes a part of the consideration of the contract and the legislature cannot repeal the law requiring the levy of the tax without impairing the obligation of the contract. *Meriweather v. Garrett*, supra; *U. S. v. Jefferson Co.*, 5 Dill. 310, Fed. Cas. No. 15,472. But no claim is made that the judgment in this case was rendered on any such cause of action. There is, indeed, nothing in the record showing that the plaintiff's judgment was rendered on any kind of a contract, or that the cause of action upon which it was rendered had any existence before the repeal of the act. It is obvious, therefore, that a statute repealed four years before this judgment was rendered can have no bearing upon it. In this connection we may observe that there is a wide difference between the rights of the holders of the negotiable bonds of a county, issued under special authority of the legislature, to make subscriptions to the capital stock of railroads, or to fund floating indebtedness, or for other extraordinary expenditures, and the rights of the holders of ordinary county warrants. As we have

seen, the obligation and duty to levy the tax to pay the former class of indebtedness, as provided by the act authorizing its issue, continues until the indebtedness is extinguished, notwithstanding the repeal of the statute; but in the case of ordinary county warrants there is commonly no obligation resting upon the county authorities to levy a special tax for the exclusive purpose of paying the warrants of some particular holder thereof. When a county is authorized to levy a given rate of tax for general county purposes, no holder of county warrants or of a judgment rendered thereon has a right to demand that a special tax shall be carved out of this general rate and levied for the exclusive purpose of paying his warrants or judgment, unless the statute requires it, and leaves the county levying board no discretion. *U. S. v. Miller Co.*, 4 Dill. 233, Fed. Cas. No. 15,776. Any other rule would make it well-nigh impossible for a county indebted in any considerable amount to discharge its functions. Its entire revenues would be absorbed by exacting holders of its warrants, and no funds could be provided for defraying the most necessary objects of county government. In most of the states the law authorizing the issue of county warrants contemplates that they will be satisfied from the ordinary county revenue or be absorbed in the payment of the county taxes. They are not negotiable instruments, and are not intended to circulate as negotiable or commercial securities. In the case of *Supervisors v. U. S.*, 18 Wall. 71, the supreme court held that, under the statutes of Iowa, a mandamus could not issue to compel the county authorities to levy a special tax to pay a judgment rendered on county warrants. In the course of its opinion the court said:

"They [county warrants] were such instruments as the legislature contemplated might be employed in conducting the current and usual business of the county. \* \* \* They are simply a means of anticipating ordinary revenue."

We need not inquire into the rights of holders of such warrants or the judgments recovered thereon, under the laws of Colorado, because there is nothing in the record before us, which we can consider, that shows the plaintiff's judgment was rendered on county warrants. The plaintiff resting his right to a mandamus solely on the fact that he has a judgment against the county, we proceed to inquire what the rights of a judgment creditor of a county are under the Colorado law. Under the statute in force when the plaintiff's judgment was rendered and by which his right to the relief sought must be determined, the county has the option to pay any judgment against it by the levy of a tax or by a warrant drawn upon the ordinary county fund in the county treasury. In this respect the repealed section 7 and the section enacted in lieu of it are identical. The statute confers on the board of county commissioners the option to pay a judgment by the levy of a tax or by drawing a warrant on the treasury, and it is not competent for any court to deprive the board of its right to exercise this option. In the case of *Stoddard v. Benton*, 6 Colo. 508, 517, the supreme court of Colorado, speaking of the obligations imposed on the county by the original section 7, says:

"If no appeal is perfected or supersedeas allowed, provision must be made for the payment of the judgment. This may be done either by the levy of a tax or by a warrant on the county treasury. In case the commissioners delay or refuse to make provision for payment, a writ of mandamus will lie to compel them to act."

The case of *State v. Township Committee*, 43 N. J. Law, 518, is identical in principle with the case at bar. A New Jersey statute empowered the authorities to borrow money by the issue of township bonds to pay a certain class of indebtedness or to pay it by the levy of assessments upon the lands benefited by the improvement. The alternative writ of mandamus commanded the authorities that "they do borrow such sum or sums as may be necessary to pay," etc. The writ was held bad. The court said:

"The duty enjoined upon the defendants is to pay. The money wherewith to make payment may be derived from the assessments or from the issue of township bonds. The relators cannot arbitrarily select the means by which the defendants shall perform their duty. If the method of performing the duty is discretionary and optional, a mandamus to compel the defendant to do it in a particular manner is defective, unless it shows the impossibility of the defendant exercising the option."

A similar question arose in the case of *Queen v. Southeastern Ry. Co.*, 4 H. L. Cas. 471. Under 8 & 9 Vict. c. 20, § 46, a railway company has the option, when its line of railway crosses a turnpike road or public highway, either to carry the road over the railway or the railway over the road. It was held that a railroad company could not be deprived of its right of option under this act, and that a mandamus could not rightly issue commanding a company to do one of these two things, unless the writ showed on its face circumstances which established the impossibility of the company exercising the option which belonged to it under the act.

The court below erred, therefore, in issuing a peremptory mandamus requiring the board of county commissioners to pay the plaintiff's judgment by the levy of a tax, and thus depriving them of their option to pay it in warrants if they elected to do so.

It is further provided by section 7 as amended:

"That the powers herein given to the board of county commissioners shall not be construed as requiring said board to levy any special tax to pay any judgment unless in its discretion, the said board shall so determine."

By this provision the question whether a special tax shall be levied to pay a judgment in any case is left to the discretion of the board of county commissioners. It was undoubtedly competent for the legislature to vest this discretion in the board of county commissioners as to all judgments except those recovered on causes of action that accrued under statutes which made it the duty of the board to levy a tax for their payment. But, as to judgments based on indebtedness as to which no such obligation exists, there is no impediment in the way of the legislature withholding altogether the power to levy a special tax for their payment, and, if it grants the taxing power at all for the payment of such judgments, it may impose just such conditions and limitations on its exercise as it sees proper. Under this act, the discretion as to the levy of the tax is vested in the board of county commissioners, because they are

charged with the administration of the affairs of the county, and familiar with its financial resources and its needs and the condition of its taxpayers. It is not reasonable to suppose that the legislature would ever invest a federal court with the exercise of this discretion.

It is a fundamental rule, underlying the entire jurisdiction by mandamus, "that in all matters requiring the exercise of official judgment or resting in the sound discretion of a person to whom a duty is confided by law, mandamus will not lie either to control the exercise of that discretion or to determine upon the decision which shall be finally given." High, Extr. Rem. § 42, and cases cited. "It cannot issue in a case where discretion and judgment are to be exercised by the officer." U. S. v. Seaman, 17 How. 225, 231; Heine v. Commissioners, 19 Wall. 655; Id., 1 Woods, 247, Fed. Cas. No. 6,325, opinion by Mr. Justice Bradley.

In the late case of U. S. v. Lamont, 15 Sup. Ct. 97, the court say:

"It is elementary law that mandamus will only lie to enforce a ministerial duty as contradistinguished from a duty which is merely discretionary."

After citing numerous authorities, the court proceeds:

"The duty to be enforced by mandamus must not only be merely ministerial, but it must be a duty which exists at the time when the application for the mandamus is made. Thus, in the case of *Ex parte Rowland*, 104 U. S. 604, this court, speaking through Mr. Chief Justice Waite, said: 'It is settled that more cannot be required of a public officer by mandamus than the law has made it his duty to do. The object of the writ is to enforce the performance of an existing duty, not to create a new one.' Moreover, the obligation must be both peremptory, and plainly defined. The law must not only authorize the act (*Com. v. Boutwell*, 13 Wall. 526), but it must require the act to be done. 'A mandamus will not lie against the secretary of the treasury unless the laws require him to do what he is asked in the petition to be made to do' (*Reeside v. Walker*, 11 How. 272. See, also, *Secretary v. McGarrahan*, 9 Wall. 298); and the duty must be 'clear and indisputable' (*Commissioners v. Aspinwall*, 24 How. 376)."

The judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

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#### DELAWARE, L. & W. R. CO. v. ASHLEY.

(Circuit Court of Appeals, Third Circuit. April 22, 1895.)

No. 2.

##### 1. RAILROADS—PASSENGERS—VALIDITY OF RELEASE.

Plaintiff was employed by one J., a shipper of poultry in car-load lots, to travel with the cars of poultry, and care for the fowls. J. shipped, by the C. Ry. Co., a car of poultry, the bill of lading stipulating that the same should go to its destination via D., L. & W. from Buffalo, and that the man in charge should pass free, and the through waybill stating the same condition. Plaintiff accompanied the car. The D., L. & W. Ry. Co. received the car, with the waybill, and passed plaintiff free, but required him to sign a release of any claim for damages. Plaintiff was injured in an accident on the D., L. & W. road. Held that, the transportation of plaintiff having been part of the consideration of the contract with the initial railway company, plaintiff was a passenger for hire, and, the D., L. & W. Ry. Co. having been bound, if it accepted the car

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and waybill, to carry plaintiff in accordance with such contract, his release was without consideration and invalid.

**2. SAME—NEGLIGENCE—QUESTION FOR JURY.**

The accident was caused by the breaking up of the freight train on which plaintiff was traveling into several parts, and their collision with each other. The cars had been inspected but a short time before the break occurred, and no defect discovered, but it was contended the inspection was superficial. One brakeman was on the engine and another in the caboose. The rules of the railway company provided that no brakeman should be allowed to leave his post while the train was in motion, that conductors must see that brakemen did not remain in the caboose, and that brakemen must not ride on the engines. *Held*, that there was sufficient evidence of negligence on the part of defendant to go to the jury.

**3. SAME—CONTRIBUTORY NEGLIGENCE.**

*Held*, further, that it could not be held, as matter of law, that plaintiff was guilty of contributory negligence in lying down in the caboose after the break occurred.

**4. EVIDENCE—RES GESTAE.**

*Held*, further, that it was not error to admit, as part of the *res gestae*, declarations of plaintiff as to how he came to be in the caboose, made after the accident happened, but while plaintiff was still lying in the caboose, and suffering acutely from the pain of his injuries.

**5. RAILROADS—DEGREE OF CARE REQUIRED.**

The court charged that the law does not exact from railroad companies all the care and diligence which can possibly be conceived, but does require, either upon freight or passenger trains, everything necessary to the security of the passenger, reasonably consistent with the business of the carrier, and that this rule applies irrespective of any distinction made by the company in the character of its trains, but that under it a passenger on a freight train acquiesces in all the usual incidents of a freight train managed by prudent men. *Held*, that this charge was as favorable as the defendant could ask.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action by Thomas Ashley against the Delaware, Lackawanna & Western Railroad Company to recover damages for personal injuries. The plaintiff recovered a judgment in the circuit court. Defendant brings error. Affirmed.

Flavel McGee, for plaintiff in error.

John T. Griffiths and William T. Edwards, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This case arises upon a writ of error sued out by the Delaware, Lackawanna & Western Railroad Company to reverse a judgment recovered against it by Thomas Ashley in the circuit court of the United States for the district of New Jersey for personal injuries. The facts of the case are these: Ashley, the plaintiff, resided in the state of Indiana, and was in the employ of one Jordan, of Indianapolis, who was a large shipper of car loads of poultry from that region to New York. For two years Ashley had accompanied such cars of poultry free of extra charge, and had fed and watered the fowls en route. On March 11, 1892, Jordan delivered to the Cleveland, Cincinnati, Chicago &

St. Louis Railway Company a car of live poultry for transportation to New York; the bill of lading stipulating, "Via D., L. & W. from Buffalo," and "Man in charge to pass free from Indianapolis," and the through waybill stating, "To go via D., L. & W. from Buffalo," and "Pass man in charge free from Indpls." The defendant company received the car with the accompanying waybill at Buffalo, and issued a permit to Ashley "to ride free on train with car 273, \* \* \* subject to the conditions this day signed by him," which conditions stipulated, inter alia, for a release to defendant for injury to person "while using said permit, even though such loss, injury, or damage should be caused by the negligence of the company or its agents." Between 5 and 6 o'clock on the evening of March 16th the train, a part of which the poultry car was, and consisting of locomotive, about 20 freight cars, and a caboose, and a crew of an engineer, fireman, three brakemen, a conductor, and a flagman, left Washington, N. J., where the cars were inspected, and from thence proceeded some three miles, to the Port Murray water station. Here it stopped for water. While passing through Ramsay's cut, a short distance beyond the water station, the caboose and two cars were found by those on board them to have parted from the forward part of the train. They were promptly stopped, and a flagman sent back, who flagged an approaching wildcat train, which was known to be following. The wildcat engine then pushed the caboose and freight cars out of the cut, so the trainmen could see and signal the forward part of the train when it returned to pick up the parted cars. The wildcat engine, with steam up, remained standing about 10 or 15 feet back of the caboose. The conductor and one of the brakemen went to the foremost car, to await the return of the forward part of the train. The flagman went into the caboose, and began making out his report, and Ashley, the plaintiff, came in, and lay down on one of the caboose bunks. The night was dark. The middle brakeman was on the rear of the train when the separation occurred, alleging that after leaving the water station he had come to the caboose to get his overcoat and rubbers, preparatory to going forward on the train to use the brakes on a descent beginning at Rockport summit. This was the situation about 7 o'clock on the rear portion of the train. The grade from Ramsay's cut to Rockport summit was rising, but not continuously so. It was broken at places by "sags" or depressions. As he was nearing the summit, the engineer failed to see the caboose light, and at once signaled for it. Receiving no response, and unable to see by reason of escaping steam, he slowed down, and sent back the forward brakeman, who was on the rear of the engine, to see the situation. In point of fact, two breaks had in the meantime happened in addition to the first one. The engine and 3 cars had broken from the other 15 cars, and of these 15, 2 or 3 cars had broken loose at the rear end. This left the train in four pieces, as follows: The engine and 3 cars, slowed up, and just reaching the summit; about 12 or 13 cars following; back of these, a third section, of 2 or 3 cars; and the caboose and 3 cars, stationary at Ramsay's cut. Very shortly after slowing up, the forward sec-



tion was struck by the second, and immediately the third struck the second. One of the cars in the first section was derailed. The striking cars rebounded, and started slowly on the down grade towards the cut, with no one aboard. The first intimation the look-outs on the rear section had was a lumber car looming out of the darkness. They shouted, and the flagman in the caboose and all the train hands got out or off. The third section struck the fourth, and this was immediately succeeded by a more violent second collision, caused by the second section striking the third. The caboose was driven into and mounted the wildcat engine, and tore off its valves. The escaping steam entered the caboose, and scalded the plaintiff. Of the serious character of his injuries, and of the amount of damages recovered, no question is raised, if in other respects there was no error. The assignments of error resolve themselves into five groups: (1) Was the release of the plaintiff valid? (2) Was there evidence of negligence on part of defendant to submit to the jury? (3) Was the court bound to give binding instructions that Ashley was guilty of contributory negligence? (4) Was there error in the admission or rejection of certain evidence? (5) Did the court fix an undue measure of care or duty as due from the defendant?

By the contract between the initial company and Jordan, the car and one man, in consideration of an agreed-upon freight charge, were to be carried to New York. The plaintiff was a passenger for hire, for his passage was one of the mutual terms of the arrangement for carrying the poultry. Had Ashley, being a passenger for hire, given a release to the initial company for the negligence of its servants, it would have been void. *Railroad Co. v. Lockwood*, 17 Wall. 358; *Railway Co. v. Stevens*, 95 U. S. 655; and *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 440, 9 Sup. Ct. 469. The release given by Ashley to the defendant company when it received him and his car cannot have any greater weight. With the car it received the through waybill, and if it accepted them it must accept them cum onere, which was the transportation of Ashley. No consideration whatever passed to him on signing the release, for by the original arrangement he already had a right to accompany the car to its destination. He was a passenger for hire, and as such the defendant was responsible for any injury to him resulting from the negligence of its servants.

This brings us to the second question, was there evidence of such negligence to submit to the jury? Clearly so. The company rules provide: Rule 47: "Every engineman is authorized to require the brakemen on his train to be at their posts; and no brakeman will be allowed to leave his post, or be in the car when the train is in motion." And 101: "Conductors of both passenger and freight trains are required to see that their brakemen do not remain inside the cars or cabooses, while the train is in motion, longer than is necessary to perform their indoor duties. \* \* \* Brakemen must not ride on the engine." The court would not have been warranted in taking the case from the jury, for (under the rules of the company) on the evidence several elements of negligence were alleged upon which it was the province of the jury to pass. Was it

negligence in John Brady, the forward brakeman, to remain on the tender of the engine instead of on the forward part of the train? Was it negligence in Michael Brady, the middle brakeman, to be in the caboose instead of on the body of the train? Was the inspection a negligent and insufficient one? And, lastly, was it negligence to leave the wildcat engine so near the caboose in view of the broken condition of the train? The facts were such that reasonable men might fairly differ as to whether there was negligence or not, and where such is the case, the jury, not the court, must decide. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679. Nor would the court have been justified in giving positive instructions that Ashley was guilty of contributory negligence. The terms of his permit did not require him to ride with the poultry car, and during many preceding trips he had occupied the caboose with the full consent of those in charge of the trains. Whether he was guilty of contributory negligence was, under the facts of this case, a question for the jury. It was fairly submitted to them by the judge below.

The gist of the defense was that the accident was unprecedented, extraordinary, and totally unexpected. Conceding, for present purposes, that Ashley went to sleep in the caboose (which, however, was one of the questions submitted to the jury), it cannot be said that he was, as a matter of law, guilty of contributory negligence in assuming that that would follow which the defendant's experienced employes looked for, namely, that the balance of the train was under the control of the engine, and would be backed slowly as soon as the break was discovered. We think the question of contributory negligence, under the facts and complicated questions of this case, was one to be decided by the jury, and it was left to them by the court in language of which the defendant had no right to complain.

Exception is taken to the testimony of Smith Hoover, showing the declarations of the plaintiff, made after the accident, viz.: "They told me to lay down here, and it would be all right; and it wasn't all right." The learned judge thought it part of the *res gestae*, and admitted it. We cannot say there was error in so doing. In the nature of things, there cannot be a sharply-defined line between what is and what is not permissible as part of the *res gestae*. In this debatable region a margin must be left for the exercise of the sound discretion of the trial judge. We cannot say there was error committed in this regard in the present case. It is not shown just how long after the accident Hoover arrived. Certain it is Ashley was still lying in the caboose. He was "going on terrible," as the witness says. No physician had arrived, nor steps been taken to relieve him. These spontaneous and repeated utterances from a man in the condition of the plaintiff, while on the very spot of the accident, and shortly following its occurrence, are so closely connected with, and a part of, the accident itself, that it was not error to admit them. *Insurance Co. v. Mosley*, 8 Wall. 397. Nor was the court in error in ruling out the answer of Michael Brady, the middle brakeman, who was asked whether there

was anything in the requirement of his duty which required him, while the train was going at that point under steam, to be out on the middle of it. It was not the province of the witness to determine whether he had done his duty; that was essentially the right of the jury. After the facts were laid before them, it was properly left to them. *Elder v. Coal Co.*, 157 Pa. St. 499, 27 Atl. 545. The same remarks apply in a general way to the question which Thompson, the flagman, was not allowed to answer. He was, in effect, asked to take all the facts and surroundings of the case into consideration, and draw a conclusion which, if material to the issue, it was the duty of the jury alone to do.

Taking the charge and the points together, no error was committed in laying down the measure of care required of the defendant company. In the charge the attention of the jury was called to the fact that the plaintiff was traveling on a freight train, and that in taking passage thereon he accepted the usual incidents of such a train. The court said:

"The law does not, indeed, exact from railroad companies all the care and diligence which the human mind may possibly conceive, nor such as will render the transportation of passengers free from all peril. It does not require, for instance, steel rails and granite ties, because they are more lasting and less liable to decay than iron and wood. Nor upon freight trains, although passengers may be carried upon them at intervals, must there be air brakes, bell ropes, or a brakeman upon each car. But the law does require everything necessary to the security of the passenger, whether upon freight or passenger trains, and reasonably consistent with the business of the carrier, and the means and conveniences employed. This rule applies irrespective of any distinction made by the company in the character of its trains. Under it, however, when a passenger upon a freight train accepts and takes passage, he acquiesces in all the usual incidents of a freight train, managed by prudent and competent men."

This instruction in the general charge was as favorable as the defendant could ask for, and, taking the general language of the points in connection with this specific application of the law to the facts of the case, the court committed no error in its submission in that regard. After a careful examination, we are of opinion the case was fairly submitted to the jury, and the judgment must be affirmed, with costs.

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#### TEXAS & P. RY. CO. v. BARRETT.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 226.

1. NEGLIGENCE—DEGREE OF CARE REQUIRED.

Those who use and control such agencies of power and danger as a locomotive, charged with steam to propel trains of cars, must use such a measure of care and skill as will bear proportion to the consequences liable to follow from the want thereof.

2. SAME—RESPONSIBILITY OF MASTER.

Plaintiff, a foreman employed in the yard of defendant railway company, was injured by the explosion of a locomotive standing in the yard. Plaintiff's duties had nothing to do with the locomotive. It appeared that the explosion was due to the defective condition of some of the

stay bolts in the boiler, and there was evidence tending to show that such defects might have been discovered by proper inspection. The court instructed the jury, in substance, that the master is not the insurer of the safety of his engines, but is required to exercise only ordinary care, such as a prudent man would use, to keep them in good repair; and that if the jury believed that the boiler which exploded was defective, and the defendant's servants, by reasonable care, might have known of such defects, then the defendant would be responsible. It refused to give instructions, asked by defendant, to the effect, in substance, that if the defendant used ordinary care in the selection of the engine, and in the selection of a competent man to inspect it, and such inspector negligently failed to discover or report the defects in the engine, the defendant would not be liable. *Held* no error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action by W. K. Barrett against the Texas & Pacific Railway Company, to recover damages for personal injuries. The plaintiff recovered a judgment in the circuit court for \$3,800. Defendant brings error.

The defendant requested the court to give the jury the following instructions: "(1) You are instructed that if you believe from the evidence that defendant used ordinary care in the selection of the engine in question, and used the same care in the selection of a competent man to inspect it and keep it in reasonably safe condition, and if you believe from the evidence that the person so employed to inspect said engine and keep it in repair did exercise ordinary care in its inspection and keeping it in good condition, you will find for the defendant. (2) You are instructed that if the defendant used due care in the selection of the inspector, Stevenson, and exercised reasonable supervision over him, and that said Stevenson negligently failed to properly inspect the engine in question, so that in consequence of such failure on his part the explosion in question occurred, his omission of care would be the negligence of a fellow servant, for which the defendant would not be responsible. (3) You are instructed that if you believe from the evidence that the defendant originally provided a reasonably safe engine, and that it used reasonable care to employ a competent inspector to keep said engine in repair, and that it used reasonable supervision to see that such inspector performed his duty, you will find for defendant. (4) You are instructed that the presumption is that the defendant performed its duty in respect to furnishing a reasonably safe engine, and in respect to keeping same in reasonably safe repair, and that it devolves upon the plaintiff to establish by a preponderance of the evidence that defendant failed to discharge its duty either in supplying such engine or in keeping it in good condition. (5) Defendant asks the court to instruct the jury herein to return a verdict for the defendant." The above special instructions, which were separately presented and asked, the court refused, and the defendant excepted.

The court charged the jury at the request of defendant as follows: "You are instructed that the master is not the insurer of the safety of its engines, but is required to exercise only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any injury resulting to the servant from a defect therein not discoverable by such ordinary care. You are instructed that the mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery, but he must, besides the fact of explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair. You are instructed that a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable, and customary; but that it fulfills its duty in this regard if it adopts such tests as are ordinarily in use by prudently conducted roads engaged in like business and surrounded by like circumstances." And in its general

charge as follows: "In this case the jury are instructed that plaintiff sues defendant for twenty thousand six hundred (\$20,600) dollars damages, which he says he has suffered by reason of injuries inflicted on him at Fort Worth, Texas, on February 19, 1893, by the explosion of a locomotive engine operated by defendant. Plaintiff in his pleadings says that said engine and its boiler were defective, in this: That many of the stay bolts in the boiler were broken, and that bands of many of the stay bolts were worn and corroded by rust; that the sheets of many parts of said engine and its boiler were corroded and eaten away by rust; that said defects in said engine and boiler were known to defendant before said explosion, or could have been known had it exercised proper care in the inspection thereof. (2) Plaintiff says that by the explosion of said boiler he was seriously and permanently injured in and about the legs, hips, shoulders, spine, etc. That as a result of said injury plaintiff suffered, now suffers, and will continue to suffer all his life under physical and bodily pain and great mental anguish. That he has expended \$500 on account of his injuries. That when injured he was earning \$100 per month. That since said injuries, and by reason thereof, he has been unable to pursue any business in the line of his occupation. (3) A railway is bound to use ordinary care to furnish safe machinery and appliances for use by its employes in operating its road, and, if ordinary and reasonable care is not exercised by the company to do this, it would be responsible for the injuries to its servants caused by such neglect. The neglect of the servant to whom the company intrusted such duties is the neglect of the master. By 'ordinary care' is meant such as a prudent man would use under the same circumstances. It must be measured by the character and risks of such business; and where such persons, whose duty it is to repair the appliances of the business, know, or ought to know by the exercise of reasonable care, of the defects in the machinery, the company is responsible for his neglect. (4) If the jury believe from the evidence, under the foregoing instructions, that the boiler which exploded and injured the plaintiff was defective and unfit for use, and that defendant's servants, whose duty it was to repair such machinery, knew, or by reasonable care might have known, of such defects in said machinery, then such neglect upon the part of its servants is imputable to the defendant, and if said boiler exploded by reason of said defects, and injured the plaintiff, the defendant would be responsible for the injuries inflicted upon plaintiff, if plaintiff in no way, by his own neglect, contributed to his injuries. (5) An employer of labor, in connection with machinery, is not bound to insure the absolute safety of the mechanical appliances which he provides for the use of his employes, nor is he bound to supply for their use the best and safest and newest of such appliances, but is bound to use all reasonable care and prudence for the safety of those in his service, by providing them with machinery reasonably safe and suitable for use, and the like care devolves upon the master to keep it in repair. (6) The burden of the proof is on the plaintiff throughout this case to show that the boiler and engine that exploded were improper appliances to be used on its railroad by defendant; that by reason of the particular defects pointed out and insisted on by plaintiff the boiler exploded and injured plaintiff. The burden is also on plaintiff throughout to show you the extent and character of his sufferings, and the damages he has suffered by reason thereof. You must also be satisfied that plaintiff was ignorant of the defects in the boiler that caused its explosion (if the evidence convinces you that such were the case), and that he did not by his negligence contribute to his own injury."

On the 19th day of February, 1893, W. K. Barrett, the appellee, who was plaintiff in the court below, was in the employ of the Texas Pacific Railway Company in the capacity of a night fireman of a switch engine, then and there in use in the yards of said company at Ft. Worth. On the night of that day the company, by its employes, placed upon a track upon said yard a locomotive engine, with steam up, to take out a train. While appellee was standing near this engine in the yard it exploded, blowing him a considerable distance from the place he was standing. He was struck by a part of the engine's jacket, scalded, and was seriously and permanently injured. He alleges that said explosion and injury to him were caused by defendant's negligence in failing to furnish a safe and suitable engine, and that the

explosion of said engine resulted from the defective, weak, and unsafe condition in which it was at and before the explosion. It is charged that many of the stay bolts in the boiler of said locomotive were broken; that it was out of repair; that the heads of many stay bolts were corroded by rust, and that the boiler could not bear and stand the pressure of steam; and that the defendant, at and before the time of the explosion, was and had been negligent and careless in not properly inspecting and causing the boiler on said engine to be properly repaired; and that the defendant knew, or ought to have known, that the engine was in a dangerous and unsafe condition. The defendant company answers by a general denial, and says, if the plaintiff was injured as he claims, it resulted from and was caused by the negligence of his fellow servants; and, further answering, it avers that it exercised due care in the selection of the engine alleged to have exploded, and in keeping it in a reasonably safe condition and good repair; that it used due care in the selection, employment, and retention of competent and skillful servants to inspect said engine from time to time, and to keep same in good repair, and that to such servants was committed the inspection of said engine, and the keeping of same in good condition and repair, defendant exercising over them such supervision and control as to render reasonably sure the faithful and efficient performance of said duties, and that defendant used all the care that the law required in respect to the procurement and keeping in good condition and repair said engine; and this defendant is ready to verify. Further answering herein, defendant avers that the person to whom it committed the duty of inspecting said engine, and keeping same in good repair and condition, carefully inspected same, and kept same in good repair and condition; and this defendant is ready to verify.

T. J. Freeman, for plaintiff in error.

W. S. Simkins, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE and TOULMIN, District Judges.

BRUCE, District Judge (after stating the facts). The leading fact in the case is the explosion of the boiler while the locomotive was at rest, standing in the yard of the company, with no extra pressure of steam, waiting to take out a train. How is this explosion to be accounted for? Can it be done on the theory of inevitable accident, which prudence and care could not reasonably have guarded against? Effects like this must have a cause, and the science of physics is in aid of an effort to discover the cause. Soon after the explosion a number of persons, whose testimony is in the record, came upon the yard where the explosion took place, and made examination of the pieces and broken fragments of the boiler, and their testimony tends to show, if it does not fully establish, that the boiler of the locomotive at the time of the explosion, and for a considerable time before that, was and had been in a weak and unsafe state, by reason of the condition of the stay bolts, many of which had been broken before the explosion, some of them for a long time before, as appeared from their rusted and corroded condition. It also appears that there are well known modes of testing the condition of stay bolts in a boiler engine, and the testimony is to the effect that, if any of these tests had been properly applied to the boiler within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered. It is true there is some conflict in the testi-

mony of the witnesses for the plaintiff in the court below and the testimony of the defendant's witnesses, but it was submitted to the jury, and the question here is whether the finding of the jury was had under proper instruction from the trial judge as to the law of the case.

The plaintiff in the court below, appellee here, was, at the time of the injury complained of, an employé of the defendant company, but not in any way in charge of that particular locomotive upon which the boiler exploded. He was standing near this engine at the time in the discharge of his duties to the company, and the question arises as to the measure of duty the defendant company owed him under the circumstances. A locomotive charged with steam to propel trains of cars is a dangerous machine, and the duty imposed upon the defendant company which it owed to its employés is that due care should be used; that it is kept and maintained in a safe and proper condition; and the measure of skill and care required of those who use and control such agencies of power and danger must bear proportion to the consequences liable to follow from the want of such care and skill.

In *Hough v. Railway Co.*, 100 U. S. 218, the court, after stating the general rule exempting the master from liability to a servant for injuries caused by the negligence of a fellow servant, say:

"But the obligation still remains to provide and maintain in suitable condition the machinery and apparatus to be used by its employés, and the obligation the more important and the degree of diligence the greater in proportion to the danger which may be encountered. Those, at least, in the organization of the corporation who are invested with controlling or superior authority in that regard represent its legal personality. Their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation."

Other authorities might be cited in which the principles applicable to cases of this character are announced and applied. *Railroad Co. v. Herbert*, 116 U. S. 647, 6 Sup. Ct. 590; *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184; *Railroad Co. v. Daniels*, 152 U. S. 688, 14 Sup. Ct. 756.

In the case last cited the court says, quoting with approval:

"The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose. \* \* \* If, by reasonable care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger."

There may seem to be some want of harmony in the decided cases upon this subject. The language of courts in the opinions delivered is sometimes shaded by the facts in the particular case then under consideration, and thus may sometimes give rise to an apparent difference in the rules applied when none really exists.

The charges Nos. 1, 2, 3, 4, and 5, requested by the defendant,

and separately presented, asked, and refused by the court, to which ruling exception was taken, were properly refused. The defendants then excepted to specified portions of the main charge given by the court. We find no error in the rulings of the court, either as to the charges given or refused, and the judgment of the court below is affirmed.

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ROUSE v. HORNSBY, Intervener (two cases).

(Circuit Court of Appeals, Eighth Circuit. March 4, 1895.)

Nos. 488 and 489.

1. NEGLIGENCE—FELLOW SERVANTS—KANSAS STATUTE.

The Kansas statute (1 Gen. St. Kan. par. 1251) which abrogates the rules of the common law regarding the negligence of a fellow servant applies to receivers operating railroads, as well as to railway companies. *Hornsby v. Eddy*, 5 C. C. A. 560, 56 Fed. 461, approved.

2. PRACTICE—INTERVENING PETITION—MODE OF TRIAL.

Where an intervening petition is filed in a chancery suit, setting up against the receiver appointed in such suit a cause of action at law, it is proper to direct the trial of the issues raised by such petition by jury.

3. SAME—MODE OF REVIEW.

The determination of such issues, so tried, is properly reviewed by writ of error, and not by appeal.

4. NEGLIGENCE—COLLISION OF TRAINS.

A collision between two of the defendants' trains operated by their agents while going at full speed in opposite directions on the same track is sufficient evidence of negligence.

In Error to the Circuit Court of the United States for the District of Kansas.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was an intervening petition filed by John E. Hornsby in the foreclosure suit of the Mercantile Trust Company against the Missouri, Kansas & Texas Railway Company, seeking to recover for personal injuries from George A. Eddy and Harrison C. Cross, the receivers appointed in the foreclosure suit. A demurrer to the petition was sustained, but the decision was reversed on appeal (5 C. C. A. 560, 56 Fed. 461); and the cause was then tried by a jury, and a verdict rendered for the intervener for \$15,000. Henry C. Rouse, the substituted receiver, brings the case to this court, both by appeal and writ of error.

T. H. Sedgwick, for plaintiff in error.

Nelson Case and W. B. Glasse (W. D. Atkinson, on the brief), for intervener.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. In the foreclosure suit of the Mercantile Trust Company against the Missouri, Kansas & Texas Rail-



way Company, commenced in the United States circuit court for the district of Kansas, George A. Eddy and Harrison C. Cross were appointed receivers of the road and property of the defendant company, and invested with the usual powers of receivers of railroads. John E. Hornsby, the intervener and defendant in error, was in the employ of the receivers as train baggageman, and on the 3d day of June, 1891, while on a train in the discharge of his duties, received personal injuries in a head-on collision between the passenger train on which he was working and a freight train. The collision resulted from the negligence of the conductor and engineer in charge of the freight train. The defendant in error filed his petition of intervention in the foreclosure suit in which the receivers were appointed, to recover damages from the receivers for the personal injuries he received in the collision. A demurrer to this petition was sustained by the circuit court, and the petition dismissed, whereupon the intervener brought the case, by writ of error, into this court, where the judgment of the circuit court was reversed, and the cause remanded, with directions to overrule the demurrer to the intervening petition, and proceed with the trial and decision thereof. The contention of the defendants in error in that case (plaintiffs in error in this) was that paragraph 1251, vol. 1, Gen. St. Kan. 1889, did not apply to railroads operated by receivers, and that, as the intervener's injuries resulted from the negligence of his fellow servants, the receivers were not liable therefor; but this court held the statute cited applied as well as to receivers operating a railroad as to a railroad company, and that in Kansas, under this statute, the fact that the injury resulted from the negligence of a fellow servant was no longer available as a defense, either to a receiver operating a railroad or to a railroad company. *Hornsby v. Eddy*, 5 C. C. A. 560, 12 U. S. App. 404, and 56 Fed. 461.

After the cause was remanded to the circuit court, the plaintiffs in error moved that it be referred to a "master, with instructions to find and report on both the law and the facts," and the defendant in error moved that a jury be impaneled to try the issue. The court denied the motion of the plaintiffs in error, and ordered a jury to be called to try the case. There were a verdict and judgment for the intervener, and the defendants sued out this writ of error. An elaborate brief is filed by the plaintiffs in error in support of the contention that the section of the Kansas statute referred to does not apply to receivers operating a railroad, and that as to them the fellow-servant rule of the common law still obtains. This question was carefully considered when this cause was first here. We are all entirely satisfied with the result then reached.

While the intervening petition was filed in a chancery suit, it had no relation to any equitable issue in that case, and presented only a cause of action at law, which the court very properly impaneled a jury to try. For all practical purposes, it was an action at law against the receivers, and the circuit court did right in treating it as such. The plaintiffs in error preferred several requests for instructions which were refused, and excepted to the instructions

given. The instructions which the plaintiffs in error asked the court to give, so far as they are good law, are embodied in the charge of the court. That portion of the charge of the court accepted to relates to the measure of damages. The charge on this subject is in the usual and customary language. The elements that go to make up the damages in such cases are as well known to the jury as to the judge. It is a very plain, practical matter, and it is difficult to perceive what more the court can profitably tell the jury than that, in estimating the damages, they will take into consideration the age of the plaintiff, his physical condition before and after the injury, the wages or income he was capable of earning before the injury, and the extent and probable duration of the loss of his earning powers resulting from the injury, and that they may include in their assessment of damages a fair and reasonable compensation for the physical pain suffered by the plaintiff as the result of his injury. This was in substance what the court told the jury. These are the very lines the jury, as practical, sensible men, would pursue in estimating the damages, without any instructions from the court. They are based on common sense, and are matters of common knowledge. It is neither desirable nor safe to indulge in too much detail and refinement in charging a jury as to what they shall and shall not take into consideration in assessing the damages in this class of cases. Too much detail and refinement serve to confuse and mislead the jury, rather than to enlighten them. The law does not require it, and the jury does not need it. *Railway Co. v. Needham*, 3 C. C. A. 129, 10 U. S. App. 339, and 52 Fed. 371.

Some exceptions are taken to the instructions given, and to the refusal of the court to give others, on the question of the defendants' negligence. On this question, the charge of the court was more favorable to the defendants than they had any right to ask. The court should have told the jury that a collision between two of the defendants' trains, operated by their agents, while going at full speed, in opposite directions, on a single track, was sufficient evidence of negligence on the part of some of the defendants' servants. The time will probably never come when a collision resulting from an attempt to have two trains going at full speed, in opposite directions, pass each other on the same track, will not be held to be negligence, in law.

The court is asked to reverse the case on the ground that the damages assessed by the jury (\$15,000) were excessive. The jury is the tribunal appointed by law to assess the damages in such cases, and their finding upon that question is conclusive in this court.

The judgment of the circuit court is affirmed.

This cause was brought here by both writ of error and on appeal, the defendants being in doubt whether this court would treat the intervening petition, setting up a legal demand accruing against the receivers, as an action at law or a suit in equity. As the intervening petition set up a cause of action exclusively cognizable

at law, and was tried by jury as such, a writ of error was the appropriate mode of bringing the record into this court. The appeal in this case will therefore be dismissed.

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**ROUSE v. CLOUGHLEY.**

(Circuit Court of Appeals, Eighth Circuit. March 22, 1895.)

No. 539.

In Error to and Appeal from the Circuit Court of the United States for the District of Kansas.

T. N. Sedgwick, for plaintiff in error and appellant.

F. H. Foster and W. B. Glasse, for defendant in error and appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This case is on all fours with the case of *Rouse v. Hornsby* (decided at the present term) 67 Fed. 219, and is affirmed on the authority of that case.

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**CLARK v. NATIONAL BENEFIT & CASUALTY CO.**

(Circuit Court, E. D. Missouri, E. D. April 20, 1895.)

No. 3,812.

**1. CONTRACTS—MEASURE OF DAMAGES.**

The N. INS. CO., a corporation of Wisconsin, was negotiating for a license from the insurance department of Missouri to do business in that state. While such negotiations were pending, it made a contract with plaintiff to employ him as its general agent in Missouri and certain other states, when its license had been obtained. Such contract was to be terminable by either party on 30 days' notice. There was considerable delay in securing the license from the insurance department, and, two months after the making of the contract, plaintiff sued the N. Co. for damages, claiming a breach of the contract by its failure to prosecute with due diligence its application for license. Upon the trial, the court instructed the jury that they could only allow such sum as damages as would be a fair compensation to plaintiff for the reasonable value of his services from the date when the N. Co., by reasonable efforts, might have obtained its license, to the time when the action was brought. *Held*, that the plaintiff was not entitled to any more ample measure of damages.

**2. SAME—TERMINATION.**

*Held*, further, that as the institution of plaintiff's suit was either an acceptance of a termination of the contract by defendant, or a declaration of plaintiff's purpose to terminate it; plaintiff was not entitled to damages beyond the commencement of his suit.

**3. SAME—BREACH.**

It seems that the plaintiff was not entitled to claim that there had been a breach of the entire contract, by reason of the defendant's renunciation or inability to perform.

This was an action by George W. Clark against the National Benefit & Casualty Company to recover damages for the breach of a contract. The jury gave plaintiff a verdict for \$238.26. Plaintiff moved for a new trial.

The defendant was organized as a corporation under the laws of the state of Wisconsin, for the purpose of doing a fidelity, guaranty, and acci-

dent insurance business. Desiring to extend its work into the states of Missouri, Arkansas, Louisiana, and Texas, it sought, first, an admission into the state of Missouri, and while its officers were here for the purpose of procuring a license, pursuant to the statutory regulations of the state of Missouri, from the insurance commissioner of that state, and before making an application to him, the plaintiff claims that said officers employed him as a general agent to represent said company and to solicit business in its line for it, within the above specified territory, agreeing to pay him for his services 30 per cent. of the premiums upon all contracts of insurance obtained in that territory. The date of this agreement is fixed at about the 17th of January, 1894. The defendant denies that any absolute agreement was made with plaintiff, but says the contract was conditioned upon the future fact of getting a license to do business in those states. The nature and circumstances of its making, as testified to by plaintiff, seems to imply the same thing. It was agreed, if the contract was made, that it contain a provision entitling either party to determine it after giving 30 days' notice of an intention so to do. The breach complained of is that the defendant "has failed and refused, and still fails and refuses, to comply with the insurance laws of this or any other state assigned to plaintiff, or obtain a license to legally do business therein." The evidence shows that on the very date at which plaintiff claims the contract to have been made, and after the making of the contract, assuming that a positive agreement was reached, the officers of the defendant company went to the insurance department, and there made application for admission to do business. The application was not then entertained or acted upon by the insurance department on account of the absence of that particular officer whose duty it was to attend to matters of that character. On the return of such officer, the application was taken up, and an objection was found to certain securities which were deposited with the insurance commissioner of Wisconsin, and the defendant was required to change such securities (amounting in all to about \$20,000), and substitute in lieu of them other securities which would be approved by the insurance department of Missouri. The deposit required by the laws of the state of Wisconsin for an insurance company doing business of the character which this was authorized to do was \$100,000. The law of Missouri is substantially the same; but, because of a certain feature in the charter of the defendant company, the insurance commissioner of Missouri exacted a deposit of \$200,000. The evidence shows that, so far as a compliance with the demand of the insurance department of Missouri to substitute other securities instead of those objected to, the defendant's officers set about with reasonable diligence to comply with that demand. It, in various ways, also, and through several officers and agents, endeavored to persuade the insurance commissioner of Missouri that a deposit of \$100,000 was all that the law of the state of Missouri required. This contest was bandied back and forth until, finally, the insurance commissioner of Missouri receded from his position, and held that the amount of the deposit was sufficient, and finally, in the latter part of October, 1894, admitted the defendant company to do business in Missouri, not, however, until he had required it to renounce the right to do a certain character of business which its charter authorized, or might be construed to authorize, it to do. The correspondence showed some impatience upon the part of the plaintiff at not being able to get to doing business for the company in the state of Missouri, and that the defendant endeavored to assuage that impatience by saying that it would in a short time obtain the necessary permit, urging the plaintiff to hold on. Finally, the plaintiff notified the defendant that, by its failure to prosecute with reasonable diligence its suit to procure the license in the state of Missouri, it had broken the contract, and that he would sue for damages; and hence he instituted this action, on the 17th day of March, 1894. The jury returned a verdict for the plaintiff in the sum of \$238.26. Plaintiff files a motion for a new trial.

Reynolds & Harlan, C. A. Powers, and Geo. H. Shields, for plaintiff.

Boyle & Adams, for defendant.

PRIEST, District Judge (after stating the facts). The chief subject of contention upon this motion for a new trial is as to the proper measure of the damages. The jury was told that they could only allow such a sum as would be a fair compensation to the plaintiff for the reasonable value of his services from and after that date, when the defendant, by its reasonable efforts, ought and could have obtained permission to do business in the territory allotted to him up to the date upon which this suit was brought. The jury have found a positive contract to have been made on the 17th of January, 1894. Suit was brought the 17th of the ensuing March, and the jury awarded the plaintiff the sum of \$238.26.

The plaintiff contends that the legal rule for the computation of his damages as given to the jury was too limited and narrow; that if not entitled to recover the full value of his contract, as for a complete and indivisible breach, he should, at least, have been entitled to recover such damages as had accrued down to the time of the trial. The rule of law to be applied to the estimate of damages for a rescission or breach of contract may differ according to the varying terms of each particular agreement. The end to be attained by juridical inquiry is compensation to the aggrieved party,—a compensation based upon reasonably proximate, clear, certain, and demonstrable consequences, not upon speculation or possibility or indefinite probability. Either one of the rules invoked by the plaintiff may be just when an appropriate state of facts exist for their befitting application. But there are confessedly many cases in which they could not at all be utilized with any degree of justness or advantage.

Let us take the first of the two rules claimed by the plaintiff,—namely, that the entire contract was broken, and he was entitled to have its full value awarded in damages,—and see how it would work with the particular facts of this case. The contract has no definite duration of time for its continuance, no fixed period for its expiration. By its terms it might be concluded by either party upon 30 days' notice. Neither party up to the time of the trial had given such notice, unless we hold the bringing of the suit to be the equivalent of such notice,—a matter to which we shall give some attention later on. In order to calculate the value of the contract, we must have, as one of the essential factors for computation, a definitive term of duration. Without it the result would be speculation, pure and simple. Upon the supposition that the contract might continue for two or three years, an award might be made of its value for that time; and, rightfully and according to the very letter of the contract, the defendant could conclude its operation 30 days after the trial. The very character of the agreement precludes the application of that principle. With not less force does the want of proof of the nature of the injury repel its application. The plaintiff did no work under the contract of an extent and character that would afford an index or reasonably definite criterion by which to measure the profits he would derive under the workings of the contract. It not only devolves upon the claimant to establish the violation of the agreement, but he must

be able to give some certain data which may with reasonable accuracy be employed to estimate such damages as are computable and recognized as such by the law. Unless this be done, the plaintiff can only recover nominal damages. Besides, the facts of this case bring it within the rule of renunciation of executory contracts upon notice of an intention not to perform; the unreasonable neglect to obtain license to do business standing for such notice.

The engagement in this case was evidently prospective, anticipating that the defendant would with reasonable industry proceed to obtain the legal permits to do insurance business in the specified territory. The contract was therefore of an executory nature, and the most that can be claimed for the failure of the defendant in respect of its neglect to obtain license is that it was notice of refusal to perform the undertaking. We doubt whether this much can be claimed for it under the facts in evidence, but, inasmuch as the defendant has not complained of the verdict, it is unnecessary to analyze the transaction to determine its accurate legal effect. The plaintiff then invokes the much-contested rule that where one of the parties to a contract of an executory character, before the time for performance, renounces it, or places himself in an attitude of impossibility of performance, the other may treat such action as a breach, and sue at once as for a breach of the entire contract, although the time when he might require performance had not yet arrived. This view rests upon the reasoning and precedent of the case of *Hochster v. De la Tour*, 2 El. & Bl. 678, and has never been approved or followed by the supreme court of the United States. All the intimations of that court are in opposition to such a rule.

Thus, in *Smoot's Case*, 15 Wall. 36-46, Mr. Justice Miller, speaking for the court, said:

"As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And, while such an impossibility may release the party from liability to suit for nonperformance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed."

In the subsequent case of *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, the disposition of the court, though not deciding the question, appears to be strongly in sympathy with the views of the supreme court of Massachusetts, so ably expressed in *Daniels v. Newton*, 114 Mass. 530, upon a careful consideration of the more prominent of the preceding cases. The views of the Massachusetts court in the case *supra* appear to me to be more consonant with reason and the spirit of the law, and would in this case preclude any recovery by the plaintiff, upon the idea of a recovery as for a breach of the entire contract.

What has been said upon this branch of the plaintiff's contention applies with equal force to his claim for damages down to the date of the trial. This additional observation may here be made: While the contract provided that either party might determine it upon 30 days' notice, this mode is not exclusive of all others, or, if exclusive, would not preclude either party from waiving it and accepting another in its stead, or as its equivalent. The plaintiff

chose to regard the failure of the defendant to qualify for business in the states allotted to him as a determination or final refusal to carry out the contract, and thereupon instituted his suit. This was virtually an acceptance of that mode of ending the contract, and a waiver of the notice expressed in the contract. Upon the other hand, if the defendant did not, by its dilatoriness, intend to break and terminate the agreement, the suit by the plaintiff was a declaration upon his part of a purpose of present and summary annulment, and, if accepted by defendant, he cannot complain.

Under no aspect of this case, in my opinion, was plaintiff entitled to an ampler rule for the assessment of damages than that given to the jury. If error was committed in the charge, it was against the defendant, not now complaining, and not the plaintiff. A review of the case has persuaded me that the plaintiff should have been nonsuited on the issue of a breach of the contract, to demonstrate which is now unnecessary, or, having proven the breach, his damages should have only been nominal.

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BUENA VISTA PETROLEUM CO. v. TULARE OIL & MINING CO. et al.

(Circuit Court, S. D. California. April 8, 1895.)

No. 559.

PUBLIC LANDS—LISTING TO STATE—ACT CONG. JULY 2, 1862.

The act of the secretary of the interior in certifying and listing to a state the lands selected by it under Act Cong. July 2, 1862, donating lands in aid of colleges of agricultural and mechanic arts, which act excludes from the grant all mineral lands, is a conclusive determination that the lands so listed and certified were such as to be within the terms of the grant, and such determination cannot be questioned collaterally in a suit involving title to the lands.

This was a suit by the Buena Vista Petroleum Company against the Tulare Oil & Mining Company and others to quiet complainant's title to certain lands. The complainant excepted to the answer of some of the defendants.

William Grant, for complainant.

Samuel Minor and Houghton, Silent & Campbell, for defendants.

ROSS, District Judge. This is a suit in equity brought to quiet the complainant's alleged title to certain subdivisions of what were public lands of the United States, as against the adverse claims of the defendants. In the bill is set out a deraignment of the title claimed by the complainant. It is therein averred that by the act of July 2, 1862, entitled "An act donating public lands to the several states and territories which may provide colleges for the benefit of agricultural and mechanic arts" (12 Stat. 503), congress granted to the state of California 150,000 acres of the public lands of the United States, and that under and by virtue of that act of congress, and pursuant to state legislation enacted to take the benefit of the grant, the agent of the state of Cali-

for California selected, with the approval of the officers of the land department of the United States, the lands in controversy, as a part of the 150,000 acres so granted to California by the general government, and that the lands so selected were certified and listed to the state on the 3d day of January, 1878, by the secretary of the interior in part satisfaction of the congressional grant, and that thereafter, and on the 25th day of September, 1886, all of the state title thereto was conveyed by its patent to the complainant, and ever since has been vested in it. The bill alleges that at various named dates thereafter the respective individual defendants entered upon the lands in controversy, and located thereon certain placer mining claims, marking the boundaries thereof upon the ground, so that they could be readily traced, and posted notices thereon, and filed the same for record, in accordance with the mining laws of the United States. The bill avers that the defendants, and each of them, claim that, at the time the lands in controversy were listed and certified to the state of California in part satisfaction of the congressional grant, all of the lands were, and ever since have been, mineral in character, and subject to be located and patented pursuant to the mining laws of the United States, and, therefore, that all of the steps taken and acts done in respect to such lands under and by virtue of the congressional grant to the state were void, and that the individual defendants, and each of them, claim to have conformed to the provisions of the statutes of the United States in respect to the location of mining ground, and that they will be entitled to receive patents from the government for their respective mining claims. The bill further alleges that the lands so listed and certified to the state, and patented to complainant by the state, are, and have been at all times, agricultural lands, and subject to be certified, listed, and patented as such in part satisfaction of the congressional grant to California, and never have been at any time mineral lands, or subject to be located or patented as such.

In the answer of the individual defendants, to which exceptions have been filed by the complainant, and which are now for disposition, no question is made in respect to the regularity of the proceedings had under the state law subsequent to the listing and certification of the lands in controversy to the state; but the answer puts in issue the averments of the bill in respect to the character of the lands in controversy, and affirmatively alleges that they are, and were at all times, mineral lands, and never were agricultural in character, and therefore never came within the terms of the grant by congress to California, but were in terms excluded therefrom, and were subject to location under the laws of the United States in relation to mineral lands, with which laws the answer sets up in detail a compliance on the part of the individual defendants regarding their respective locations.

The act of congress making the grant to the state expressly excluded therefrom all mineral lands; and both sides to the controversy submit, as the controlling, and indeed the only, question for decision, whether the listing and certification of the lands in ques-



tion to the state is a conclusive determination that the character of the lands was such as brought them within the terms of the grant, or whether the defendants are, in this suit, entitled to show that the lands in controversy were, at the time they were so listed and certified, and since have been, mineral in character, and therefore excluded from the grant to the state.

The act of congress making the grant does not provide for the issuance of a patent to the state for the lands granted thereby, nor is there any other act, to which attention is called, or which I have been able to find, providing for the issuance to the state of a patent therefor. But by an act of congress of August 3, 1854 (10 Stat. 346, and embodied in the Revised Statutes as section 2449), it is declared:

"That in all cases where lands have been, or shall hereafter be, granted by any law of congress to any one of the several states and territories; and where said law does not convey the fee-simple title of such lands, or require patents to be issued therefor; the lists of such lands which have been, or may hereafter be certified by the commissioner of the general land-office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

The supreme court has decided in a number of cases that a certified list, issued under and pursuant to this statute, is of the same effect as a patent. *Frasher v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. 1141; *Mower v. Fletcher*, 116 U. S. 380, 6 Sup. Ct. 409; *McCreery v. Haskell*, 119 U. S. 327, 7 Sup. Ct. 176; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Chandler v. Mining Co.*, 149 U. S. 79, 13 Sup. Ct. 798. It is said for the defendants that in none of those cases was a question made as to the character of the land. In this counsel are mistaken, and notably so in respect to the case of *Chandler v. Mining Co.* In that case both parties claimed the particular 40-acre tract of land in controversy under a conveyance from the state of Michigan; the plaintiff contending, and offering to prove by parol, that it was a part of the swamp lands granted to the state of Michigan by the act of congress approved September 28, 1850 (9 Stat. 519), and the defendant claiming it under the grant to the state by congress approved August 26, 1852 (10 Stat. 35), by which there was granted to Michigan, for the purpose of building a ship canal around the falls of St. Mary's, 750,000 acres of public land. The tract in controversy was selected and certified to the state in part satisfaction of the canal grant, and was never selected by the state, or listed to it, as swamp land, although a portion of the land in the vicinity thereof, and in the same township, was included in the lists of such lands which were selected and approved by the secretary of the interior. The supreme court held that there had been such affirmative action on the part of the department of the interior as constituted a conclusive determination in respect to the character of the land, and that parol evidence on the part of the plaintiff to show that the particular tract was swamp in char-

acter, and therefore embraced by the swamp-land grant to the state was inadmissible. This ruling clearly controls a case like the present, where the lands in controversy were selected by the state as being within the grant to it, the selection approved by the secretary of the interior, and the certified list issued to the state pursuant thereto. And, appropriate to the question, is also the following from the opinion of the same court in the recent case of *Barden v. Railroad Co.*, 154 U. S. 328, 14 Sup. Ct. 1030:

"In *Steel v. Smelting Co.*, 106 U. S. 447, 450, 1 Sup. Ct. 389, the language of the court was that: 'The land department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation.' In *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380, it was held that 'the question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact, properly determinable by the land department.' And Mr. Justice Lamar added, 'It is settled by an unbroken line of decisions of this court, in land jurisprudence, that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.' If the land department must decide what lands shall not be patented, because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral, or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the secretary of the interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight v. Association*, 142 U. S. 161, 178, 12 Sup. Ct. 258, as the 'supervising agent of the government to do justice to all claims, and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain. There are undoubtedly many cases arising before the land department, in the disposition of the public lands, where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands; and in such cases the rule adopted, that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time, as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

The circumstance that the complainant makes an express allegation in the bill in respect to the character of the lands in dispute at the time of their selection, listing, and certification is unimportant, for it is nothing more than is conclusively implied, as against the defendants, by the certified lists issued to complainant's grantor. **Exceptions allowed.**

**Ex parte WHITTEN.**

(Circuit Court, D. Connecticut. April 4, 1895.)

**HABEAS CORPUS—CONFLICTING STATE AND FEDERAL JURISDICTION—COMITY.**

A person under indictment for crime in Connecticut, who has been extradited from Massachusetts, will not be discharged on habeas corpus by the federal courts on the ground that the indictment is invalid, or that petitioner was not a fugitive from justice, until such questions have been first passed on by the state court.

Petition of one Whitten for a writ of habeas corpus. Heard on motion to quash the return.

Wm. H. Baker and A. D. Penney, for petitioner.

T. E. Doolittle and L. N. Blydenburgh, for the State.

**TOWNSEND**, District Judge. Petition for a writ of habeas corpus alleging that the petitioner is a citizen of the state of Massachusetts, and that he is now detained in Connecticut, in violation of the constitution and laws of the United States. The writ was issued, and the sheriff brought the petitioner into this court, and made return, as to the cause of his detention and imprisonment, that he was committed to jail by virtue of a mittimus, in the form provided for by statute, duly issued by a justice of the peace on the application of the bondsman upon oath that the petitioner intended to abscond. A hearing was had upon a motion to quash the return. As counsel have asked for a speedy disposition of the case, I have confined myself herein to a brief statement of my conclusions. The petitioner was arrested in Massachusetts, and brought into this state under a warrant issued by the governor of Massachusetts upon the requisition of the governor of Connecticut, accompanied by a certified copy of the indictment charging the crime, and an affidavit that the petitioner was a fugitive from justice. It is claimed in support of the petition that the indictment was procured by mistake, and that the prisoner was not in fact a fugitive from justice. These claims are denied by the attorney for the state. In view of the conclusions reached, it is not necessary to pass upon these questions of fact. It may be assumed, in the disposition of this motion, that the allegations in the petition are true. Counsel for the petitioner claims that he can prove, in the first place, that the indictment is invalid or void by reason of some mistake on the part of the grand jury. But the effect of an inquiry into this question, assuming such evidence to be admissible and true, would be to call upon the federal court to examine into the proceedings under which said indictment was obtained, and to determine collaterally its sufficiency under the laws of this state. It has been repeatedly decided by the supreme court of the United States, in cases of this character, that while the federal court may have power, in its discretion, to issue writs of habeas corpus to state courts in cases of urgency, and where it appears that the petitioner is restrained of his liberty in violation of his rights under the constitution, the exercise of such power, before the question

has been raised or determined in the state court, is one which ought not to be encouraged. As is said by Mr. Justice Brown, delivering the opinion of the supreme court in *Cook v. Hart*, 146 U. S. 183, 195, 13 Sup. Ct. 40:

"The party charged waives no defect of jurisdiction by submitting to a trial of his case upon the merits, and we think that comity demands that the state courts, under whose process he is held, and which are equally with the federal courts charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired."

It is further claimed that the petitioner was not a fugitive from justice, and that, inasmuch as extradition proceedings are based upon the statutes of the United States, the question whether he was in fact such fugitive is a federal question, which it is the duty of this court to decide. But it is not denied that the demand made upon the executive authority of the asylum state, and his action thereon, were proper in form, and it will not be assumed in advance that he has surrendered the petitioner upon insufficient evidence. In *Ex Parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, the prisoner was arrested under authority of a warrant of the governor of Utah, upon a requisition from the governor of Pennsylvania, representing that the accused was a fugitive from justice. He applied for a writ of habeas corpus, on the ground that the evidence was insufficient to show that he was a fugitive from justice, and, the application being denied, he carried the case to the supreme court of the United States. The court in its opinion on that point said as follows:

"If the determination of that fact by the governor of Utah, upon evidence introduced before him, is subject to judicial review, upon habeas corpus, the accused in custody under his warrant, which recites the demand of the governor of Pennsylvania, accompanied by an authentic indictment charging him, substantially in the language of her statutes, with a specific crime committed within her limits, should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full as might properly have been required, or because it was so meager as, perhaps, to admit of a conclusion different from that reached by him. In the present case, the proof before the governor of Utah may be deemed sufficient to make a *prima facie* case against the appellant as a fugitive from justice, within the meaning of the act of congress."

I do not mean to be understood as denying the right to this prisoner, at an appropriate time, to introduce evidence that he was not a fugitive from justice, or that the evidence before the governor of Massachusetts was insufficient to authorize his action; nor do I intend at this time to pass upon the merits of this or any other questions presented, nor to intimate what disposition might be made of these claims, in case they were brought before this court after final action in the state court. All that is now decided is that it must be assumed in advance that the petitioner may obtain all the protection to which he may be entitled in the courts of this state. In *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30, the supreme court of the United States held that the state court of original jurisdiction was competent to decide questions of this character in the first instance, and that its obligation to render such decision

as would give full effect to the supreme law of the land, and protect any right secured by it to the accused, was the same as that resting upon the courts of the United States. If the final judgment of the state court be adverse to this petitioner, he may then invoke the protection of the federal court in case of any denial of his constitutional right. In *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, the supreme court expressly decides that the states have the right, by their own courts, to inquire into the grounds upon which any person, within their respective limits, is restrained of his liberty, and to discharge him from arrest if such restraint is illegal, even though such illegality arise from a violation of the constitution or laws of the United States. In view of the principles of right and law underlying the forbearance which the federal and state courts exercise towards each other in order to avoid conflict, I should not be justified in passing upon such questions in advance of the proceedings in the state courts. In the brief time which has elapsed since the argument, I have examined most of the cases cited by counsel for the petitioner in support of his claims. They show that whenever a federal court has inquired into the constitution of a grand jury, or the validity of indictments found by it, the original case either arose in a federal court, or, as in *Ex parte Farley*, 40 Fed. 66, the petition for the writ was brought after trial in the state court. The conclusions announced are confirmed by the very recent decision of the supreme court of the United States in *Pearce v. State*, 15 Sup. Ct. 116, which I have examined since the argument. In that case the asylum state refused to inquire into the sufficiency of the indictment, but left those questions to be determined by the demanding state. The supreme court held that such refusal did not deny to the petitioner any constitutional right. The motion to quash the return is denied, without prejudice to the petitioner to hereafter renew his petition to this court, provided the circumstances render it proper to do so.

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IRWIN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

No. 90.

CUSTOMS DUTIES—CLASSIFICATION—HYDRATE OF ALUMINA.

The fine powder known as "hydrate of alumina," and manufactured from the crude mineral known as "bauxite," is not entitled to free entry, as bauxite, under paragraph 501 of the free list of the act of October 1, 1890, but is dutiable, under paragraph 9, at six-tenths of one cent per pound, as alumina. 62 Fed. 150, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by Thomas Irwin & Sons, importers, for a review of the decision of the board of general appraisers reversing the decision of the collector of the port of New York as to the rate of duty on certain imports. The circuit court re-

versed the decision of the board, and affirmed that of the collector. 62 Fed. 150. The importers appeal.

Stephen G. Clarke, for appellants.

James T. Van Rensselaer, Asst. U. S. Atty., for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** This appeal from the circuit court involves the question whether the fine powder known as "hydrate of alumina," and manufactured from the crude mineral known as "bauxite," should be classified for tariff purposes, under the free list of the tariff act of October 1, 1890, as bauxite, or as alumina, under paragraph 9 of the same act, and dutiable at six-tenths of one cent per pound. The opinion of Judge Coxe (62 Fed. 150) states clearly and at length the various reasons which induced him to affirm the decision of the collector, and to hold that the article was not bauxite, but was dutiable under the name of "alumina." In those reasons we fully concur. While the article, technically speaking, is hydrate of alumina, it sufficiently appears from the testimony taken for use before the circuit court that in common speech the terms "hydrate of alumina" and "alumina" are used as synonymous. The decision of the circuit court is affirmed.

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LA MANNA et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

**CUSTOMS DUTIES—CLASSIFICATION—SARDINES.**

The act of October 1, 1890, provides (Schedule G, par. 291) that anchovies and sardines imported in boxes measuring "not more" than (giving dimensions) shall pay 10 cents per whole box; in "half boxes" measuring "not more" than (giving dimensions), 5 cents each; in "quarter boxes" measuring "not more" than (giving dimensions), 2½ cents each; "when imported in any other form, 40 per cent. ad valorem." *Held*, that sardines imported in boxes much smaller than quarter boxes, and commercially known as "eighth boxes," were not subject to a specific duty of 2½ cents per box, but only to the ad valorem duty of 40 per cent.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by La Manna, Azema & Farnan, importers of certain sardines in boxes, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on said merchandise. The circuit court affirmed the decision of the board, and the importers appealed.

William B. Coughtry (Stephen G. Clarke, of counsel), for appellants.

Wallace MacFarlane, U. S. Atty., and Chas. Duane Baker, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** In October, 1891, the appellants imported certain sardines in boxes, which were classified and assessed for duty by the collector of the port of New York at  $2\frac{1}{2}$  cents per each box. They insisted by their protest that the sardines should have been subjected to duty at 40 per centum ad valorem. The board of general appraisers affirmed the action of the collector, and upon an appeal to the circuit court that court affirmed the decision of the board of appraisers. From that decision the present appeal was taken.

The case is controlled by the provision of the tariff act of October 1, 1890 (Schedule G, par. 291), which enacts that duties shall be levied as follows upon "anchovies and sardines, packed in oil or otherwise, in tin boxes measuring not more than five inches long, four inches wide and three and one-half inches deep, ten cents per whole box; in half boxes, measuring not more than five inches long, four inches wide, and one and five-eighths inches deep, five cents each; in quarter boxes, measuring not more than four and three-fourths inches long, three and one-half inches wide, and one and one-fourth inches deep, two and one-half cents each; when imported in any other form, forty per centum ad valorem." It appears by the record that the boxes imported by the appellants were  $3\frac{1}{4}$  inches long,  $2\frac{1}{2}$  inches wide, and  $\frac{3}{4}$  of an inch deep. It also appears that, at the date of the enactment of the tariff provision, "whole boxes," "half boxes," "quarter boxes," and "eighth boxes" were terms of commercial designation as applied to sardines in boxes, and that boxes like those imported by the appellants were known in the trade as "eighth boxes," and would not be bought and sold, or commercially recognized, as "quarter boxes." The capacity of these boxes was about  $7\frac{1}{4}$  cubic inches, while that of whole boxes, half boxes, and quarter boxes is respectively about 70,  $32\frac{1}{2}$ , and 20 cubic inches. The theory adopted by the collector, by the board of general appraisers, and by the circuit court was that, because the boxes in controversy measured "not more" than the dimensions specified in the clause subjecting quarter boxes to duty at  $2\frac{1}{2}$  cents each, they were described by that clause. We cannot assent to this proposition. Upon that reasoning they are as accurately described in the preceding clauses of the paragraph, and are subject to duty at 10 cents per box and at 5 cents per box, as well as to duty at  $2\frac{1}{2}$  cents per box. The boxes measured "not more" than those described in the preceding clauses. Manifestly, it is the intention of the provision to graduate the duty according to the size of the boxes, and subject the smaller sizes to the lower specific duty; and it is not supposable that congress intended to impose upon smaller boxes than the half or quarter sizes the higher duty of the largest size. Consequently, boxes like those in controversy, although "not more" than the size of the largest boxes, as well as "not more" than the size of the half and quarter boxes, if dutiable as belonging to any one of these three classes, would more naturally fall within the category of the last. They do not, however, fall within that category, because they do not correctly fit the description of this class. They are not "quarter boxes,"—a term of

commercial designation, which cannot be disregarded without doing violence to the cardinal rule in the construction of tariff acts. It follows that, if they are described by the provision at all, they are described by the last clause, and are subject to the *ad valorem* duty. We conclude that sardines packed in a tin box of a larger size than the ordinary "whole box," if there are such, as well as in boxes smaller than quarter boxes, are intended to be dutiable at 40 per centum *ad valorem*. The judgment of the circuit court is accordingly reversed.

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ENTERPRISE MANUF'G CO. OF PENNSYLVANIA v. SNOW et al

(Circuit Court, D. Connecticut. April 4, 1895.)

No. 822.

PLEADINGS IN PATENT CASES—SUFFICIENCY OF BILL—PROPERT OF PATENT.

A bill for infringement, which makes propret of the letters patent, without other description of the patented invention, is sufficient as against a demurrer. *La Republique Francaise v. Schultz*, 57 Fed. 37, followed.

This was a bill by the Enterprise Manufacturing Company of Pennsylvania against Levi T. Snow and others for infringement of a patent.

Howson & Howson and C. E. Mitchell, for complainant.  
Albert H. Walker, for defendants.

TOWNSEND, District Judge. The demurrer to this bill alleges as follows: "That the bill does not contain any description, delineation, or definition of any patented claim that is alleged to have been infringed by the defendants." The bill merely makes propret of the patent. The demurrer raises the question whether such propret is equivalent to a sufficient description of the patented invention. This question has been presented and considered in prior cases in this circuit. The practice referred to does not seem to be supported by principle, except, possibly, upon the theory that the patent itself is the foundation of the statutory right of the complainant. Upon this ground, and in view of the manifest convenience of such a course, and its general adoption, I followed the prior decision in *La Republique Francaise v. Schultz*, 57 Fed. 37. The exhaustive brief of counsel for defendants forcibly suggests the reasons why the substitution of such propret for an adequate description of the patent is contrary to the rules of equity. It is not necessary to express any opinion upon the merits of the question, inasmuch as I feel bound by the settled practice, and by the prior decisions in the various circuits to the effect that propret of the patent is sufficient. The demurrer is therefore overruled.



## JENSEN CAN-FILLING MACH. CO. et al. v. NORTON et al.

(Circuit Court of Appeals, Ninth Circuit. January 28, 1895.)

No. 134.

## 1. PATENTS—INFRINGEMENT OF COMBINATION CLAIMS—EQUIVALENTS.

Infringement of combination claims can only be made out by showing that defendant's machine has substantially every one of the elements composing the combination, or mechanical equivalents for any that are omitted; and "mechanical equivalents," as used in this connection, means devices previously known, which, in the particular combination of the patent, can be adapted to perform the functions of those specified devices for which they are substituted without changing the inventor's idea of means.

## 2. SAME—INFRINGEMENT—CAN-MAKING MACHINES.

The Norton patent (No. 250,096) for a machine for soldering side seams of cans construed, as to claims 2 and 3, and the same *held* not infringed by a machine made according to the Jensen patent (No. 442,484).

## 3. SAME.

The Leavitt patent (No. 250,266) for a can-body forming machine construed, as to claims 2 and 12, and the same *held* not infringed by the said Jensen machine.

## 4. SAME—LIMITATION BY PRIOR ART.

The Norton patent (No. 395,795) for a can forming and soldering machine construed, as to claims 1, 2, 3, 4, 5, and 10, and the same *held* to be limited by the prior state of the art to the specific devices shown; and, being so limited, *held*, further, that they are not infringed by the Jensen can-body making machine (patent No. 442,484).

## 5. SAME.

The Hipperling patent (No. 366,482) for wiping surplus solder from the inside of can bodies analyzed, as to claim 1, and *held* not infringed by the solder-wiping device of the Jensen machine.

## 6. SAME.

The Leavitt patent (No. 444,000) for a can-body forming and side-seam soldering machine construed and limited, as to claims 20, 22, 23, 25, 26, 27, 28, 30, and 31, and the same *held* not infringed by the Jensen machine.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a bill in equity by Edwin Norton and Oliver W. Norton against the Jensen Can-Filling Machine Company, Mathias Jensen, and John Fox, for infringement of certain patents. The circuit court dismissed the bill, as to said Fox, and granted an injunction against the remaining defendants. The latter appeal.

Wheaton, Kalloch & Kierce, for appellants.

Estee & Miller and Mundy, Evarts & Adcock, for appellees.

Before ROSS, HANFORD, and MORROW, District Judges.

HANFORD, District Judge. This is a suit in equity commenced in the United States circuit court for the district of Oregon by the appellees against the appellants and one John Fox, for alleged infringements of the following United States patents, viz.: No. 250,096, to Edwin Norton, granted November 29, 1881, on machine for soldering side seams of cans. No. 250,266, to F. M. Leavitt, granted November 29, 1881, on machine for making the seams of sheet-metal cans. No. 366,482, granted to W. Hipperling, July 12,

1887, on apparatus for the manufacture of tin cans. No 395,788, to F. M. Leavitt and Edwin Norton, granted January 8, 1889, on can forming and soldering machine. No. 395,795, to Edwin Norton, granted January 8, 1889, on can forming and soldering machine. No. 444,000, to Frank M. Leavitt, granted January 6, 1891, on can-body forming and side-seam soldering machine. After a full hearing on the pleadings and proofs, the circuit court made a decree dismissing the bill, as to the defendant John Fox, and granting an injunction against the other defendants, forbidding the manufacture, vending, or use of certain machinery described in letters patent No. 442,484, granted to the defendant Jensen, December 9, 1890, for a "Can-Body Making Machine," which by said decree was adjudged to be an infringement of the rights of the complainants under claims 2 and 3 of the Norton patent (No. 250,096); claims 2 and 12 of the Leavitt patent (No. 250,266); claim 1 of the Hipperling patent (No. 366,482); claims 20, 22, 23, 25, 26, 27, 28, 30, and 31 of the Leavitt patent (No. 444,000); claims 1, 2, 3, 4, 5, and 10 of the Norton patent (No. 395,795); and claims 1, 3, 6, and 19 of the Leavitt & Norton patent (No. 395,788). From said decree the defendants Jensen and the Jensen Can-Filling Machine Company, a corporation, have appealed to this court.

The proofs in the case consist of the several patents above mentioned, including specifications and drawings, incomplete models, and depositions of the complainant Edwin Norton, and of a patent expert named Melville E. Dayton. There is no evidence tending to prove, nor admission by the defendants of, the making, vending, or using of any machine, since the date of said patent No. 395,788, having the particular devices which are supposed to infringe claims 1, 3, 6, and 19 of said patent, nor does it in any way appear that the appellants threaten or have threatened or intend to hereafter, in any way, infringe said patent. Therefore, as to said patent, the decree is certainly erroneous.

As to the other claims, the pleadings and assignments of error relieve the case of all questions save and except the one general question, does the Jensen machine infringe the claims of the patents sued on? Upon this general issue the cause has been tried and submitted, except as to patent No. 395,788, and it is to be determined accordingly. The patents sued on, and remaining to be considered, all relate to devices for doing some part of the work of forming the bodies of tin cans, with interlocked side seams, and soldering the seams inside the can body as well as on the outer surface, and removing from the can body, and saving, all surplus solder; and these several combinations of devices described in the patents are capable of being so connected as to work harmoniously together, and, by a continuous series of movements, automatically and rapidly act upon flat pieces of tin, converting them into cylinders with side seams perfectly interlocked, pressed, soldered, and wiped, and the cylinders or can bodies then passed on, to be acted upon by other machinery for putting on, crimping, and soldering the tops and bottoms, so as to work harmoniously, and produce finished cans, as stated.

Of the patents to be considered, the first in order, because the oldest, is patent No. 250,096. This patent covers the machinery in the section of a can-making plant, which takes the can bodies after the side seams have been pressed, carries them forward so as to bring the seams in contact with acid, then with molten solder, and then with a wiper for removing the surplus solder from the outside of the seams, and delivers them, completed, to the mechanism which performs the function of applying the heads. The elements of the invention are two parallel bars or rails, forming a track for the cans to move upon; an endless-chain carrier, to convey them forward upon the track; a track for the carrier; tanks for the acid and molten solder placed under the track for the cans, so as to apply first acid and then solder to the side seam of each can body as it passes upon the track with its seam downward; two parallel bars or guides placed above the track, and coterminous with the solder tank, for the cans to pass under, and to hold them down upon the track at that stage of their journey, so as to receive the full benefit of the solder bath; a wiping device to come in contact with the outside of the seams immediately after the cans have passed the solder bath, so as to remove the surplus solder while yet in a molten state; and a hood or guide made in shape to fit the part of a can body above the track, and press it downward against the wiper, while passing over it, without mashing or bruising the can body. The track is partly level and partly inclined, so that the can bodies are in a horizontal position while passing the acid bath; then taken up a slight incline, to facilitate the dripping off of surplus acid; then carried on a level, so as to be in a horizontal position over the solder bath; and then up a second incline, to facilitate the wiping off of the surplus solder. In operation, the track upholds the can bodies; the two parallel, overhead guides hold them down, in contact with the molten solder in the solder tank; the carrier track upholds the carrier; a link of the carrier surrounds a can body, and engages the latter end so as to move it as the chain moves, forward along the track; the acid tank applies acid, and the solder tank applies molten solder, to the seams of the cans, as they pass; the wiper rubs off the surplus solder from the outside of the seams; and the hood exerts sufficient pressure from above to compel the moving can body to rub against the wiper. Each of the devices described has a function, and is necessary to success, in the operation of the machine. The claims of the patent which are to be considered show, in connection with the accompanying specifications and drawings, each of said devices to be an essential part of the combinations constituting the invention. They are as follows:

"(2) In a machine for soldering side seams of cans, a track for the cans, a carrier to move the cans, and a solder bath, in combination with guides, M, M, substantially as and for the purpose specified. (3) In a soldering machine, a wiper, J, for the purpose of removing surplus solder from the outside of the can, in combination with a hood, K, for the purpose of holding the can in contact with the wiper, substantially as specified."

To make a case against the defendants of infringement of this patent, the Jensen machine must be shown to have substantially

the same combinations, including every one of the above-mentioned devices, or mechanical equivalents for any that may have been omitted. "Mechanical equivalents," as that phrase is to be understood in this connection, are such devices as were known previously, and which, in the particular combination of devices specified as constituting the patented invention, can be adapted to perform the functions of those specified devices for which they are employed as substitutes, without changing the inventor's idea of means. In other words, without introducing an original idea, producing, as the result of it, an improvement which is itself a patentable invention. 1 Rob. Pat. §§ 248, 253, 254. By comparing the two, we find that the Jensen machine does the work of soldering the side seams of tin cans and wiping the outside by the same mode of operation as the Norton patented machine; the devices for holding and applying acid and molten solder are substantially the same in both machines; the carrier and wiper of the Jensen machine are different in form, but may well be regarded as equivalents for the mechanism for performing the same functions in the Norton machine. The important difference is in tracks. The Jensen track is two parallel bars framed together, and suspended so as to be inside of the can bodies; the upper edges upholding them as they pass through the soldering and wiping process, and the lower edges of the frame at the same time exerting all the downward pressure necessary to bring them in contact with the solder bath and the outside wiper, and dispensing entirely with the guides and hood of the Norton machine, without creating any necessity for equivalent devices for supplying external force from above. The single device of the frame, P, as constructed by Jensen, does all the work of the track, E, E, the guides, M, M, and the hood, K, described in the specifications of the Norton patent. The guides, M, M, are essential parts of the combination, and an element of claim 2; and the hood, K, is an essential part of the combination and an element of claim 3. As the Jensen machine does not have either of these devices, nor any substitute therefor, but gets the pressure which they have to supply, to render Norton's mechanism effective, from the frame, P, which also does all the work of Norton's track, it is entitled to be regarded, not as a mere improvement, but as a new invention.

#### The Leavitt Can-Body Forming Machine (Patent No. 250,266).

This is an automatic machine for making can bodies with interlocked side seams. The claims supposed to be infringed by Jensen's machine are as follows:

"(2) The combination of the horn, P, former, M', heads, W, nipping hammer, H, angular guides, M, an edge-folding mechanism, and separate means for relatively operating the several parts, substantially as and for the purpose specified." "(12) The horn, P, constructed with longitudinal grooves in its opposite sides, in combination with the longitudinally movable stripping jaws, A\*, substantially as and for the purpose herein set forth."

It is our conclusion that the horn, P, or shaping device, which is an element of the combination described in each of these claims,

has not been reproduced or imitated by Jensen, and that, by omitting that important part of the mechanism of this patent from his machine, infringement has been avoided with respect to both claims. To properly understand and appreciate the features and functions of horn, P, it becomes necessary to refer to the specifications and drawings descriptive of the invention which accompany and explain the claims. By such reference we find horn, P, described as follows:

"It will be observed that in describing the operation of bending the blank to form the body of the can or box, and also the operation of forming the seam, I have spoken of the horn, P, as if it were solid. So far as the operation of the said horn is concerned, its parts are rigid and practically solid during the bending of the blank; but during the interlocking of the end-folded edges, and also during the removal of the finished body from the horn, it is necessary that the horizontal diameter thereof, especially at the upper part, should automatically diminish, to meet the exigencies of the work. Thus, for example, if the horn did not contract laterally at its upper part, the hooked or end-folded edges of the blank could not pass one over the other, as I have just described; and, in like manner, if such contraction were not provided during the removal of the body from the horn, the former would be so closely bound upon the latter that the friction would prevent its facile or speedy removal. To provide for this contraction in a certain direction of the horn, P, at certain stages in the operation of the machine, the said horn is constructed as follows: It is bored from its inner end nearly to its outer end, as represented at  $g^7$ , in Fig. 5, and its main or rigid portion is beveled at one side, as shown in the cross section, Fig. 8; and there is fitted to the said side, as also represented in the said figure, a hinged leaf,  $C^7$ . A lateral opening,  $m^7$ , extends from the bore,  $g^7$ , out through the adjacent beveled side of the horn, and into and through this opening projects a stud,  $n^7$ , which extends inward from the leaf,  $C^7$ . Working longitudinally in the bore,  $g^7$ , is a rod or bar,  $D^7$ , the inner end of which is beveled to the wedge-like form shown at  $r^7$ , in Fig. 5. These parts are so proportioned that when the rod,  $D^7$ , has been pushed inward, the wedge,  $r^7$ , acting against the inner end of the stud,  $n^7$ , will force outward the leaf,  $C^7$ , to give the size and contour to the horn, P, required while the blank is being bent around the latter, as hereinbefore explained; but when the rod,  $D^7$ , is drawn in an opposite direction, the wedge  $r^7$ , being withdrawn, permits the leaf,  $C^7$ , to move inward against the beveled surface,  $l^7$ , of the main portion of the horn, thereby narrowing the said horn, considered as a whole, at its upper side. In order to give the requisite longitudinal movement to the rod  $D^7$ , its outer end is provided with a head,  $u^7$ , which is fitted within a socket,  $F^7$ . The construction last described is more clearly indicated in Figs. 5 and 8 aforesaid. The socket,  $F^7$ , is really a vertical, inwardly flanged groove, formed in the upper end of a lever,  $G^7$ , which is attached to a rock shaft, H, from which extends a horizontal lever,  $H'$ , from which extends upwards the rod  $H''$ , as shown in Fig. 4. This rod,  $H''$ , as shown in Fig. 2, is actuated from two cams,  $H^4$ ,  $H^7$ , on the shaft, G, by devices substantially the same as those by which the rod, C, is operated from the cams,  $I^4$ , and  $I^5$ , on one of the shafts, E. With reference to the mechanism for forming the end-folded edges upon the blank by this means, such movement is given to the rod  $D^7$ , as to expand the horn to its full size at the requisite stages of the operation of bending the blank to form the body and of forming the joint in the latter, and to permit the contraction of the upper part thereof when such is necessary. The leaf,  $C^7$ , it should be mentioned, is pushed inward to contract the available size of the horn by the impact of the adjacent pusher,  $e^7$ , when the same advances with the contiguous folding head, W; the leaf yielding, of course, simultaneously with the withdrawal from the stud,  $n^7$ , of the wedge,  $r^7$ , and also simultaneously with the passage of the uppermost of the end-folded edges of the blank upon and over the undermost of said edges."

The multiplication of parts, and the union and adjustment thereof, above described, is certainly very intricate, and the functions

of each part must be important and necessary to the accurate and successful working of the machine; and yet the argument of counsel for the complainants treats this device as if it were a simple, solid, round thing, without any use other than to co-operate with the exterior forming devices so as to prevent mashing while the blanks are being pressed into cylindrical form. Care has been shown to call attention to the similarity of Jensen's forming horn in the matter of the side grooves for the stripping jaws to work in, but the important differences between the two devices have been ignored. And in his testimony the complainants' expert witness, Mr. Dayton, also makes full and graphic descriptions of the parts of the Leavitt machine which do resemble corresponding parts found in Jensen's machine; but his description of this horn, P, consists principally of mere references to the drawings, and the following statement:

"This roller acts as the can body is being drawn off the horn, by means of the stripping jaws, Q<sup>1</sup>, Q<sup>1</sup>, which have the same construction and operation, substantially, as the stripping jaws, A\*, in the Leavitt patent, and the hooks of which extend into side grooves in the horn seen at G<sup>2</sup>, in Fig. 8, exactly corresponding to the side grooves in the horn of the Leavitt patent. Said side grooves are also seen at G<sup>2</sup>, and the stripping jaws at Q<sup>1</sup>, in Fig. 1 of the Jensen patent. In both the Leavitt patent and the Jensen machine, there are also devices for positively causing the hooks on the edges of the metal sheet to engage with each other before the seam is compressed, but, as these are not made an element of either claims 2 or 12 of the Leavitt patent, I have not heretofore mentioned them. In the Leavitt patent this device consists of a hinged part of the horn itself, whereby the latter may expand within the can body, and thus cause its overhooked edges to engage each other. In the Jensen patent it consists of an external hinged or pivoted part, N<sup>1</sup>, seen in Figs. 8, 9, and 18. The folding devices first bring the edges into their proper relation, or past each other, in both machines. In the Leavitt patent the nipping hammer, f<sup>1</sup>, first bears lightly upon the outer or over folded edge of the blank, and thereby prevents it from lifting during retraction, so that by this means the hooking of the two edges together is assured. When this is done the further downward movement of the nipping hammer \* \* \* forcibly compresses the uppermost of the folded edges upon the lowermost thereof, thereby bringing them firmly and closely together to form a tight and snug joint, required in the finished body of the can or box.' In the Jensen machine the lever, N<sup>1</sup>, also bears lightly against the outer fold or edge of the sheet, and in like manner insures its interengagement with the opposite folded edge upon the retraction of said edges, or the expansion of the can body."

This is manifestly intended to be misleading. The particular device for positively causing the hooks on the edges of the metal sheet to engage with each other before the seam is compressed, of the Leavitt patent, which Mr. Dayton here asserts is not made an element of either claim 2 or 12, is an essential part of the horn, P, as the inventor's specifications clearly show; and it is not a part merely of horn, P, nor part of the purpose of its peculiarities of form and construction, but the whole of it, and the purpose in full, which is made an element of both of said claims. *Hendy v. Iron Works*, 127 U. S. 370, 8 Sup. Ct. 1275. Now, what is represented as being the part of Jensen's machine corresponding to the horn, P, of the Leavitt patent, is a solid piece of wood, nearly round, approx-

imating in diameter the diameter of the cans, and adapted to co-operate with other devices so as to prevent mashing of the tin in the process of rolling the blanks into cylindrical forms. But the whole mechanism and operation of Jensen's machine differ from the Leavitt machine, and particularly the horn. The Jensen horn is not bored; has no lateral opening, hinged leaf, stud, lever, rod, wedge, nor socket. It is not capable of expansion or contraction, and it does not by itself positively cause the bent edges of the metal sheets to interlock, nor assist in causing such interlocking of edges, in the manner of the Leavitt horn; that is, by forcibly expanding the can bodies so as to draw the folded edges into each other.

Patent No. 395,795.

This patent is for a combined can-body forming and side-seam soldering machine. It may be briefly described as the Leavitt can-body forming machine, with its mechanism inverted so as to make the interlocked side seam under, instead of on, the upper part of the forming horn, and then coupling that reorganized machine to the Norton side-seam soldering machine, heretofore described. The claims of this patent alleged to have been infringed by the Jensen machine are as follows:

"(1) The combination, with a can-body former horn, of a side-seam closing device below the horn, adapted and operating to close the side seam against the lowermost part of the horn, a side-seam soldering device having a can-body carrier, and mechanism for delivering the can body from said horn into said carrier, substantially as specified. (2) The combination, in a can-body forming machine, with a can-body blank feed device, of a can-body former horn below said feed device, and above which the blanks are fed, and mechanism for folding the blank downward around said horn, and a device below said horn for closing the folds of the seam against the horn, substantially as specified. (3) The combination, with a can-body former horn, of mechanism above the horn for folding or forming the can body downward around the horn, and a seam-closing device for squeezing or closing the folds of the seam against the horn, substantially as specified. (4) The combination, with a can-body forming machine constructed and adapted to interlock and close the seam at the under side of the can body, of a side-seam soldering machine having a bath or soldering device over which the can body is carried, and means for delivering the can body from the forming machine to the side-seam soldering machine, substantially as specified. (5) The combination, with a can-body former horn, of a device for feeding the blank sheets in above the horn, a device for folding the sheet downward around the horn, devices for forming the side seam of the can body, a side-seam soldering device having a carrier, and a device for moving the can body from said horn, and delivering the same into said carrier, substantially as specified." "(10) The combination, with a can-body former horn, of a device below the horn for closing the seam against the horn, substantially as specified."

These are all combination claims, and each is broad enough to include every imaginable style of mechanism for forming can bodies and soldering the side seams thereof. So regarded, they would all be void for failure to describe any patentable invention. They must necessarily be limited to include only the particular devices specified. Thus construed, each of said claims, except the fourth, is for a combination, one essential element of which is the expan-

sion forming horn of the Leavitt machine, heretofore described. The Jensen machine, having no such device, is innocent of infringement of the several claims of which it is an element. That which appears to be original with the patentee, in the mechanism described in this patent, and which is therefore to be regarded as his invention, is the can conveyor, K, described in the specifications, consisting of a track, guides, hooks, and springs placed between the can-forming horn and the tracks and endless-chain carrier of the soldering machine, and designed to pull the can bodies off the former horn, and deliver them to the soldering machine in proper position to be operated upon by the latter. This intermediate can conveyor is a principal element of the fourth claim. In the Jensen machine there is no intermediate can conveyor for delivering the cans to the soldering apparatus, and no mechanism whatever corresponding to any part of it, except the hooks which pull the can bodies from the horn directly over the frame, which is hooked directly to the end of the horn, and which serves as a track for conducting the can bodies over the acid and solder baths. Use of the hooks, merely, without the other specified appliances, in a machine having so many other points of difference, is not sufficient to fill the place of Norton's conveyor, or complete the combination so as to become an infringement.

**The Hipperling Inside Wiper (Patent No. 366,482).**

This contrivance for automatically removing surplus solder from the inside of can bodies during the process of soldering the side seams by machinery, like Norton's, having an outside track and guides for conducting the cans over the solder bath, comprises the wiper proper, and means for supporting it and making it work inside the can bodies without obstructing their onward progress. The wiper is mounted upon a bar made in two parts, hinged together at one end like an ordinary pocket or folding rule. A spring placed between the two sections of this bar gives pressure to the end of the lower arm of the bar to which the wiper is attached, and a weight placed on that part also adds to the pressure, the object being to supply sufficient pressure to insure effectual wiping. The bar is suspended from a supporting frame by a series of slides and dogs which spring laterally into grooves or pockets in each side of the upper section, and adjusted to be easily pushed out of place by an endless-chain can carrier so as to permit the cans to pass them, and spring back to support the bar after each can has passed. The invention, which is the foundation of the patent right, is found in the ingenious method of suspending a device for working inside of moving can bodies to an outside supporting frame, and the means of supplying force to thoroughly wipe. Jensen's inside wiper is comparatively a very simple device. It is just a wiper, and nothing else, attached to his inside frame, which serves as a track for conducting the can bodies over the acid and solder baths heretofore described. It does not contain any of the mechanism which Hipperling invented. Consequently, it does not infringe his patent.



**The Leavitt Combined Can-Body Forming and Side-Seam Soldering Machine (Patent No. 444,000).**

The complainants assert that this patent covers an invention of the primary class, inasmuch as it embodies the original idea of combining in one organized machine mechanism for forming automatically, from a flat, rectangular piece of tin, a can body with an interlocked and welded side seam. But after considering with care all the claims, specifications, and drawings of the patent, and the testimony and arguments relating thereto, we regard this patent as being, in the main, descriptive of an aggregation of previously known machinery, rather than of any new discovery in the realm of mechanic arts. Take from what the inventor has described the framework, the driving wheels, belts, gearing, and means for connecting the operating mechanism with the power which actuates it, none of which are original with this inventor, and the inside wiper, and means for attaching it to the projecting end of the former horn, and the mechanism for giving to each can body a half revolution after its side seam has been compressed so as to bring the seam into position to come in contact with the molten solder beneath the track, which are new, and nothing will be left, except an improved Norton machine for soldering side seams of cans, as described in patent No. 250,096, and Leavitt's machine for making can bodies with interlocked side seams, described in patent No. 250,266, each of which is capable, without co-operation from the other, of doing all the work assigned to it. In his specifications, Mr. Leavitt himself declares that:

"It is the principal object of my invention to save the labor of the attendant whose duty it is to place the can bodies in the soldering machine can carrier, and at the same time always deliver the can bodies into the carrier with their seams turned directly downward, so that the can bodies need be immersed in the solder bath only to the depth necessary to solder the seam, and thus dispense with the necessity of immersing the can body in the solder bath to a greater depth in order to compensate for slight inaccuracies in turning the seam of the can bodies directly downward, as must always be the case where such work is done by hand. \* \* \* My invention consists primarily in the combination, with a can-body forming machine or its horn, of a side-seam soldering bath, into which the can body may pass directly from the body-forming horn, and with its seam turned down. It further consists in the combination, with a body-former horn and the side-seam solderer, of suitable mechanism for turning the body a part of, or one-half of, a revolution, so that the seam will be underneath at the time the soldering is being done. It further consists in the combination, with a body-former horn, of a side-seam solderer and an inside wiper secured to and supported by the horn, so that the can body, as it passes off the horn and through the soldering device, may at the same time pass around the wiper or wiper-carrying rod, and the can thus be effectually wiped upon the inside, without any complicated mechanism, and without interfering with the continuous movement of the can bodies as they are carried along. The invention further consists in the combination, with a can-body former horn and suitable mechanism for moving the can bodies along and off of said horn, of mechanism for revolving the can body a part of a revolution on said horn, and a stop or projection adapted to engage the interlocked side seam to limit the extent of such revolving movement of the can body on the horn. It further consists in a can-body former horn having a longitudinal guide groove at the lower part of its circumference to receive the side seam, and thereby guide the can body into the side-seam solderer, with the seam directly underneath, in proper position for

soldering. It further consists in certain novel features in the construction of the side-seam solderer and of its fluxing device, hereinafter fully described. It also consists in the novel devices and novel combinations of parts or devices herein shown and described, and more particularly pointed out in the claims."

The defendants are charged with infringement of 9 of the 34 claims of the patent. They are the following:

"(20) In a can-soldering machine, the combination, with a horn, of a rod connected thereto, a wiper connected to the end of the rod, a solder tank over which the rod extends, and a means, substantially as described, for advancing the can bodies, as and for the purposes stated." "(22) In a combined can-body-forming and side-seam-soldering machine, the combination, with a can-body former horn, of a side-seam-soldering device and mechanism for delivering the can body to the soldering device from the horn with its seam turned down so that the soldering may be done from below, substantially as specified. (23) The combination, with a can-body former horn, of a side-seam solderer, and means for moving the can body along from the horn over the solderer, substantially as specified." "(25) The combination, with a can-body former horn, of a side-seam solderer and an inside wiper secured to the horn, and means for moving the can body along from the horn over the solderer, substantially as specified. (26) The combination, with a can-body former horn having a longitudinal groove on its under side, at the end section thereof, for the side seam, of a side-seam solderer, into which the can bodies are delivered directly from the horn, with their seams turned down, so that they will be soldered from below, and means for moving the can body along from the horn over the solderer, substantially as specified. (27) In a combined can-body forming and side-seam soldering machine, the combination, with a can-body former horn, of a side-seam solder bath and can-forwarding mechanism, for conveying the cans from the horn through and over the solder bath, substantially as specified. (28) In a combined can-body forming and side-seam soldering machine, the combination, with a can-body former horn, of a side-seam solder bath and can-forwarding mechanism for conveying the cans from the horn through and over the solder bath, and an inside wiper secured to the horn, substantially as specified." "(30) In a combined can-body forming and side-seam soldering machine, the combination, with a can-body former horn, of mechanism for advancing the can body along the same, a side-seam solderer, and a can-carrier device for conveying the cans through and over the solderer,—said side-seam solderer being beneath the path of the can-carrier,—substantially as specified. (31) The combination with the can-body forming machine, having a horn around which the can body is formed, and means for advancing the can body along the horn, of a side-seam soldering machine having a solder bath or device for moving the can body along over said soldering bath or device, substantially as specified."

These are all combination claims, and everything within the scope of each of them which Mr. Leavitt did invent, as shown by his specifications, and which may be found reproduced or imitated in Jensen's machine, is claimed only as part of a combination with other things, which are thereby made essential elements of the patented invention, and which are not in the Jensen machine. Mechanism for giving the cans a half revolution, so as to bring them to the solder bath with seams down, which is made an element of the twenty-second and twenty-sixth claims, is not in the Jensen machine, nor does it have any mechanism adapted to the especial task of giving the can bodies a revolving movement previous to the soldering process. An inside wiper connected to the end of a long rod attached to and supported by the end of the can-body forming horn, which is made an element of the combina-

tions of the twentieth, twenty-fifth, and twenty-eighth claims, bears some resemblance to Jensen's device for wiping inside of the advancing cans. The latter is certainly a means for doing the same work in a similar manner. But Leavitt claimed this device only in combination with "a means, substantially as described, for advancing the can bodies, \* \* \* means for moving the can body along from the horn over the solderer, substantially as specified," and "can-forwarding mechanism for conveying the cans from the horn through and over the solder bath." The means for advancing the cans and can-forwarding mechanism specified, which are elements of each of these claims, differ from the means and mechanism of Jensen's machine, as we have heretofore shown, by comparison of the latter machine with the Norton soldering machine. These claims must be limited to the upper and lower tracks, supporting arms and shafts, wheels, chains, blocks, brackets, rollers, saddles, and the rest of the complicated mechanism for conveying the can bodies through and over the solder bath, described in the specifications, or known equivalents for said can-forwarding mechanism. The law does not authorize an extension of said claims to cover the subsequently invented and comparatively simple can-body conveyor of the Jensen machine. This one principle of patent law strikes every one of these claims, with the possible exception of the twenty-second; and, in view of the length to which this opinion has already progressed, it becomes unnecessary and inexpedient to further continue comparing this machinery. We have gone down the list, and shown that each claim covers a combination of elements not found in Jensen's machine, and that is enough. The decree is reversed, and the cause will be remanded to the circuit court for the district of Oregon with directions to dismiss the bill, with costs.

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S. F. HEATH CYCLE CO. v. HAY et al.

(Circuit Court, D. Indiana. April 22, 1895.)

No. 9,064.

1. PATENTS—VALIDITY OF COMBINATION CLAIMS.

A combination, to be patentable, must produce a single new and useful result, or an old result in a better or cheaper manner; and if it only produces an aggregate of single results, each the complete result of one of the combined elements, it is not patentable. It is not necessary, however, that the mode of action of every element should be changed by each of the others, but, so long as a new and useful result is produced, it is immaterial whether their operation is simultaneous or successive. *Pickering v. McCullough*, 104 U. S. 310, criticised, and *National Cash Register Co. v. American Cash Register Co.*, 3 C. C. A. 559, 53 Fed. 367, followed.

2. SAME—ANTICIPATION—INVENTION.

The fact that, after a combination which accomplishes a new and useful result has once been produced, it would seem but a simple and easy matter to change a pre-existing device so as to produce the same result in the same way, is not sufficient to show anticipation by such device, when it appears that, although the latter was long in common use, no one had pre-

viously discovered its adaptability to accomplish the result achieved by the combination.

3. SAME.

The Johnson patent, No. 507,224, for a machine for inflating pneumatic bicycle tires without regard to the size, shape, or kind of nipple used upon them, held to be a patentable combination disclosing invention, and also held infringed.

This was a bill by the S. F. Heath Cycle Company against Thomas Hay and V. B. Willits, copartners as Hay & Willits, for alleged infringement of a patent for inflating pneumatic tires.

Paul & Hawley, for complainant.

Chester Bradford and Harry Bowser, for defendants.

BAKER, District Judge. This is a suit in equity by the complainant against the defendants for the infringement of letters patent No. 507,224, granted to complainant October 24, 1893, as assignee of Hastings H. Johnson, for improvements in inflating devices for pneumatic tires. The invention relates to means for inflating pneumatic tires for bicycles and other vehicles. Prior to this invention it had been necessary to provide a different sized threaded metallic air-pump hose coupling for each line or make of pneumatic tires, owing to the fact that the inflating tubes or nipples of the several makes of vehicles varied considerably in size, and owing to the manner in which their metal parts were threaded. The object of the invention was to provide a universal air-pump hose and couplings, which could be employed for inflating the tires of any machine. The defenses interposed are that the patent is invalid, and that, in view of the prior state of the art, the claims, if valid, ought to be limited so that the defendants' device would not be held to constitute an infringement. The defense of invalidity is bottomed upon the three following grounds: (1) That neither of the claims discloses a patentable combination of elements, but only what is known in law as "an aggregation"; (2) that the devices display no invention; (3) that the devices, in view of the prior state of the art, are not novel or patentable, but have been anticipated in all their essential features.

The invention described and claimed in the patent is a combination of devices arranged to be used for inflating pneumatic tires in common use upon bicycles. Such tires are generally provided with a rubber-covered metal nipple, having within it a valve that is adapted to open inward, and held to its seat by a suitable spring or other device, and by the pressure of the air within the pneumatic tire, thus preventing the escape of the air through the nipple. The end of the nipple is usually provided with an internal screw thread, and, prior to the invention of the device covered by the patent in suit, it had been customary to inflate such tires by means of an air pump having a hose upon the end of which was an externally screw-threaded coupling, adapted to screw into the internally screw-threaded end of the nipple on the bicycle tire. The inconveniences and disadvantages in the use of this device were many. As there are numerous styles of bicycles upon the market, and as the

threaded nipples on the tires were seldom alike, it resulted that a separate pump must be used for every different style of bicycle, or a separate connection must be had, specially adapted for use with each bicycle tire having differing nipples. This objection and the manner in which it was proposed to be overcome are fully set forth in the specifications of the patent. The device which forms the subject of the invention described and claimed in the patent consists of an air pump provided with a flexible hose or tube having an open end, into which the nipple of any pneumatic tire may be inserted. With the air pump having this particular arrangement of hose, there is combined a device for forming an air-tight joint between the hose and the nipple inserted therein, consisting of a loop arranged to encircle the hose, a follower arranged to slide along the sides of the loop, which thus forms guides to keep the follower from shifting out of place, and a screw connected to the follower, and adapted to be used to force the follower in against the outer surface of the hose, thereby clamping the hose around the nipple by compressing it between the curved inner surface of the lower part of the loop and the curved surface of the under side of the follower. By this means the hose is equally compressed at all points around its surface, and an air-tight joint is formed between the inner surface of the hose and the outer surface of the nipple. There are two claims in the patent:

"(1) The combination, with an air-pump hose, within the end of which the pneumatic tire nipple may be inserted, of means for compressing said hose about said nipple to form an air-tight joint between the tube; said means consisting in a loop, a follower, and a device for forcing in said follower, substantially as and for the purpose specified. (2) The combination, with an air-pump hose, wherein a pneumatic tire nipple may be inserted, of a loop surrounding said hose, a follower or gib adapted to operate within said loop, and a thumbscrew arranged in the end of said loop, pressing on the end of said gib, whereby said hose may be tightened on said nipple, substantially as and for the purpose specified."

It is earnestly contended that the claims of complainant's patent are void because they do not cover patentable combinations. It is urged that the action of the clamping device does not qualify the action of the pump, and that it is necessary, to constitute a patentable combination, that each element should qualify the action of every other element; and numerous authorities are cited which it is claimed support this position. The case of *Pickering v. McCullough*, 104 U. S. 310, a leading case upon this question, is mainly relied on to support this contention. Counsel quote from the opinion in that case, as decisive of the invalidity of the patent in suit, the following:

"In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seised each of every part, per my et per tout, and not mere tenants in common, with separate interests and estates. It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions. Otherwise, it is only a mechanical juxtaposition, and not a vital union."

It is claimed that this case and others following it establish the doctrine that in a patentable combination of old elements all the constituents must so enter into it that each qualifies the mode of action of every other, and that each element must not merely perform its own part in the combination, but must also, in some way, be directly and immediately concerned in the performance of their respective parts by every other of the elements. No such doctrine as is claimed was essential to the decision of that case, nor is it fairly deducible from the particular language above quoted. All that can be claimed to be settled by that case is that a combination, to be patentable, must produce a single new and useful result, or an old result in a better or cheaper manner, as the product of the combination. If the combination produces an aggregate of several results, each the complete result of one of the combined elements, it does not constitute a patentable combination. There must be some new and useful result produced by the combination, but each element of the combination, so far as essential to the production of the single new and useful result, may act according to the law of its own nature or structure. As has been well said in the case of *National Cash Register Co. v. American Cash Register Co.*, 53 Fed. 367, 3 C. C. A. 559:

"If it were essential to a valid patent for any combination whatever that the mode of action of every element included in the combination should be changed by each of the others, it would have been impossible to sustain several combination patents which have in fact been upheld, as, indeed, it would be difficult to conceive of any mechanical combination which would be both possible and patentable. A screw or a lever can act only in one way, yet a screw and a lever may so act in combination as to produce, in consequence of their combination, a single new and useful result. Moreover, there is no intimation in the opinion in *Pickering v. McCullough* of a purpose to overrule the earlier decisions with which, upon the view taken of it by counsel, it would appear to conflict, nor has it in later cases, which are of course to be followed, prevented the supreme court from declaring the law of this subject in accordance with our understanding of it. *Blake v. Robertson*, 94 U. S. 728; *Parks v. Booth*, 102 U. S. 96; *Loom Co. v. Higgins*, 105 U. S. 580; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188; *Lake Shore & M. S. Ry. Co. v. National Car Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. 33; *Manufacturing Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. 934."

It seems clear that the claims in the patent in suit come within the rule laid down in these cases, and cover a patentable combination. A single unitary result, that of inflating a bicycle tire, is produced by the co-operation of all the elements of the claims, and it is immaterial whether the operation of the elements is simultaneous or successive.

It is insisted that in view of the prior state of the art the patent in question does not disclose invention. It is claimed that the lathe dogs, scythe snath handles, scythe holders, saw handles, hose couplings for fire engines, and other like exhibits introduced in evidence have parts more or less analogous to some part of the clamping device constituting a part of complainant's combination, and that, in consequence thereof, the combination covered by the claims in suit does not involve invention. I perceive nothing in any of these devices which ought to be held to anticipate the com-

plainant's combination. None of them would suggest to a mechanic the combination in suit. The English patent, No. 18,147, and the choker model used upon the hearing, each show a device constructed and adapted to take the place of a valve in a flexible tube. They operate on the same principle as the Dart patent, No. 318,091, which is a cut-off device for the flexible tubes of fountain syringes. The choker devices are constructed and intended for use with the nipples of bicycle tires, and are used for the purpose of choking the nipple after the tire has been inflated, and thus preventing the escape of air therefrom. They take the place and perform the office of valves. It was suggested on the hearing that by making the choker of larger size and by changing the form of the follower this device could be used in the combination set forth in complainant's patent. This is doubtless true, but, if such a change would not involve invention, it is to be borne in mind that the complainant is not claiming the clamping device alone, but is claiming it in combination with other elements, the entire combination producing a single unitary result, namely, the inflation of any bicycle tire. The claims are for a combination which can be readily and economically used for the inflation of any bicycle tire, without regard to size, shape, or kind of nipple used upon it. The complainant was the first to discover a combination capable of producing this new and useful result by means of a simple and inexpensive device. In my opinion, it involved invention to change the form of the choker device, and provide it with a concave instead of a convex follower, and combine it with an air pump having a hose with an open end adapted to slip over any bicycle nipple, and by this means form an air-tight joint between the inner side of the hose and the outside of the nipple. The English device was patented in 1890, and that and the choker model have never been used for any other purpose than that for which they were designed. Indeed, they are incapable, without material change, of being used to accomplish the purpose to which the clamping device of complainant is applied. It is, of course, simple, after the thing has been done, and after complainant's patent has shown how it can be done, to make the necessary changes in the English patent and in the choker model, and to combine the same with the other elements of complainant's combination so as to produce the same result in the same way as complainant does. It is a fact, however, that these choker devices are many years older than the complainant's invention, and, though they were in common use to take the place of valves in the nipples of the pneumatic tires of bicycles, yet the users of them went on employing a different device for the inflation of such tires, and it remained for complainant's assignor to show that by his combination a device had been discovered which would provide a simple and economical means for the inflation of any pneumatic tire, regardless of size, shape, or style of nipple, or the kind of valve used therein. To one who has accomplished this result the quality of inventor should not be denied. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Consolidated Safety Valve Co.*

v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513; Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295; Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670; Stohlmann v. Parker, 53 Fed. 925, 4 C. C. A. 109; Machine Co. v. Dizer, 61 Fed. 102, 9 C. C. A. 382.

The foregoing are some of the cases in which the deviations from former devices were trifling, but the changes produced better results, and were held to constitute patentable inventions.

In the case of *Topliff v. Topliff*, supra, the court, speaking of the change in the patented device from former ones, observed:

"Trifling as this deviation seems to be, it renders it possible to adapt the Augur device to any side-spring wagon of ordinary construction."

And on this ground the patent was upheld. In the *Barbed Wire Patent Case*, supra, the court said:

"From this view of the state of the art at the time the patent in suit was issued, it is evident that Glidden can neither claim broadly the use of the plain or the twisted wire, nor the sharp thorns of barbs, nor, indeed, the combination of the two as they appear in the Kelly patent. \* \* \* The vital difference in the two patents is in the shape of the barb itself."

And upon this difference the patent was sustained. In *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, supra, the principal thing that had been done by the inventor of the patent there involved was to make a change in the size and shape of the area of the valve outside of the beveled seat. In *Manufacturing Co. v. Adams*, supra, although the court found it difficult to differentiate between the patent in suit and previous devices, yet it was held that, as a better machine was produced, the patent therefor was sustainable.

Applying these principles to the patent in suit, I am of opinion that the device covered by it constitutes a patentable invention, and that it had not been anticipated by any prior patented device. It is not seriously contended but that, if the complainant's patent is valid, the defendants' device is an infringement of it. In my judgment, it is so palpable an infringement that it is needless to point out the coincidence of structure and operation of the two devices. It is apparent upon the most casual inspection. There will be a decree for the complainant.

#### THE BATTLER.

NEALL v. WESTERN ASSUR. CO. et al.

(District Court, E. D. Pennsylvania. March 8, 1895.)

No. 115.

#### 1. MARITIME LIENS—DISTRIBUTION OF FUND—LIMITATION OF LIABILITY.

Holders of maritime liens of the same class are entitled, especially in proceedings for limitation of liability, to pro rata distribution, without regard to the dates of issuing process or obtaining decrees, unless their rights have been forfeited.



2. SAME—FORFEITURE BY LACHES.

Where the owner of tows lost by a tug invited the insurer of their cargoes to join with him in a suit against the tug, and the insurer refused to do so, but, after the tug's liability had been established by a decree, then filed a separate libel, *held*, that it had waived its right to share pro rata with the original libellant, and was only entitled to the surplus, if any, after his decree was satisfied. *Woodworth v. Insurance Co.*, 5 Wall 87, followed.

Sur exceptions to the report of the commissioner appointed by virtue of the petition of Frank M. Neall, trustee, as owner of the steam tug *Battler*, for limitation of liability for damages claimed from loss or injury by the sinking of the barges *Tonawanda* and *Wallace* while in charge of the *Battler*.

The original suit was brought by John J. Schrader, as owner of the said barges, on December 9, 1889, and was heard on May 23, 1893; and on June 13, 1893, an interlocutory decree was made in favor of the libellant. See 55 Fed. 1006. A commissioner was then appointed to compute and report the amount of damages. On October 20, 1893, before the taking of testimony upon the matter of damages was completed, a libel was filed against the tug by the Western Assurance Company of Toronto, Canada; the said company being the underwriters of coal shipped on the said barges at the time of the loss. The damages claimed in this libel were \$13,688.31. Service of the writ, however, was not effected, and on October 28, 1893, Frank M. Neall, trustee, filed this petition for a limitation of liability. See 58 Fed. 704. On November 3, 1893, in accordance therewith, a commissioner was appointed to ascertain the value of the tug, and it was found to be \$20,784.22. A bond in that amount having been entered by the owners of the tug, it was ordered that further prosecution of all suits in respect to claims in said matter should be restrained, and the commissioner whose report is now passed upon was appointed for the purpose of hearing proof of claims. He allowed the claims of Schrader to the amount of \$19,701.26, with interest thereon from the date of the sinking of the barges, viz. September 10, 1889, to the date of the filing of the decree, the amount of which when added to the face of the claim would exceed the amount of the bond entered, basing his decision upon *Woodworth v. Insurance Co.*, 5 Wall. 89, and *The Saracen*, 6 Moore, P. C. 56. The proofs showed that Schrader and the other parties interested had invited the assurance company to join with them in the original suit; that the said company had agents in Philadelphia to attend to their interest in the premises; and that, from correspondence and other evidence, it was evident to the commissioner that no steps had been taken or were intended to have been taken by the company except the outcome of the original suit was successful.

N. Dubois Miller and J. Rodman Paul, for libellants.

John F. Lewis, Edwin F. Pugh, and Henry Flanders, for respondents.

BUTLER, District Judge. As respects the tug's liability, I am asked to reconsider the subject in the light of testimony presented by the assurance company before the commissioner. This testimony was produced solely to account for the company's delay in making claim, and is of no material value in considering the question of liability. It consists mainly of opinions of the company's agents based upon what they learned after the occurrence. One or more of them visited the locality of the accident to ascertain the feasibility of reclaiming some part of the cargo, and for that purpose alone. The testimony shows that this was the subject of their inquiries, and that the question of the tug's liability was not mooted. These opin-

ions are not evidence against the original libellant. To the extent that the witnesses state facts, I have considered their statements, but find nothing in them that answers the testimony on which the tug was condemned.

As respects the assurance company's claim to participate in the distribution, the question is interesting, if not difficult. In the absence of *Woodworth v. Insurance Co.*, 5 Wall. 87, I would allow the claim. After a careful examination, I am satisfied that a decree in favor of one lien holder does not of itself entitle him to a preference over others of the same class (in this country), where the proceeds of a vessel are in court for distribution. Neither the date of issuing process nor obtaining a decree is important in this respect.

But especially is this so where the proceeding is governed by the act of congress for limitation of vessel owners' liability. All parties having liens are entitled to share in the distribution, unless their rights have been forfeited. *Henry*, Adm. 201; *The Martha*, No. 44 of 1884, Dist. Ct. E. D. Pa.; *The Sarah*, No. 56 of 1880, Dist. Ct. E. D. Pa.; *The E. A. Barnard*, 2 Fed. 719; *The City of Tawas*, 3 Fed. 173; *U. S. v. Ames*, 99 U. S. 35; *The Rose Culkin*, 52 Fed. 331; *The Benefactor*, 103 U. S. 244; *The City of Norwich*, 118 U. S. 491 [6 Sup. Ct. 1150]; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578 [3 Sup. Ct. 379, 617]; *The Triumph*, 2 Blatchf. 433, note [Fed. Cas. No. 14,182]; *The Saracen*, 6 Moore, P. C. 56; *The Phebe*, 1 Ware, 365 [Fed. Cas. No. 11,065]; *The Fanny*, 2 Low. 509 [Fed. Cas. No. 4,638]; *The America*, 16 Law Rep. 264 [Fed. Cas. No. 288]; *The Arcturus*, 18 Fed. 744; *The J. W. Tucker*, 20 Fed. 131; *The Julia*, 57 Fed. 235.

Aside from this question, however, I am unable to distinguish the case before me from that of *Woodworth v. Insurance Co.*, 5 Wall. 87. In that case the supreme court held that where one of two parties injured in a collision institutes proceedings against the vessel in fault, and at his own expense prosecutes the suit to condemnation, the other, who has contributed nothing to establish the vessel's liability, but has stood by, taking no part, cannot share the proceeds of the vessel, or receive any thing therefrom until the claim of the other has been satisfied. Here the assurance company not only stood by, doing nothing, but as the commissioner has found, refused to assist when requested. Indeed it discouraged, or sought to discourage, the original libellant by suggesting difficulties in the way of a recovery. Under such circumstances the supreme court seems to regard it as inequitable to allow one occupying the position of the assurance company to participate in the distribution, and therefore treats him as having waived or forfeited his claim in so far as the original libellant is concerned.

All exceptions are dismissed and the report confirmed.

## THE SPOKANE.

## MCGRAW TRANSPORTATION CO. v. THE SPOKANE.

(District Court, E. D. Wisconsin. April 17, 1895.)

## ADMIRALTY—SALVAGE.

The steamship S., while navigating on Lake Michigan, at the close of the season, and when storms were to be expected, broke her shaft, and thereby became disabled, having no sails. Neither her position nor the conditions of the weather at the time threatened any immediate danger, but the barometer was falling, indicating the approach of a storm. The steamship V., passing on her course, responded to the signals of the S., and at the request of the master of the latter took her in tow for a port where she could be repaired. During the following night a storm came on which caused some trouble in the towage, but no extraordinary difficulty or great danger. On the afternoon of the day following that when the S. was taken in tow, the two steamers reached a port, where the S. was left in charge of a tug. The V. suffered no injury except a delay of 22 hours. The value of the S. and cargo was \$320,000, and of the V. \$125,000. *Held*, that the service rendered by the V. was a salvage service, but not of the highest order, and that an allowance of \$3,600 was proper.

This was a libel by the McGraw Transportation Company against the propeller Spokane for salvage.

This libel was filed by the owner of the propeller City of Venice for salvage services in releasing from peril on Lake Michigan the propeller Spokane and her cargo of general merchandise, and towing to the port of Milwaukee for repairs. The City of Venice was a freighting steamer, registering 1,771 tons, and laden with coal, bound for Chicago. The Spokane was a steel steamer, and also a freighter, of about equal tonnage, bound from Chicago to Buffalo, stanch and well manned and equipped. The Spokane left Chicago December 9, 1894, for her last return trip of the season. On December 10, at 9:55 a. m., her shaft broke, leaving the vessel without motive power, as she was not provided with sails. At the time of this disaster she was on her course, 12 to 15 miles off the east shore of Lake Michigan, about 8 miles north of the port of Manistee, and about 40 miles south of the South Manitou Island. Her position was only a few miles south of Point Au Becs Scie, where the courses join of vessels bound south by either the outer or inner passage of the Manitous, and there diverge for Milwaukee and Chicago. The master knew that several large steamers were then about due at that point, bound down for those ports; that their courses would bring them in sight, and one of them might be expected soon. Preparations were thereupon made for a tow; a new 10-inch hawser which was on board was placed in readiness, and a flag of distress was raised. Excepting her inability to navigate, the Spokane was in every respect seaworthy, and in no imminent peril; there was no sea running, an off-shore breeze prevailed, there was deep water, a good shore, and she was well supplied with ground tackle; a small boat could be safely sent to the shore to wire for assistance, but it does not appear that a sufficient tugboat could be obtained from any port nearer than Milwaukee. The testimony shows that there was a falling barometer at the time the assistance in question was rendered, betokening the storm of rain and wind which came that night. The City of Venice, on her course for Chicago, sighted the Spokane about noon of the 10th, bearing a trifle on her starboard bow; the Spokane gave the distress signal of four blasts of her whistle, in addition to the flag signal, whereupon the Venice was promptly headed for her, coming within hail at about 12:40; was informed of her disabled condition, and asked to stand by and give her a tow to Milwaukee for repairs. There is some variance with regard to the expressions used by the master of the Spokane,—whether he was urgent that the Venice should not leave them, and whether the port of Manitowoc was mentioned, and rejected because

not having sufficient water for safety,—but it is undisputed that assistance was requested for the helpless steamer, that no terms were asked for, suggested, or imposed, and that the help was prompt, voluntary, and meritorious. The Venice was fortunately provided with a tow post, although not engaged in the business of towing. The hawser of the Spokane was taken aboard without difficulty, and the tow headed for Milwaukee, with the wind freshening, and towards night the weather thickened, with rain. Good progress was made, without serious difficulty, for about 70 miles, on a southwesterly course, until about 10 o'clock that night, when, the wind having increased to about 20 miles an hour, or more, with a heavy sea running, and the vessels approaching the west shore, then distant about 15 miles, the master of the Venice deemed it prudent to put about head to the wind. This maneuver was successfully accomplished, and they were so headed eastward, under check, until 6 a. m. of the 11th, when the signal was given by the Venice for the turn southward. There is some dispute in relation to the signals for this move, but it is sufficient that in some manner the chock at the bow of the Spokane, through which the line led, was pulled out, and the hawser was cut by the steel stanchion, and parted. The hawser was hauled in by the Venice, was passed again to the Spokane, after two ineffectual attempts, and the tow resumed. Milwaukee was reached without further incident, about 5 p. m. of the 11th, and, the Spokane being left outside in charge of a tug, the City of Venice proceeded to Chicago, having suffered no injury from her service, except a delay which the master states at 22 hours. The repairs to the Spokane were completed the next day, and she proceeded on her voyage. There was much testimony with reference to the violence of the storm, but it is apparent that it was not more dangerous than those which often occur on the Great Lakes late in the season, and through which like tows are conducted with safety. The circumstances required skill, special watchfulness, and judgment beyond that of ordinary navigation without a tow; but, with the exercise of good seamanship (which was here shown), cannot be considered as involving the towing steamer, or probably either steamer, in imminent peril. The libellant places much stress upon the fact that navigation closes nominally with the month of November, when regular insurance terminates, with a margin of five days; but it was well shown that practical navigation, especially with steam vessels, has extended far into December in later years; that, for several days in the month in question beyond the time of the accident, a large number of steam craft were plying on Lake Michigan, and around the lakes; that several steamers of similar class with the Spokane were actually in the vicinity, bound down, and closely following the Venice; that one, the Frontenac, came in sight soon after the line was taken; that another, the Charlemagne Tower, Jr., owned by respondent, reached the place of accident about 5 p. m. The agreed estimate of valuation of the Spokane and her cargo was \$320,000. The valuation of the City of Venice was \$125,000. The libellant claims that it "is entitled to a salvage compensation equal to one-fifth of the gross value of the property saved"; but is willing to accept, and insists upon, \$15,000. The respondent contends that the allowance should be for a towage service only, or, at the utmost, "a salvage service of the lowest order of merit." It was testified that the expense of a tow in that weather, by a competent tug summoned from Milwaukee, would have been about \$600.

Van Dyke & Van Dyke and J. C. Shaw, for libellant.  
C. E. Kremer and H. D. Goulder, for claimant.

SEAMAN, District Judge (after stating the facts as above). The libel and the answer in this case differ mainly in their statements of the degree of peril or of comparative safety encountered in the towage to Milwaukee. The testimony was heard in open court, and I find no substantial contradictions in matters material to a decision. It is apparent both that the libel states the conditions in some respects in terms of exaggeration, and that the answer

tends to belittle the actual merits and difficulties of the undertaking. A version about medium between them is made out by the testimony.

There has been much discussion by the courts in attempted distinction of cases of mere towage from those of salvage, and in some a classification of "extraordinary towage" has been adopted. A notable instance of the latter distinction is found in *The Emily B. Souder*, 15 Blatchf. 185, Fed. Cas. No. 4,458, where Chief Justice Waite at the circuit reduced the amount decreed by the district court from \$3,000 to \$1,000; and the fact that the master of the assisting vessel did not give notice before taking the towline that he would claim salvage remuneration (although his steamer was thereby taken entirely out of her course, and put to expense and inconvenience) was mentioned as one of the reasons which made the service towage, and not salvage. In that case it appeared, however, that the assisted steamer, deprived of her steam power, had the use of her sails, had made fair progress, and within 24 hours would probably have reached the vicinity of her port; that she gave no signal of distress, but sought to have a charge fixed for towage. These circumstances and the absence of actual peril were evidently taken to deprive the service of the character of salvage, and the comment upon the want of any demand or assertion as a salvor is only referred to in connection with those facts, and cannot be understood to make notice or demand a prerequisite for salvage, or that its absence would count, of itself, as a circumstance against the claim. Indeed, the rule is stated the other way,—that, in the absence of a definite proposal or arrangement, where a vessel in distress calls upon a passing vessel for help, salvage compensation is implied. *The Louisa Jane*, 2 Low. 295.<sup>1</sup> The distinction of meritorious volunteer service as towage rather than salvage appears in the cases of *The Viola*, 52 Fed. 172, and, on appeal, 5 C. C. A. 283, 55 Fed. 829, and *The Leipsic*, 5 Fed. 108, and, on appeal, 10 Fed. 585. On the other hand, the current of decisions would generally designate the services rendered by a volunteer, owing no obligation of contract or duty, in saving a vessel from peril or distress, as salvage, or in the nature of salvage, and entitled to remuneration as such. Salvage is defined by Justice Bradley in *Sonderburg v. Tow Boat Co.*, 3 Woods, 146, Fed. Cas. No. 13,175, to be "a reward for meritorious services in saving property in peril on navigable waters, which might otherwise be destroyed, and is allowed as an encouragement to persons engaged in business on such waters, and others, to bestow their utmost endeavor to save vessels and cargoes in peril." It is the fact of peril, and not its extent, that gives foundation for salvage. It is sufficient if it be "something distinctly beyond ordinary danger,—something which exposes the property to destruction unless extraordinary assistance be rendered." 2 Pars. Shipp. & Adm. 282. And it is not essential that escape by other means be impossible. *Talbot v. Seeman*, 1 Cranch, 1; *The Connemara*, 108 U. S. 352, 2

<sup>1</sup> Fed. Cas. No. 8,532.

Sup. Ct. 754; *Coffin v. The John Shaw*, 1 Cliff. 230, Fed. Cas. No. 2,949. The importance of the distinction of salvage service from mere towage, or from any service governed by contract or legal duty, lies in the difference in the basis and measure of recovery. In salvage the allowance is made by way of reward, and is not limited by the rule of quantum meruit; while the recovery for all other services is limited to the measure of the contract, or *pro opere et labore*. But the amount of salvage allowance is always dependent upon the consideration of all the circumstances, the extent of maritime peril averted, the risk incurred, the heroism exhibited, and the value of the property salvaged. Therefore, the courts recognize different degrees of merit in salvage; and for the higher order,—for example, cases of derelict, or cases involving extreme risk,—the reward is usually a share or proportion of the value of the salvaged property, while in the lower orders the idea of reward is preserved, but is not proportioned to the value; and, when the risk is inconsiderable and the service slight, the allowance “is little more than a mere remuneration *pro opere et labore*.” *Macl. Shipp.* (3d Ed.) 619; *The John E. Clayton*, 4 Blatchf. 372, Fed. Cas. No. 7,338; *The Bolivar v. The Chalmette*, 1 Woods, 397, Fed. Cas. No. 1,611. In the case at bar I find no difficulty in placing the service, upon the undisputed facts, within all well-considered definitions of salvage. The Spokane was found in the open waters of Lake Michigan, entirely disabled in her motive power, and helpless to reach any port for refuge or repair, at the close of the season, when severe storms were to be apprehended, and when a falling barometer indicated a storm pending; she was flying the signal and sounding the whistle of distress. In response thereto, the City of Venice, bound for Chicago, headed for the Spokane, and, on information of her condition, promptly took her line and towed her to Milwaukee. The passage with such a tow, and in the heavy sea and thick weather which came upon them, was difficult, although not of extreme danger; the service was meritorious, and entitled to reward in the nature of salvage. It is equally clear that this salvage service was not of the higher order, and is not entitled to remuneration based upon a share or percentage of the value of the Spokane and cargo *eo nomine*.

The delicate and difficult question remains to determine an amount for this salvage which shall not only recompense the service, but shall be a just reward for it, and shall also serve as an encouragement of others to like action. At the same time, the court ought not to impose more than should be justly paid by the respondents in view of the extent of peril from which the vessel and cargo were rescued, or an amount that would constitute a precedent discouraging vessels in distress or peril from invoking and accepting necessary aid. In the quest of light for this determination, I have examined all the cases cited by counsel, and many additional. Each case depends, for the allowance made, upon its particular facts, and the view taken by the court of the conditions and surroundings. A review of them, pointing out distinctions, would extend this opinion unnecessarily. I deem it sufficient to

note that the conditions affecting navigation upon the Great Lakes differ in many respects from those which prevail upon the ocean and its dangerous coasts; that cases from the seaboard, having in view the perils there encountered, and the fewer chances of rescue, all tending to swell the rewards for salvage, are not wholly applicable here for guidance in fixing the amount. For example, in *The Alaska*, 23 Fed. 597, a great Atlantic liner, carrying hundreds of passengers and a valuable cargo, lost her rudder in mid-ocean, was helplessly drifting, and liable to be taken out of the course of travel, when the saving assistance was rendered. The case of *The Egypt*, 17 Fed. 359, explains the need of a large salvage allowance by reason of the peculiar dangers of the South Atlantic coast. In *The Kenmore Castle*, 5 Asp. 27, the rescued steamer was upon the Red Sea with a broken shaft, in treacherous waters lined with coral reefs, and required towage for several days before reaching a port. Upon these Lakes commerce has assumed vast proportions; vessels up and down pursue a regular and well-defined course, often within sight of shore, and in case of distress are not liable to remain long out of sight of other vessels; the newspapers publish the fact of passing Detroit and other points, so that the progress and position of all vessels are approximately known; good harbors are frequent; the towage of large vessels, barges, and rafts has become a feature of this navigation, and only storms of the utmost severity are regarded as dangerous to such undertaking. The allowance for salvage must be made in conformity with these modified conditions. There are few reported decisions in reference to salvage service on the Lakes; none has been cited justifying the allowance claimed by the libellant. I am satisfied that it would not subserve the public interest, and would not be just between the parties to allow so large an amount for salvage under the circumstances shown. I am greatly aided to the conclusion reached by a precedent cited from the records of this district in a decree entered by Judge Dyer, October 6, 1879, and affirmed by Judge Drummond on appeal. It is the case of *The Ensign v. The Peerless*, Fed. Cas. No. 4,494, for salvage services, which was thoroughly presented and contested by eminent proctors. Unfortunately, there does not appear in the record any written opinion by either judge, but upon the conceded facts the decrees give an unmistakable expression of their views. The *Peerless* was a large steamer, navigating the waters of Lakes Michigan and Superior, carrying passengers and freight. She left Manitowoc, on the west shore of Lake Michigan, bound for Lake Superior, on the night of September 1, 1877, with 50 passengers and heavily laden with merchandise and live stock. While in mid-lake, and out of the usual course of steamers, at about 4:40 a. m., her air pump broke, disabling her motive power, and the water rushed in through the discharge pipe, threatening to sink the vessel; much freight was jettisoned (including cattle and other live stock, and flour), to lighten the vessel, and to cause her to list over, and bring the leak above water. This was successful, and the hole was temporarily plugged, "filling up with blankets and flour to stop the water." She was for the time being disabled and

in danger, and put up distress signals. There is dispute over the question whether she could have been put in condition to navigate, and with reference to the violence of the wind and the sea. It is clear, however, that the vessel called for and needed assistance, and that there was much panic among the passengers, if not on the part of the crew. The freight propeller *Scotia* hove in sight (claiming to be out of her course because of the gale), and, discovering that the *Peerless* was in distress, went to her assistance, and was requested to take her to the harbor at the Manitou Islands. The line was promptly taken, and she was towed to that harbor, a distance of about 45 miles, occupying about nine hours, without serious difficulty, aside from a stormy passage. The libel states the value of the *Peerless* at \$118,000, and her cargo at \$50,000, and that she had about 50 passengers and her crew; the answer states her value at \$60,000, and the cargo at \$27,000. The *Scotia* was of about the same value. The actual worth of the service as towage would have been \$500 to \$600, according to the testimony; \$15,000 was claimed as salvage. The decree pronounced the service one of salvage, and allowed \$2,000. The libellant appealed, and the decree was in all respects affirmed. In the present case it is undisputed that the shaft of the *Spokane* could not be repaired until she reached a port; in this respect the *Peerless* may have been in better condition, but the danger to the *Peerless* was more imminent. The *Spokane*, however, required towage for a greater distance; the passage was rougher and more difficult; the season was at its close, when a sudden and violent storm was to be apprehended; the values of all the property at risk were much greater. The compensation here should be larger. As \$600 would probably have been a fair charge for the towage alone, there will be added to that the sum of \$3,000, making an allowance of \$3,600 for salvage, for which amount I decree for the libellant, with costs.

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#### THE RICHARD WINSLOW.

NORTON et al. v. THE RICHARD WINSLOW.

(District Court, E. D. Wisconsin. April 17, 1895.)

#### 1. CARRIERS—TERMINATION OF CARRIAGE—CHARACTER OF LIABILITY.

In November, 1893, a cargo of corn was shipped on a schooner at Chicago, to be carried to Buffalo, the bill of lading providing that the charge for freight should include free storage in the vessel at Buffalo until April 1, 1894. On arrival at Buffalo, the cargo was inspected and found in good order. Thereafter the vessel remained moored at a wharf, in charge of the captain. During the winter, in consequence of an unusually low tide, the vessel grounded, and was thereby strained and caused to leak, whereby the cargo was damaged. *Held*, that the liability of the owner of the vessel, as carrier, ceased on her arrival at Buffalo, and thereafter his liability was that of a warehouseman only.

#### 2. ADMIRALTY—JURISDICTION—CONTRACT FOR STORAGE ON VESSEL.

*Held*, further, that the water-borne character of the contract ceased on the arrival of the vessel at Buffalo, and the admiralty had no jurisdiction of the claim for damages to the cargo while lying in the vessel as a mere storehouse.



**8. SHIPPING—HARTER ACT.**

It seems that, even if the contract were maritime, the vessel would be relieved of liability under the Harter Act (Laws 1893, c. 105), the vessel having been properly manned and equipped, and the fault, if any, having been in the management of the vessel during the winter.

This was a libel by J. Henry Norton and others against the schooner Richard Winslow for damages to a cargo of corn.

The schooner Richard Winslow received at Chicago, November 16, 1893, a cargo of corn to be carried to Buffalo. The bill of lading states that the lake freight is three cents per bushel, "including free storage in vessel in Buffalo harbor until April 1, 1894, to be unloaded at shipper's option on or before April 1, 1894." The vessel arrived at Buffalo November 22, 1893. The cargo was then examined by two "surveyors," one selected by the consignee, and the other by the carrier, and they certified that it was in good condition and uninjured. The vessel was thereupon moored at a wharf, pursuant to direction by the shipper, and remained during the winter in charge of the master as ship keeper. In February there occurred heavy northeast gales, which lowered the water in the harbor to an extraordinary degree, and the answer states that it caused "said schooner to take the bottom, and strained the butts of her deck, hatch combings, and mast apartment, without any fault or neglect" on the part of the respondent; that, in consequence thereof, "a portion of the cargo was found to be wet during the winter, and was taken out, and when the schooner was discharged in the spring" 820 bushels of corn was "in bad condition, and the remainder somewhat damaged." The cargo was delivered April 7, 1894, and the consignee then paid the freight, but claims \$2,202.64 for damages to the corn under the circumstances shown. After the inspection by the "surveyors" on arrival, and in accordance with their suggestion, "the hatches were put on and covered with tarred paper and canvas covers." The "surveyors" made another examination after the February storm, and removed some wet corn, but pronounced the remainder safe, and closed the hatches. The testimony is undisputed that they looked over the deck and hatches and found no signs of openings from the strain, and that the decks were kept clear of snow throughout the winter. The libelants claim, and their testimony shows, that the grounding and listing of the vessel would tend "to strain the deck and open the butts on deck and hatches," and cause leakage; that the safest precaution was to try the seams with a knife, and go over them with the calking iron, immediately after the vessel was restored to position. The testimony does not indicate that such measures were either suggested or adopted. The libelants further show that the vessel owner was living at Buffalo, was frequently about the vessel during the winter, was an experienced mariner, and they therefore claim he should have known of and adopted these requirements for protection of the cargo.

Schuyler & Kremer, for libelants.

Van Dyke & Van Dyke, for claimant.

SEAMAN, District Judge (after stating the facts as above). The practice of utilizing vessels, when laid up for the winter, as store-houses for grain has become frequent in the ports of the Great Lakes. The shipper thereby saves elevator charges, and the vessel owner secures a cargo. The transportation may precede the storage, or may close it; in either scheme the storage extends to the opening of navigation in the spring. In view of this practice, the questions involved in this case have special importance, and I have given them careful consideration. In the hope and expectation that they will be taken up by appeal, and thus become settled for this circuit, a brief statement of my conclusions will suffice for the purpose of a decree here.

1. Upon the facts it is clear and undisputed that the damages for which a recovery is sought by this libel originated after the vessel had completed the transportation,—after arrival in Buffalo, inspection of the cargo, mooring and dismantling the vessel for the winter, and covering the hatches to protect the corn. It is the general rule of law respecting carriers of goods that their liability as carriers terminates with the service of transportation, after a reasonable time and opportunity for the consignee to accept and remove them, and that for any storage thereafter, or any storage previous to and while awaiting orders of the shipper for forwarding, the liability is that of a warehouseman only. Pars. Cont. c. 11, § 9; 2 Am. & Eng. Enc. Law, 878, and note; Peoria, etc., Ry. Co. v. United States Rolling Stock Co. (Ill. Sup.) 27 N. E. 59. This rule applies to carriage by water. Carv. Carr. by Sea, § 472. As defined in Kohn v. Packard, 3 La. 224, the contract of affreightment by water is one “to carry from port to port, and the owners of a vessel fulfill the duties imposed on them by delivering the merchandise at the usual places of discharge.” I can find no ground for excepting the contract in this case from that rule, and the conclusion follows that the respondent can only be charged with the liability which attaches to the contract of storage,—that of warehouseman. The measure of that duty is the exercise of ordinary care, or the care which a reasonably prudent man takes of his own property similarly situated. If it be assumed that the storage is so connected with the transportation that the admiralty may take jurisdiction and consider that liability, and if it be further assumed that the vessel owner owed a duty of personal attention and care, aside from furnishing a competent ship keeper, the testimony does not satisfy me that there was neglect or want of ordinary care upon his part. Arguing from the result, it is easy to suggest what precautions might have saved the injury, but he was not an insurer, nor is he held to the exercise of all possible care.

2. If any cause of action is shown, I think it is not within the cognizance of admiralty. With the termination of the carriage the water-borne character of the contract ceased, and the vessel was converted into a mere winter storehouse for the corn. It is true that the ordinary contract of affreightment includes, and is only discharged by, delivery to the consignee, but here there was a constructive delivery, so far as concerned that contract, and thenceforward the corn was taken and held under the new bailment, that of warehouseman. Jurisdiction of that liability does not pertain to the admiralty. In *The Pulaski*, 33 Fed. 383, Mr. Justice Brown, then district judge, so held in respect to a similar contract, wherein the winter storage was at the port of shipment, intending transportation on the opening of navigation, and the libel was filed for injury suffered by the grain during the term of storage. The storage here in question was no more an incident of the transportation than it was there. The division of the contract into its separate characters is here marked by the constructive delivery at Buffalo. The storage side of the contract was not maritime. See *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355; *Gilbert Hubbard & Co. v.*

Roach, 2 Fed. 393; The W. F. Brown, 46 Fed. 290; The Sirius, 65 Fed. 226.

3. If the contract be regarded as maritime—as that of a carrier throughout the storage—it is doubtful whether the vessel and the owner would not be relieved of liability by the provisions of section 3 of chapter 105, Laws 1893, known as the “Harter Act.” It is alleged and shown that the vessel was “in all respects seaworthy and properly manned, equipped and supplied” when the cargo was received, and if there was any fault during the winter it was “in the management of said vessel.” That act expressly saves the vessel and owner from liability in such cases. See The Viola, 59 Fed. 634; The Berkshire, Id. 1007; The Silvia, 64 Fed. 607; The Etona, Id. 880; The Sintram, Id. 884.

The libel must be dismissed, with costs, and decree will be entered accordingly.

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#### THE POCONOKET.

#### BACON v. THE POCONOKET.

(District Court, E. D. Pennsylvania. March 22, 1895.)

No. 9.

1. CONSTRUCTION OF CONTRACT—SALE OF VESSEL—WHEN TITLE PASSES—PAYMENTS DURING CONSTRUCTION.

The rule in this country (contrary to that in England) is that under a contract for the sale of a vessel, to be paid for as the work progresses, the title remains in the seller until delivery, in the absence of any provision indicating an opposite intent; but the question is one of intention, purely.

2. SAME.

Where a vessel was to be built under a contract providing for payment by installments as the work progressed, *held*, that the question whether title passed immediately to the purchasers was not determined in the negative by the fact that the contract gave them a right, in certain contingencies, to reject the vessel after completion and recover the money paid; nor in the affirmative by the fact that part of the earlier installments was to be paid in bonds of the purchasing company, secured by mortgage, which was to include the vessel herself, together with other specified property.

3. SAME—PAROL EVIDENCE.

Where a contract provides for the purchase of a vessel, to be paid for as the work of construction progresses, without any express provisions indicating the intent of the parties as to whether title shall pass before delivery or not, it is competent to prove a parol agreement, made before execution of the contract, that the title should pass when work was commenced, as there is nothing in such an agreement which tends to contradict or vary the written contract.

4. SAME—FRAUD.

Where it appears that in consideration of such a parol agreement the purchasing company reduced its demand as to the amount of security required of the builders for repayment of the advances in case the contract was not satisfactorily performed, it would be a fraud upon the purchasers to permit the repudiation of such agreement, for the intent to repudiate, as manifested at the trial, would (under the Pennsylvania decisions) relate back to the date of the contract, and constitute a fraud in its procurement, such as would justify its reformation in equity.

**I. CORPORATIONS — CONTRACTS BY OFFICERS — ESTOPPEL BY ACCEPTING BENEFITS.**

A corporation which accepts the benefits flowing from a parole agreement made by one of its officers in connection with a written contract is estopped to repudiate such agreement.

This was a libel by Nathaniel T. Bacon against the steamship Poconoket.

Henry B. Clossom, J. Rodman Paul, and N. Dubois Miller, for libellant.

H. G. Harris, John A. Burton, Edward F. Pugh, and Henry Flanders, for respondents.

**BUTLER, District Judge.** The controversy arises out of the following contract:

This agreement made this third day of March, 1893, by and between the Cowles Engineering Company, hereinafter called the "Cowles Company," a corporation existing under the laws of the state of New Jersey, of the first part, and the Interstate Steamboat Company, hereinafter called the "Interstate Company," a corporation existing under the laws of the state of New Jersey, of the second part, witnesseth:

First. The Cowles Company for and in consideration of the agreements hereinafter contained, to be kept and performed by the Interstate Company, and of the moneys hereinafter mentioned to be paid to it by the Interstate Company, covenants and agrees to construct, build and complete for the said Interstate Company, one twin-screw, steel-hull, passenger steamer of not less than one hundred and sixty-two (62) feet long over all, of not less than twenty-nine (29) feet extreme beam over all, with not over four (4) feet draught, when coal and regular crew are on board; the said steamer to be equipped with two compound engines with suitable boilers, condenser, and pumps, agreeably to the specifications hereto attached and forming a part of this agreement, and to deliver the same to the Interstate Company, in the water, at the works of the Cowles Company, foot Forty-Fourth street, South Brooklyn, N. Y., on or before August 22, 1893.

Second. The Cowles Company agrees that the said steamer shall attain a speed of 16 miles an hour through the water in a one hour's run, upon a straight course, in smooth water, with not more than four (4) tons load on board; it being understood that the Cowles Company is to have the choice of the course and to conduct the trials and that if a straightaway course of 16 miles should not be selected, any time consumed in making turns shall be deducted and that chart measurements of the latest United States coast survey shall be accepted as accurate.

Third. The Interstate Company for and in consideration of the agreements hereinbefore contained to be kept and performed by the Cowles Company, covenants and agrees to pay or cause to be paid to the Cowles Company for the said steamer, the sum of fifty thousand dollars (\$50,000) to be paid as follows, to wit: 1st, 10 per cent. (\$5,000) on the signing hereof; 2nd, 25 per cent. (\$12,500) when all the steel for said steamer is in the yard and shops of the Cowles Company and being worked upon; 3rd, 25 per cent. (\$12,500) when the said steamer is in frame; and the principal forgings, castings, plates and tubes for the engines and boilers are in the shops of the Cowles Company and being worked upon; 4th, 25 per cent. (\$12,500) when said steamer is launched; 5th, 15 per cent. (\$7,500), being the balance, upon the completion of the steamer, in accordance with this agreement and the said plans and specifications and upon her attaining the speed aforesaid.

Fourth. It is mutually agreed that if for any reason the Cowles Company is not satisfied with the result of the first trial of speed of said steamer, it shall have the privilege of further trials to demonstrate the true power and speed of the steamer, and that when the Cowles Company is prepared to make trials of

the speed of said steamer, it shall notify the Interstate Company in writing, by letter or telegram, addressed to it at Bordentown, New Jersey, at least two days previous thereto, of the times and places of such trials.

Fifth. It is mutually agreed that the Interstate Company may pay five thousand dollars (\$5,000) of the fourth payment of \$12,500, above mentioned, and five thousand dollars (\$5,000) of the fifth payment of \$7,500, above mentioned, in its bonds, payable \$5,000 thereof not later than August 1st, 1895, and \$5,000 thereof not later than August 1st, 1896, bearing 6 per cent. interest, payable semiannually, and secured by a first mortgage upon the real estate located at Bordentown, New Jersey, now owned and occupied by said Interstate Company and described as follows:

All that certain tract of land on the shore of the Delaware river, in the city of Bordentown in the county of Burlington and state of New Jersey, and bounding on Crosswick's creek, lying between the stone wall of the Camden and Amboy Railroad and Transportation Company and low-water mark on said creek: beginning say five hundred feet below the wharf where the storehouse now stands at a stake standing at the foot of said stone wall and runs (1) a southerly course along said stone wall of the Camden and Amboy Railroad and Transportation Company two hundred feet; thence (2) a northerly course one hundred and fifty feet more or less to low water mark on Crosswick's creek; thence (3) an easterly course following the line of said Camden and Amboy Railroad and Transportation Company; thence (4) a southerly course along the line of said railroad company's land, one hundred and fifty feet more or less to the place of beginning.

Together with all and singular, the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and of every part and parcel thereof. And also the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the second part, of, in and to the said premises with the appurtenances; as well as by a first mortgage upon the steamer Florence, now owned by said Interstate Company, as well as the steamer to be constructed under this agreement and all its personal property and franchises, the whole issue of said bonds not to exceed twenty-six thousand dollars (\$26,000), and the said Interstate Company to furnish to the Cowles Company evidence satisfactory to the Cowles Company that the said bonds are secured as aforesaid by a mortgage or mortgages, to a trustee to be approved by the Cowles Company, and which shall be a first lien upon the said premises and property; said mortgages to contain tax, interest, and fire and marine insurance clauses, satisfactory to the Cowles Company.

Sixth. It is mutually agreed that in case the Cowles Company shall not complete said steamer in accordance with the terms thereof on or before the 22nd day of August, 1893, it shall forfeit to the Interstate Company the sum of one hundred dollars (\$100) per day as damages for each day's delay after that date in the completion of said steamer, to be deducted from the amount of the bonds which the Interstate Company may pay on the final payment as above provided.

Seventh. It is mutually agreed that from time to time as payments become due, the Cowles Company shall furnish to the Interstate Company a statement of the materials in place in said steamer or in process of construction and generally the state and condition thereof at that time.

Eighth. It is mutually agreed that if the said steamer shall not be completed within two months after the time hereinbefore fixed for her completion, the Interstate Company may accept or reject her upon her completion; and that if it does then reject her the Cowles Company shall repay with interest to the Interstate Company all sums paid to the Cowles Company under this agreement.

Ninth. It is mutually agreed that all the times during which delay in the completion of said steamer shall be caused by strikes of workmen whether in the works of the Cowles Company or in the works where any of the materials or machinery for said steamer is made or by epidemics or by the elements, or by delays of carriers or by other causes beyond the control, by the exercise of reasonable diligence, of the Cowles Company, shall be added to the time here-

inbefore fixed for the completion of the said steamer and the said time extended accordingly.

In witness whereof the said parties have caused these presents to be signed by their presidents and their corporate seals to be hereunto affixed the day and year first above written.

Witness:

Rufus L. Ogden.

[Seal.]

Attested:

Henry Lysholm, Secretary.

[Seal.]

The Cowles Engineering Co.,

By William Cowles, President.

The Interstate Steamboat Co.,

By F. B. Vandergrift, President.

Attest:

Edward S. Wyckoff, Secretary.

At the time of entering into this contract the parties agreed that the steamboat company should receive the builders' bond with sureties, in the sum of \$25,000, for the latters' faithful performance of their undertaking, and the bond and contract were executed and delivered simultaneously. After the vessel had been partially constructed, and launched, and the steamboat company had paid \$42,500 on her, (the full amount due) the builders became financially embarrassed and assigned their property for the benefit of creditors.

In consequence of their failure thereafter to proceed with the work, the steamboat company took possession of the vessel and removed her to this port. Subsequently the assignee sold such interest in her as he might have to the libellant, with notice of the steamboat company's claim to ownership.

He stands, therefore, in the shoes of the builders. If as between the latter and the steamboat company the title was in the builders, he can recover; otherwise he cannot. A different case might, possibly, have arisen if the vessel had been levied upon and sold by creditors, while in the builders' possession.

Looking at the terms of the written contract, alone, and construing them as similar terms have been construed by the courts of this country, I would be constrained to hold that the title was in the builders. See *Elliott v. Edwards*, 35 N. J. Law, 265; *Stevens v. Shippen*, 29 N. J. Eq. 602; *Merritt v. Johnson*, 7 Johns. 473; *Andrews v. Durant*, 11 N. Y. 35; *The Revenue Cutter No. 2*, 4 Sawy. 143, [Fed. Cas. No. 11,714]; *Clarkson v. Stevens*, 106 U. S. 505 [1 Sup. Ct. 200].

These cases decide that payment by installments during the progress of construction does not vest title to a vessel in the party for whom it is built, in advance of delivery. The question is one of intention, and our courts hold that such payment is not, of itself, sufficient evidence of an intention to vest title in the purchaser before delivery. The subject has produced much controversy, and in England the inference from such payment is directly the reverse of that drawn here. See *Benj. Sales*, p. 246, and the cases there cited. Of course parties may agree for the transfer of title in advance of delivery, and such agreement may be inferred in the absence of positive expression, where the contract and attendant circumstances justify it. I repeat, looking at the terms

of the paper alone, in the light of our decisions, I would be constrained to hold that the title of this vessel remained in the builders. I do not attach importance however to the eighth clause, which the libellant invokes as affirmative evidence in his favor. It provides that the steamboat company may decline to accept possession (which must necessarily remain in the builders) if the latter fail in their contract; and that in such case the former shall be entitled to recover the price paid with interest. This is not inconsistent with an intention that the title should vest in the steamboat company before delivery. Of course on the rejection of possession, and a return of the money, the title would return to the builders—if it had previously passed out. A clause expressly providing that it should vest in the steamboat company would not be inconsistent with the eighth.

The latter would then be held (as it must now) to provide, in effect, for a return of the vessel after trial, and a recovery of the price advanced in place of the remedy by suit for damages.

Nor on the other hand, do I attach importance to the clause providing for a mortgage of the vessel, and the action of the parties under it. The mortgage was to embrace other property of the steamboat company; and as it was to secure a part of the third installment and must therefore be issued when that installment became due, and consequently in advance of completing the work, it was natural to include the unfinished vessel, even though the title had not passed.

The mortgagors had an inchoate title or interest at least; and even if they had not, the mortgage would be as effectual as if executed after the vessel was delivered. The inclusion would avoid the necessity for a second mortgage, and answer the purpose of the parties as well whether the title had passed or not.

The clause is silent as respects the time when the vessel shall be mortgaged. It may well be construed to mean after she is completed. It is true that the acceptance of the mortgage would unexplained, be an acknowledgment of title in the mortgagor, and as against one who had acted on this acknowledgment (as, for instance, purchasers of bonds) would constitute an estoppel. But as between the immediate parties I do not think the matter important.

The case is, therefore, reduced to the following questions:

First: Was there an agreement, (or mutual understanding, which is the same thing) when the paper was signed, that the title should vest in the steamboat company before delivery of possession; and if there was, then, second, may this be shown?

I think it is clear that there was such an agreement. The steamboat company was represented by Mr. Vandergrift and the builders by Mr. Cowles. Each appears to have had full authority in the premises. The question of title arose when the subject of security for advance payments was under consideration. The demand was for \$50,000, which Mr. Cowles pronounced unreasonable, because as he stated in effect, the title of the vessel would be in the steamboat company, affording partial security at least, for

the money paid. The final draft of the written contract had not been made. The statement was not a mere expression of Mr. Cowles' understanding of the law, or construction of the proposed paper, which it was understood might or might not be correct. It was the assertion of a fact, based as he declared, on his extensive experience in such business—that the title to vessels in process of construction, as contemplated in this instance, is in the party for whom they are constructed, that the title to this vessel would be so vested, and he therefore proposed that the parties proceed in the matter of making a contract, and taking security, on this basis; and they did so—Mr. Vandergrift accepting and acting upon the statement and proposition. The testimony of Mr. Vandergrift and Mr. Cowles (to be found in the respondent's record at pages 20, 21, 31, 48, 49, 64, 65, 66) is harmonious throughout, and leaves no doubt that it was distinctly agreed that the title should be treated as vesting in the steamboat company from the beginning, if a contract, as proposed, was entered into. The demand for security was consequently reduced \$25,000 on this account, and the paper signed. Without this agreement Mr. Vandergrift declares the demand for security would not have been reduced, nor the paper signed. The testimony of Mr. Cowles and the transaction itself, sustain this declaration. It is unreasonable to suppose the steamboat company would otherwise have bound itself, for the advancement of nearly \$50,000 on security for its return in only \$25,000—in case the builders failed. I have called this an agreement, rather than an understanding, because a mutual understanding between contracting parties is an agreement, and properly is so designated. The following language taken from the libellant's brief ("Supplementary Points," p. 5) substantially admits the agreement:

"It is quite possible that Cowles, as ignorant of the law applicable to such contracts as the parties whom he assumed to advise, did in good faith, express the opinion that no such express clause was necessary. And if the respondents had been willing to take the contract as it then stood they might have been entitled in their present predicament \* \* \* to sympathy."

It is supposed, however, that they cannot have anything more than sympathy because they executed the paper without requiring the agreement to be inserted, and because the eighth clause which was subsequently added, shows that the agreement was abandoned. This clause however, as we have seen, does not touch the question of title; and as the testimony plainly shows was not intended to affect it.

We are thus brought to the question: Does the execution of the paper preclude proof of the agreement? Counsel have urged with great earnestness and ability that it does, because such proof would contradict the paper. I am not able to adopt this view. The paper is silent on the subject. It provides, simply, for building the vessel described within a specified period, and paying for it in a specified manner, with privilege in the steamboat company to refuse possession and recover the price paid if the builders fail in duty. There is no mention of title or allusion to the sub-



ject. It is left entirely to inference. Without more (as stated) the court would infer intention to leave it in the builders, because the contrary is not expressed. If the paper had said it shall vest in the steamboat company it would of course have so vested, and this would not have been inconsistent with any other provision. It would simply have repelled an inference, otherwise arising from its absence. If it had been reduced to writing separately this writing would certainly be admissible as collateral to, and consistent with the terms of the paper. It would no more contradict it than it would if inserted therein. Suppose the parties had written: "It is agreed (or understood) that title to the vessel shall (or will) vest in the steamboat company during the process of construction, and consequently security for advancements on account of price is fixed at \$25,000, and the contract will be signed," or had written: "It is understood, in entering upon the contract about to be executed, that title to the vessel shall vest in the steamboat company when work commences;" could it reasonably be contended that the writing would not be admissible. That the agreement was left in parol is unimportant. A parol agreement collateral to a written one whose terms it does not contradict or vary, is as admissible as one reduced to writing. I find no difficulty therefore in admitting the evidence on this ground. *Walker v. France*, 112 Pa. St. 203, 5 Atl. 208; *Cullmans v. Lindsay*, 114 Pa. St. 166 [6 Atl. 332]; *Chapin v. Dobson*, 78 N. Y. 75; *Bank v. Fordyce*, 9 Pa. St. 275; *Chalfant v. Williams*, 35 Pa. St. 212; *Steamboat Co. v. Brown*, 54 Pa. St. 77; *Chew v. Gillespie*, 56 Pa. St. 308; *Martin v. Berens*, 67 Pa. St. 459; *Graver v. Scott*, 80 Pa. St. 88; *Kostenbader v. Peters*, Id. 438; *Driesbach v. Bridge Co.*, \*81 Pa. St. 177; *Whitney v. Shippen*, 89 Pa. St. 22; *Jessop v. Ivory*, 158 Pa. St. 71 [27 Atl. 840]; 1 Greenl. Ev. pt. 2, c. 5, §§ 296, 304.

Would it not be admissible, on another ground, even if it contradicted the terms of the paper? As we have seen the paper and bond were executed contemporaneously, and formed one transaction. The arrangement for constructing the vessel, paying for it, and securing a return of the price in case the builders fail, constitutes a single contract, and it is clear that the steamboat company's consent to this contract, and acceptance of the bond in \$25,000, were procured by the assurances and on the agreement before stated. Mr. Vandergrift says distinctly that he would not have signed the paper, or accepted the bond without it, and as before remarked Mr. Cowles' testimony, and the original demand of security in \$50,000, sustain his statement. The object of the security was to provide for the contingency which has occurred—the builders' failure to keep their contract. By means of the agreement and understanding, induced by Mr. Cowles, the paper was procured, binding the steamboat company to advance \$42,500, on a bond for \$25,000, which must now prove wholly inadequate to protect the company against loss, if the agreement may be repudiated. To allow such repudiation would be to allow the perpetration of a fraud. The intention to repudiate now manifested would relate back to the date of the contract, constitute a fraud

in its procurement, and thus justify its reformation. *Caley v. Railroad Co.*, 80 Pa. St. 363; *Miller v. Railroad Co.*, 87 Pa. St. 95; *Hoffman v. Railroad Co.*, 157 Pa. St. 174 [27 Atl. 564]; *Reilly v. Daly*, 159 Pa. St. 605 [28 Atl. 493]; *Cullmans v. Lindsay* (Pa. Sup.) 6 Atl. 332; *Cake v. Bank*, 116 Pa. St. 264 [9 Atl. 302]; *Jackson v. Payne*, 114 Pa. St. 67 [6 Atl. 340]; *Thomas v. Loose*, 114 Pa. St. 35 [6 Atl. 326]; *Phillips v. Meily*, 106 Pa. St. 536; *Graver v. Scott*, 80 Pa. St. 88; *Renshaw v. Gans*, 7 Pa. St. 118; *Rearich v. Swinehart*, 11 Pa. St. 240.

It is asserted that the doctrine of these cases is not that of the common law, as administered in the federal courts; but no authority for this is cited; and none is known to me.

It is urged that Cowles did not represent his company in this respect. If he did not, the company took the benefit of his acts—the contract and the \$42,500, paid under it, obtained on the faith of them; and it cannot therefore deny his authority. If he failed to inform his principal he may have failed in his duty to it; but the steamboat company is not responsible for this, and must not suffer from it. The contract and reduction of security were the fruit of the oral agreement which he induced, and his company cannot take the fruit and withhold the price. There is no hardship, whatever, in applying this familiar rule to the company. They could lose nothing whatever by such vesting of the title. They had no interest in retaining it; their lien afforded all the security the title could possibly confer; while to the steamboat company its possession was vital—with their security for advancements reduced to \$25,000. The amount of reduction must now be lost if the company can take the benefits of the contract and repudiate the authority of its agent.

While I am impressed with the belief that the evidence is admissible also on the ground of mutual mistake—if held to conflict with the paper—it is unnecessary to consider this question, and I will not, therefore, do so.

I intended to say in the proper place, but did not: that I attach no importance to the builders' insurance of the vessel. It does not tend to shed light even on their understanding of the contract at that time. Their lien called for insurance as clearly as possession of the title would.

A decree must be entered dismissing the libel with costs.

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THE GEORGE W. CHILDS.

THE W. C. TANNER.

OWNERS OF THE GEN. GEARY v. THE GEORGE W. CHILDS and THE W. C. TANNER.

(District Court, E. D. Pennsylvania. March 19, 1895.)

No. 83.

1. COLLISION—TOW WITH ANCHORED VESSEL—ACTS IN EXTREMIS.

A sloop which was anchored at night without a light up cannot complain because a tow, which, without fault of her own, was brought into

immediate danger of collision, failed in the excitement of the moment to drop her anchor or cut her hawser as soon as she might have done.

2. SAME—PRESUMPTIONS.

Where sufficient cause for a collision is found in a neglect of duty by one vessel, it should be ascribed to that alone, unless other contributory negligence is proved; but if it is shown that the other vessel had no sufficient lookout it will be presumed that her negligence contributed to the accident unless the contrary is proved.

3. SAME—INSUFFICIENT LOOKOUT—MASTER OF TUG.

The master of a tug stationed in her pilot house in charge of the wheel is not a competent lookout, and is not in a proper place for that purpose. There should be at least one person assigned exclusively to that duty and stationed in the most favorable position for seeing, and an alleged custom among tugs to have no lookout but the master is no excuse.

This was a libel by the owners of the sloop Gen. Geary against the tug George W. Childs and the schooner W. C. Tanner, to recover damages resulting from a collision.

J. Warren Coulston and Alfred Driver, for the Gen. Geary.  
John F. Lewis, for the George W. Childs.

BUTLER, District Judge. On the night of November 11, 1892, as the sloop passed down the Delaware river, near Chester, she was run into by the schooner, then in charge of the tug, and with her cargo was sunk. The night was clear, without moon, and the tide ebb.

The material questions raised are: Were the sloop's lights up? and was either the schooner or tug in fault? As respects the first, the testimony is conflicting, and irreconcilable. After a careful examination of it, my judgment is against the sloop. The clear weight of the testimony justifies a conclusion that her lights were not up.

As respects the second question, I have found more difficulty. The sloop's negligence did not of course, justify the collision if it could be avoided by the exercise of proper care. The libellant says it could have been avoided, and charges the respondent with carelessness which tended necessarily and directly to produce it. As respects the schooner the charge is not sustained. She appears to have been blameless. She had a proper lookout and followed the tug as closely as she could. It is far from clear, if it is even probable, that dropping her anchor, or cutting her hawser earlier would have been serviceable. I believe, with her mate Cunley, that neither would. But if a different conclusion were justifiable she could not be blamed for the omission. Being placed in a position of danger, without fault of her own, the sloop could not complain that she failed in the consequent excitement to select the best means of escape. As regards the tug the case is not so clear. She is charged with negligence in failing to maintain a proper lookout, and as a consequence in approaching too near the sloop. Finding a sufficient cause for the collision in the latter's neglect of duty, it should be ascribed to this alone, unless other contributory negligence is proved. If the charge against the tug

is sustained by the evidence the necessary inference is that her negligence contributed to the accident, unless the contrary is proved. Is the charge so sustained? All the direct testimony on the subject is from her witnesses—the master Horner—the deck-hand Tracy, and the mate Jefferson. Their testimony is not such as to inspire full confidence in their statements. They contradict each other, and Tracy contradicts himself as well. Making the most of what they say for the tug, it shows that her only lookout, for some time before the collision, was the master, who was stationed in the pilot house, and had charge of the wheel. That this was not a proper lookout is clear. The station was not the most favorable for seeing—especially low-down craft; and the master in charge of the wheel, and of the navigation of the vessel, was not a proper person to entrust with the duty. There should have been at least one person assigned exclusively to this duty, and stationed in the most favorable situation for seeing. The subject has been so often considered by the courts, that it is only necessary to refer to what is said in the cases cited. *The Ottawa*, 3 Wall. 273; *Haney v. Steam Packet Co.*, 23 How. 291–293; *Chamberlain v. Ward*, 21 How. 548, 570; *St. John v. Paine*, 10 How. 585; *The Genesee Chief v. Fitzhugh*, 12 How. 443; *The Ripple*, 41 Fed. 63; *The Myrtle*, 44 Fed. 779; *City of Philadelphia v. Gavagnin* [10 C. C. A. 552], 62 Fed. 617. In the case last named, decided by the court of appeals of this circuit, it is said:

“The evidence discloses the vital fact that the tugboat had no proper lookout. It is true the mate declared that he was keeping a lookout in the pilot house, but that is not a compliance with the duty imposed on the tug. The officer in charge of the navigation of the vessel is not a competent lookout, nor is the pilot house the place where the lookout should be stationed. The lookout should be charged with no other duty, and in that duty he should be actually vigilant, and continuously employed without having his attention distracted by anything else.”

In this view of the law the conclusion is unavoidable that the tug was guilty of carelessness, which directly tended to the collision—as directly as did that of the sloop; and in the absence of satisfactory proof that it did not so contribute, it is reasonable to infer that it did; indeed the inference cannot be avoided. Of course it may be repelled by proof that it did not. On behalf of the tug it is urged that the sloop could not have been seen earlier than she was by the most vigilant lookout properly stationed. If the testimony proves this, it follows that the failure to maintain a lookout did not contribute to the accident. I do not think, however, that the evidence does prove it. The master says she could not have been seen earlier. But he does not know. Had he been differently stationed and devoting his attention exclusively to ascertaining this fact he could tell us. But stationed in the pilot house directly behind the mast, in charge of the wheel, and engaged in “jabbering” as his mate says, who was “keeping him company,” his statement that the sloop could not have been seen earlier is unreliable. Besides he is not an impartial witness. The mate Jefferson says he was not looking out for objects ahead, but was engaged in conversation with the master and was thus in-

terfering with a proper discharge of the latter's duty. A lookout should not be interested in anything whatever, but the performance of that duty. Conversation tends to divert his attention; men instinctively and unconsciously look towards those with whom they talk, and allow their minds to become absorbed in the conversation. This witness, Jefferson, says he did not see the sloop till his attention was called to her; of course he would not, as he was not looking forward. He saw her, however, when the master directed his attention that way, and says she could not then be seen with distinctness, but that he saw she was a vessel with sails and seemed to be a sloop. How much further he could have seen her he does not know, nor can we infer. The witnesses from aboard the schooner did not see her until the tug gave warning; but the schooner was 50 fathoms behind, with the tug directly between her and the sloop, as the schooner's lookout testified, and also with whatever smoke the tug's stack emitted increasing the obstruction to the view. As soon as the tug sheered the sloop was seen from the schooner. I believe the tug should have seen her considerably earlier. The night was favorable to seeing; the schooner's sail was new and bright in color; and I am convinced that she was not seen earlier only because of the tug's neglect to maintain a proper lookout. The statement that it is not customary for tugs to maintain a more vigilant lookout than this tug had, is immaterial. The law determines their duty in this respect, and they cannot avoid it without becoming responsible for the consequences. I will not pursue the subject further. While I believe it to be clear that a proper lookout would have discovered the sloop in time to keep off, it is not necessary that this fact shall affirmatively appear, except as a result of the inference stated. It is sufficient that the contrary is not proved. In such case the presumption against the tug stands. Each vessel was guilty, and equally guilty of carelessness which naturally tended to the accident, and each must therefore be held guilty of having contributed to its occurrence. It can no more be ascribed exclusively to the negligence of the one than the other. It cannot be said the sloop would have escaped if her lights had been up. That cannot be known. Vessels with lights up are frequently run into for want of proper lookout on those approaching. As well might it be said that the absence of the sloop's lights is immaterial because the absence of a lookout on the tug rendered them useless.

A decree must be entered sustaining the libel for half damages and half costs.

## HAYDEN v. THOMPSON et al.

(Circuit Court, D. Nebraska. April 23, 1895.)

## 1. LIMITATION OF ACTIONS—RUNNING OF STATUTE—TRUSTS.

Where dividends were paid stockholders in a bank out of its capital stock, if the dividends constitute a trust fund in the hands of the stockholders for the benefit of creditors, it is a constructive trust, and the statute of limitations began to run against an action to recover such dividends from the date of payment.

## 2. SAME—ACTION BY RECEIVER.

The statute of limitations runs against the right of a bank to recover dividends paid to its stockholders out of its capital stock, either through fraud or mistake, from the date of payment, and, when an action by the bank to recover such dividends would be barred, an action by a receiver on behalf of creditors is also barred.

## 3. EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

The receiver of a national bank cannot maintain a bill in equity against its stockholders to recover dividends illegally paid them out of its capital stock, as they may be recovered in an action at law.

## 4. SAME—PLEADING—MULTIFARIOUSNESS.

Equity cannot entertain jurisdiction of a bill by the receiver of a national bank against its stockholders to recover dividends illegally paid them out of its capital stock, on the ground of preventing a multiplicity of suits, as such a bill is multifarious, one stockholder having no interest in the claim against another.

## 5. NATIONAL BANKING ACT—ILLEGAL DIVIDENDS—LIABILITY OF DIRECTORS.

The remedy against directors of a national bank provided by Rev. St. § 5239, for violations of the national banking act, is exclusive, and their liability for declaring and paying dividends out of the capital stock of the bank can be enforced only by the receiver acting under the direction of the comptroller, after the violation of the statute has been judicially determined, and a forfeiture declared.

Bill in equity by the receiver of the Capital National Bank of Lincoln, Neb., to recover dividends paid to stockholders.

Mr. Lamberson and Mr. Harvey, for plaintiff.

Mr. Flansburg, Mr. Ames, Mr. Hall, Mr. Magoon, and Mr. De-weese, for defendants.

Before DUNDY and RINER, District Judges.

RINER, District Judge. The bill in this case is filed by the receiver of the Capital National Bank of Lincoln against the stockholders of the bank to recover dividends paid by the bank to the stockholders at different times from its organization until the bank became insolvent, in January, 1893.

The principal allegations of the bill, briefly summarized, are that from the date of its organization up to the date of its failure the bank did a large business, and received large sums of money on deposit; that its expense account was large, and from the date of the organization to the date of the failure it met with and sustained great losses in business, and that by reason of these losses the capital stock became and was greatly impaired; that at no time since its organization had there been any earnings or profits in any given year; that notwithstanding the fact that there were no net earnings or profits from which a dividend could be declared, the directors, for the

years the bank was transacting business, unlawfully and fraudulently, and with the intent to further impair the capital of the bank, and to defraud its creditors, declared certain dividends in various amounts, which are each set out in the bill pro rata to the stock held by the respective stockholders, defendants in this case; that the stockholders accepted and retained the dividends so declared, and that the bank was insolvent at each and all of the times when these dividends were declared and paid. The bill then proceeds to set out in detail a history of the transactions of the bank, and prays that the court decree the several acts of the directors of the bank in declaring and paying the dividends to shareholders unlawful and fraudulent, and that the stockholders be ordered to return and pay back the dividends to the receiver, to be paid out and apportioned among the creditors of the bank. To this bill a number of the defendants have demurred; others have answered, pleading the statute of limitations, and the right to set off the amount of their deposits in the bank against any claim that the court may find due from them to the bank upon these dividends.

Several very interesting questions were urged and were fully discussed at the argument. We do not find it necessary, however, in disposing of the case, to consider all of the questions presented. It is contended by the defendants that in some instances all of the dividends paid to them as stockholders of the bank, and in other cases a part of the dividends, are barred by the statute of limitations of this state, and, in this last-mentioned class, that, where dividends are not barred, the parties have the right to set off their liability, if any, for these dividends, against the indebtedness due them from the bank upon their deposits in the bank at the date of its failure. The bill seeks to charge the defendants with this liability upon the ground that in each instance when they accepted the dividend it was accepted and received by them impressed and charged with a trust in favor of the bank and its creditors, and that, therefore, although the defendants are not charged with any participation in the alleged fraud of the directors, they are, nevertheless, liable to the extent of these dividends, for the reason that the effect of their payment was to diminish the capital stock. The rule is well settled that express trusts are not within the statute of limitations, for the reason that the possession of the trustee is the possession of his cestui que trust. This rule, however, is subject to this qualification: that the time begins to run against a trust as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest, which is clearly and unequivocally made known to the cestui que trust. Hence it follows that, in the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is a complete bar, both in equity and at law. Recognizing this rule, it was contended by counsel for the plaintiff at the argument that the allegations of the fraudulent action of the directors in declaring these dividends charged the dividends with a trust in the nature of an express trust, and that, because of the fraud of the directors in declaring the dividends, they bring themselves within the twelfth section of the stat-

ute, and the time, therefore, did not begin to run until after the discovery of the fraud by the receiver, who represents the creditors of the bank. To this proposition we cannot assent. These stockholders are not charged with any fraudulent act in connection with declaring these dividends. The only allegations of fraud in the bill are against the directors as officers of the bank. These dividends were paid to the stockholders, accepted and retained by them openly and notoriously as their own from the date of their payment until the bank closed. The liability of the defendants to the bank for these illegal dividends, if they were illegal, does not arise solely because of the fraud of the directors, but because of the fact that the dividend itself was illegal, in that it impaired the capital stock, and was not taken from the profits. This would be equally true if the dividend was paid by mistake of the directors. We are of opinion that in either case the liability of the stockholder exists, if at all, by implication of law for the receipt of money which did not belong to him, and that the time would begin to run from the date of its payment. In other words, we do not find that the trust, if it was trust, is such an express and continuing trust as would bring the case within the exclusive jurisdiction of a court of equity. The money, as already stated, was received by the stockholders in their own right, and they claim that they were legally entitled to it. There is nothing in the bill, as it seems to us, which will authorize the inference that these stockholders ever agreed to hold these dividends in trust for anybody, or that they claimed them otherwise than as belonging to themselves. If, then, the payment of the dividends constituted a trust at all in the hands of the stockholders, it was by implication of law, and not such a trust as was within the exclusive jurisdiction of a court of equity, but was cognizable in a court of law, and therefore lacked the essential attributes of trusts which are exempt from the statute.

The right of action for the recovery of these dividends, if paid either through fraud or mistake, was in the bank, and this right of action existed as soon as they were paid over to the stockholders. The time of limitation commenced to run from that period, and when the bar became complete against the bank it was also complete against a creditor of the bank. As was well stated by the supreme court of Kentucky: If a debtor cannot recover a payment because it is barred by the statute of limitations, most certainly a creditor of the debtor cannot compel its payment in discharge of his debt on the ground that his cause of action had accrued within the time specified by the statute. His rights are measured by and do not exceed those which belong to his debtor. We do not think this rule is changed or modified, as was urged at the argument, because the case is brought by the receiver for and on behalf of all creditors. The receiver took the same rights, so far as the collection of claims is concerned, as existed in favor of the bank; no more, no less. If these defendants could plead the bar of the statute against the bank, we think they can also plead it where the suit is by the receiver on behalf of the creditors of the bank. We are aware that the views here expressed conflict with a decision announced by the circuit



court in another district of this circuit. The learned judge who announced the conclusions of the court in that case put his judgment upon the ground that the case was in the same situation as if the stockholders had never paid for their stock, and goes to the extent of holding that, even if it were conceded that the corporation was barred, the creditors would not be. To this view we cannot assent, for the reason that, in the absence of any participation in the fraud by the stockholders, the rights of the creditors are measured by and limited to the rights of the bank.

Another question presented is whether, in any event, a bill in equity can be maintained. In other words, must not this plaintiff, if entitled to any relief at all, pursue his remedy in a court of law. It is the settled doctrine of the federal courts that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law. Accordingly it has been held that a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief in kind or in degree on the equity side than on the law side of the court; for example, by compelling a specific performance or the removal of a cloud on the title to real estate, or preventing an injury for which damages are not recoverable at law, or where an agreement procured by fraud is of a continuing nature. In cases of fraud or mistake, as under any other head of equity jurisdiction, a court will not sustain a bill in equity to obtain a decree for the payment of money only, and by way of damages, where a like amount can be recovered at law. This, we think, is the rule both in this country and in England. It is true, as was suggested at the argument, that a favorite object with a court of equity is to prevent a multiplicity of suits, and for this purpose it is uniformly held that all persons materially interested must be made parties. The forms of proceeding in equity, and the power of the court to mold its decree to suit the various equities and rights of the parties as established by the record, enables a court to adjust in a single suit rights and interests which, according to the rules of pleading at law, would necessarily result in various issues, incapable of being tried in a single case, and disposed of by a single judgment. This disposition, however, of a court of equity to prevent a multiplicity of suits will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of different natures against several defendants; the rule being that a bill against several persons must relate to matters of the same nature having a connection with each other, and in which all of the defendants are more or less concerned. Thus it has been held that, if an estate has been sold in parcels to different purchasers, a vendor cannot unite them in one bill for a specific performance, nor can they unite in one suit against the vendor for the same purpose, for the reason that the rights of each are separate and independent, and each case must depend upon its own peculiar circumstances. This, we think, is true in the case at bar. What possible interest has

any one of these stockholders who have received dividends in the result of the claim against any other stockholder? It is not contended that, in any event, could a stockholder be made liable for more than the amount of dividends received by him; therefore his interest is entirely independent of the interest of every other stockholder receiving dividends.

Another proposition urged at the argument, which we will briefly consider, is whether the remedies and rights of the parties and the liability of the stockholders as fixed by the national banking act are not exclusive. At common law the individual property of the stockholder could not be subjected to the payment of the debts of a corporation under any circumstances. The liability to pay assessments on stock, made by the comptroller, exists only by virtue of the statute, and the assent of the incorporators to its provisions. The liability for the assessment is maintained upon the ground, and the sole ground, that in subscribing for a share of stock the stockholder accepts the provisions of the statute, and takes the stock charged with this statutory liability in case an assessment becomes necessary, in the opinion of the comptroller, for the protection of creditors. So far as any assessment of the stock is concerned, the liability of a stockholder is fixed and determined by the statute. No provision is made for a proceeding of the character here sought to be maintained, hence we think, if a bill is sustained at all, it could only be sustained upon the ground that a stockholder, in subscribing for the stock, took it charged with an express or continuing trust. As to the directors, however, of whose alleged fraudulent action complaint is made, the statute does provide a remedy in section 5239, and we are inclined to the view that the method provided by the statute for enforcing a liability against the directors is exclusive of other remedies, and that their liability can only be enforced by the receiver acting under the direction of the comptroller, after the violation of the statute has been judicially determined by a court of the United States, and a forfeiture declared. When this course is taken, they may be held liable in a personal and individual capacity for all damages which the association, shareholders, and other persons shall have sustained in consequence of their violation of the provisions of the statute. The demurrers to the bill will be sustained, and the exceptions to the answers overruled, and the bill dismissed.

DUNDY, District Judge., concurs.

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NEW YORK, N. H. & H. R. CO. v. BLESSING.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

1. CONTRIBUTORY NEGLIGENCE—CROSSING RAILROAD.

B., a man of mature years and in possession of all his faculties, but somewhat hard of hearing, was walking from the south towards the tracks of defendant's railroad, at a highway crossing, just after dusk. There was nothing to intercept his view after he came within a step or two of the

southerly track, which was nearly five feet between the rails and seven feet distant from the northerly track. B. crossed the southerly track, and, while on the northerly track, was struck by a train and killed. A witness testified that he crossed the track, running quite fast, just in advance of B., looked, and saw no train. Another witness testified that he was driving a truck towards the track, from the south, looked, and saw no train, and was about crossing, when he saw B. struck. *Held*, that it was not error to refuse to instruct the jury, as a matter of law, that B. was guilty of contributory negligence.

2. CHARGING JURY.—ISSUE NOT RAISED BY EVIDENCE.

The fireman and engineer of the train testified that they first saw B., walking slowly towards the track, when the train was about 50 or 60 feet away; that the bell was rung and whistle sounded, and the brakes applied, and the train stopped as soon as possible. There was no evidence to contradict defendant's evidence that the train was stopped as soon as possible after B. was seen. *Held*, that it was error to instruct the jury that, if the engineer and fireman could have discovered B. on the track in time to avoid him, and did not, the defendant was guilty of negligence, there being no evidence to which such instruction could apply.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Karl H. Blessing, as administrator of Jacob F. Blessing, against the New York, New Haven & Hartford Railroad Company, to recover damages for the death of the intestate, alleged to have been caused by defendant's negligence. The plaintiff recovered a judgment in the circuit court. Defendant brings error.

Henry W. Taft, for plaintiff in error.

Ullo, Reubsamen & Cochran, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The action was brought by an administrator to recover damages for the death of Jacob F. Blessing, who, it was alleged, was killed by the negligence of the defendant. The issues upon the trial were whether the defendant was guilty of negligence, and whether the deceased was guilty of contributory negligence.

It appeared in evidence that the deceased was struck and fatally injured by the locomotive of a freight train while crossing the defendant's railroad at its intersection with a public highway. He had approached along the highway from the south, on foot; had walked across the first, or southerly, track of the railroad, and was upon the second, or northerly, track when he was struck. The accident happened in the early evening, shortly after dusk. According to some of the testimony, the freight train, which was composed of 12 or 15 cars, was moving at a speed of 15 or 20 miles an hour, and had given no warning of its approach by the ringing of a bell, by a whistle, or otherwise. The deceased was familiar with the crossing, was a man of mature years, and was in possession of all his faculties, but was somewhat hard of hearing. He was alone. There was nothing upon the railroad to intercept his view after he came within a step or two of the southerly track. That track

was nearly five feet between the rails, and was seven feet distant from the northerly track. There was evidence tending to show that the view of the track was intercepted by bushes and high land until the road from the south reached the crossing. How far the deceased could have seen the train if he had looked in the direction from which it came was a fact in dispute. According to the testimony of a surveyor, and other apparently reliable witnesses, the view was unintercepted for a distance of several hundred feet. But there was testimony to the contrary. A witness for the plaintiff testified that he ran across the track running quite fast, just in advance of the deceased; that before he crossed he looked towards the east to see if any train was coming, and could see none; that it was dark, and "there was a kind of curve there"; that he had got a short distance beyond the track, something less than half the distance to Hahn's house, when he looked back, and saw the deceased just being struck by the locomotive. Hahn's house, according to some of the testimony, was from 50 to 65 feet beyond the railroad. Another witness, who was about crossing the railroad from the south, driving a team and truck, testified that although he looked for approaching trains he did not see or hear any, and had got within two or three yards of the track, and was about to drive over it, when he saw the deceased stricken down. The testimony of these witnesses tended to prove that the train from the east was not visible to a person crossing the track from the south until very near; but whether this was because of the curve of the track, or because the train was obscured by the high land at the sides of the track, and the headlight of the locomotive was not burning, were left as matters of inference merely. The fireman of the locomotive testified that as the train was approaching the crossing, and when it was 50 or 60 feet away from it, he saw the deceased walking slowly towards the track, and that he notified the engineer, who was ringing the bell, and the latter immediately sounded an alarm whistle and applied the air brakes. The train ran about 150 feet beyond the crossing before it was brought to a stop. He said:

"When I first saw him (the deceased) he was just in the act of going on the track. I told the engineer just as soon as I laid my eyes on him. In fact, I only just saw him for a moment."

The engineer testified that the deceased was about 25 or 30 feet away when he first saw him. According to the testimony for the defendant, the train was running about 12 miles an hour, and the headlight of the locomotive was burning, and shone upon the track 100 to 200 feet in front of the train.

At the close of the evidence the trial judge was requested on behalf of the defendant to instruct the jury to render a verdict in its favor, because the evidence did not establish negligence on its part, and also because the evidence established contributory negligence upon the part of the deceased. This request was denied by the trial judge, and error has been assigned of the ruling.

It has not been argued before us that the evidence did not justify submitting the question of the defendant's negligence to the jury,

but it is contended that the evidence of the contributory negligence of the deceased was such that it was the duty of the court to direct a verdict for the defendant upon that ground as requested.

If the trial judge had granted the motion, which was made directly after the rendition of the verdict, to set aside the verdict as contrary to the evidence, we should not have regarded it as an unwise exercise of discretion; but he did not do so, and if there was any evidence, however unsatisfactory it may have been, to support the conclusion that the deceased was not guilty of contributory negligence, we cannot rule that his refusal to direct a verdict for the defendant was error. This court has no power to review the decision of the court below in refusing to grant a new trial, based upon the ground that the verdict was contrary to evidence. *Steamship Co. v. Anderson*, 1 U. S. App. 176, 1 C. C. A. 529, 50 Fed. 462. It is only when the evidence given at the trial, with all the inferences that the jury can justly draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, that the court is justified in directing a verdict. If upon any construction which the jury were authorized to put upon the evidence, or by any inferences they were authorized to draw from it, the conclusion that the deceased was not guilty of negligence can be justified, the defendant was not entitled to the instruction requested. *Railroad Co. v. Stout*, 17 Wall. 657. It is undoubtedly true that the railroad is itself a warning, and that it can never be assumed by a person about to cross one that cars are not approaching, or that danger is not to be apprehended; and we recognize to the fullest extent the doctrine that a person who is about to cross a railroad track is bound to listen and look in order to avoid danger, and if he fails to do so, or if doing so, and seeing the danger, he persists in the attempt, he is guilty of negligence which will defeat any recovery if he is injured. But, applying these rules to the facts of the case in hand, we are unable to accede to the conclusion urged upon us. We cannot ignore the consideration that one who is about to cross a railroad has the greatest incentive to exercise ordinary prudence, and is not to be presumed to be destitute of the ordinary instincts of self-preservation. Because men are sometimes reckless, we cannot assume that they are generally so. There is no evidence to indicate that the deceased was intoxicated, and none which is indisputable to show that he did not look and listen as he approached the track. Two other persons, having practically the same opportunities as he did for observation and discovery of danger, according to the testimony, used ordinary diligence and failed to discover it. If the jury believed these witnesses, as we must assume they did, they were justified in inferring that there was some unexplained condition or circumstance in the situation which prevented the train from being seen or heard; and however improbable or incredible that testimony may seem to have been, especially in view of the photographs introduced in evidence, it was exclusively for the jury to credit or reject it. If the jury believed that these witnesses could not see or hear the train, although they sought to do so, they were justified

in assuming that the deceased, governed by the natural impulses of self-preservation, looked and listened as he approached the train, and by reason of some unexplained cause, which prevented it from being seen or heard by the others, was himself unable to see or hear it. Whether the headlight was burning, whether the shade of the high ground obscured the train, whether there was a wind that deadened the noise of its approach, whether the noise of the truck just behind the deceased prevented him from hearing the train, whether, dazed by the sudden appearance of the train as he was crossing the first track, he lost his presence of mind, and stepped forward, instead of backward, were all matters of inference bearing upon the question of the contributory negligence of the deceased, with which it was the particular province of the jury to deal, and which, if found in favor of the plaintiff, were sufficient to explain the conduct of the deceased, and reconcile it with that of an ordinarily prudent man under the same circumstances.

Error has also been assigned of an instruction given to the jury on behalf of the plaintiff which was as follows:

"If the engineer or fireman of the defendant company could have discovered the plaintiff's intestate on the track in time to have avoided injuring him, and if the jury find that under the circumstances of this case the engineer or his fireman on the train should have so discovered the plaintiff's intestate in time to avoid injuring him, but did not, the defendant company was guilty of negligence, and the plaintiff should have a verdict, provided he was not guilty of contributory negligence."

This instruction was excepted to on behalf of the defendant. It was given pursuant to a request on the part of the plaintiff. We think it was erroneous, and properly excepted to.

To instruct a jury upon assumed facts to which no evidence applies is error. Such instructions tend to mislead them, by withdrawing their attention from the proper points involved in the issue. "Juries are sufficiently prone to indulge in conjectures, without having possible facts not in evidence suggested for their consideration." *Railroad Co. v. Houston*, 95 U. S. 697, 703. The instruction given could not in any respect have enlightened the jury in reaching a just conclusion. On the contrary, it tended to divert their minds from the real issues in the case. The facts were either, as contended for by the plaintiff, that a pedestrian crossing the track could not see or hear the train, or be seen by those in charge of it, until it was close upon him; or, as contended for by the defendant, that it was visible to a person looking for it for several hundred feet beyond the crossing, and the deceased was actually seen 50 or 60 feet away. In the one case the train could not possibly have been stopped in time to avoid striking the deceased; in the other, those in charge of it had the right to assume that he had noticed it, and would not step in front of it, until he actually attempted to do so, when also it was too late to stop it. There was not a scintilla of evidence to contradict the witnesses for the defendant in the statement that the train was stopped as soon as possible after the deceased was discovered, apparently intending to cross the track, by the fireman. By asking for this instruction,

the plaintiff injected into the real controversy a false and dangerous ingredient. We cannot doubt that the instruction was prejudicial to the defendant. This error should lead to a reversal of the judgment. The judgment is reversed.

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HARDY v. KETCHUM et al.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1895.)

No. 499.

UNLAWFUL DETAINER—WHEN ACTION LIES.

A lessee, having the right to immediate possession under the terms of his lease, cannot maintain an action of unlawful detainer in the United States court in the Indian Territory, under the Arkansas statute (Mansf. Dig. 3348), against a prior lessee from the same landlord, who is unlawfully holding over after the expiration of his term. *McCauley v. Hazlewood*, 8 C. C. A. 339, 59 Fed. 877, followed.

In Error to the United States Court in the Indian Territory.

C. L. Herbert and W. O. Davis, for plaintiff in error.

W. A. Ledbetter and S. T. Bledsoe, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This was an action of unlawful detainer brought by J. G. Hardy, the plaintiff in error, against R. C. Ketchum and Dock Ketchum, defendants in error, in the United States court in the Indian Territory, to recover the possession of the premises described in the complaint. The defendants interposed a demurrer to the complaint, which raised the question whether a subsequent lessee, who, by the terms of his lease, is entitled to the possession of the premises, can maintain unlawful detainer, under the Arkansas statute in force in the Indian Territory, against the former lessee from the same landlord, who is unlawfully holding over after the expiration of his lease. The court below held that in such a case the relation of landlord and tenant did not exist between the lessees from the common landlord, either expressly or by implication, and that for that reason the action of unlawful detainer would not lie under the Arkansas statute, and rendered final judgment on the demurrer in favor of the defendants.

On the authority of *McCauley v. Hazlewood*, 59 Fed. 877, 8 C. C. A. 339, the judgment of the United States court in the Indian Territory is affirmed.

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YOUMANS v. MINNESOTA TITLE INSURANCE & TRUST CO.

(Circuit Court, D. Massachusetts. March 26, 1895.)

No. 220.

1. FOREIGN CORPORATIONS—ACTION AGAINST—BY NONRESIDENT—SERVICE ON COMMISSIONER.

Under Acts Mass. 1884, c. 330, § 1, providing that every foreign corporation having a place of business in the state shall, as a condition to doing

business in the state, appoint the commissioner of corporations its attorney, on whom process "in any action \* \* \* against it may be served," a nonresident may institute suit, the same as a citizen of the state.

2. SAME—CONTINUANCE OF COMMISSIONER'S AUTHORITY.

Under the provision of said section, that the authority of the commissioner as such attorney shall continue in force so long as any liability remains outstanding against the corporation in the state, a nonresident may maintain an action against the corporation, after it has ceased to do business in the state, so long as suits against it by citizens of the state are pending, or till it is decided that at the time of bringing the action the corporation had no existing liabilities in the state.

Suit by William Youmans against the Minnesota Title Insurance & Trust Company.

This case was heard on plea in abatement to the jurisdiction of the court. For the purpose of submitting this question, the parties have agreed to certain facts. The suit was brought in the superior court of Massachusetts, and removed to this court. The plaintiff is a citizen of the state of New York. The defendant is a corporation organized under the laws of the state of Minnesota, and having its principal place of business in Minneapolis. Prior to February 27, 1890, one James M. Keith, who had an office in Boston, sold on commission certain of the mortgage loans of the defendant. Upon the representation of Keith that it was necessary from a legal point of view, the defendant, on April 14, 1890, filed in the office of the commissioner of corporations for the commonwealth of Massachusetts an "Appointment of Attorney for the State of Massachusetts," and a "Foreign Corporation's Certificate," in accordance with the requirements of chapter 330, Acts Mass. 1884. The first paper appoints the commissioner its attorney, upon whom all lawful processes in any action or proceeding against it may be served, in like manner and with the same effect as if the corporation existed within the commonwealth. Then follows this provision: "This appointment and the authority of said attorney shall continue in force so long as any liability remains outstanding against said corporation in said commonwealth." Section 1 of chapter 330 of the Acts of 1884 provides as follows: "Every corporation established under the laws of any other state or foreign country and hereafter having a usual place of business in this commonwealth shall, before doing business in this commonwealth, appoint in writing the commissioner of corporations or his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, and that the authority shall continue in force so long as any liability remains outstanding against the company in this commonwealth." Since March 14, 1891, the defendant has transacted no business in Massachusetts; and said Keith declined, on July 21, 1891, to sell any more loans for it. On July 13, 1891, 13 suits at law, which are still pending, were brought by citizens of Massachusetts against this defendant, in the superior court for the county of Suffolk, in said commonwealth, to recover damages, which aggregate about \$30,000. In these cases the only service of process was made upon the commissioner. The defendant duly appeared in these suits, and filed answers. The transaction out of which the present suit grew occurred on the 28th day of September, 1891. On the 23d day of October, 1891, notice was given to the commissioner of corporations by the defendant that it had ceased to do business in the commonwealth. This suit was brought December 29, 1891.

M. F. Dickinson, Jr., and Samuel Williston, for plaintiff.  
Strout & Coolidge and Edward L. Rand, for defendant.

COLT, Circuit Judge. A foreign corporation, having a usual place of business in Massachusetts, must, before transacting business in the



state, appoint the commissioner of corporations its attorney upon whom process can be served in any action against it, and this authority of the commissioner continues "so long as any liability remains outstanding against the company in this commonwealth." Acts Mass. 1884, c. 330. This statute is a re-enactment in substance of the act of March 6, 1878, which applied only to insurance companies. Acts Mass. 1878, c. 36. A law which requires a foreign corporation to appoint an agent upon whom process may be served, as a condition precedent to its right to transact business within the limits of a state, is valid, and binding. *Wilson v. Seligman*, 144 U. S. 41, 45, 12 Sup. Ct. 541; *Insurance Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369, 374; *Reyer v. Association*, 157 Mass. 367, 373, 32 N. E. 469; *Vallee v. Dumergue*, 4 Exch. 290, 303; *Copin v. Adamson*, L. R. 9 Exch. 345, 355, 1 Exch. Div. 17. The supreme court of Massachusetts, in construing the act of 1878, held that the right to bring suit is not confined to citizens of the commonwealth, but extends to nonresidents upon contracts made outside of the state. In *Johnston v. Insurance Co.*, 132 Mass. 432, the contention of the defendant was "that the court will not, in the absence of express statute authority, entertain jurisdiction of an action between a nonresident plaintiff and a foreign insurance company doing business in this state, upon a contract made out of the state, and insuring property in another state, where no attachment has been made, and no service had except upon the insurance commissioner."

But the court, in reply to this proposition, said:

"It is true the statute does not in express terms provide for the maintenance of such an action, nor does it prohibit its maintenance. The statute was not framed for that purpose; its object is simply to provide for serving upon such companies 'all lawful processes in any action or proceeding' against them. The words, 'all lawful processes in any action or proceeding,' must be held to include all actions which might lawfully be brought against a company thus having a domicile of business in this commonwealth. It is also true that the main purpose of the statute is to secure to our own citizens the benefit of our laws and tribunals in regard to contracts made with foreign insurance companies who do business in this state; and it contains particular provisions which clearly indicate this general purpose. But it is true of all our statutes, applicable to our own citizens, that their primary object is the benefit of our own citizens, and the security and protection of their rights. We have, however, always extended the privileges of our laws to nonresidents, and opened our courts to their litigation, if the defendant can be found here. *Anc. Chart.* 91, 192. And it was said by Chief Justice Chapman, in delivering the judgment in *Roberts v. Knights*, 7 Allen, 449, 452: 'It is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.'"

This decision places a nonresident plaintiff upon the same footing as citizens of Massachusetts with respect to suits brought against foreign corporations under the act of 1884. The defendant availed itself of the privilege of this law in April, 1890. So far as the present question is concerned, it is immaterial when it ceased to do business in the state. The important inquiry is when it ceased to have any liability in the state; for, so long as any such liability exists, it has consented to be sued here. There

are now pending and undetermined in the courts of the state 13 suits against the defendant, to recover damages amounting to about \$30,000. These suits were brought in July, 1891, and the present suit was brought December 29, 1891. The defendant having agreed that its domicile here for the purpose of bringing suit should last so long as any liability remains outstanding in the state, and the supreme court of Massachusetts having held that a nonresident in a transitory action could avail himself of the same right which the citizens of the state possess, I see no escape from the conclusion that the court has jurisdiction of this case, at least while the suits in the state court remain undetermined, or until it has been decided that at the time of the bringing of this suit the defendant had no existing liabilities within the state. Plea in abatement overruled.

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CHISOLM et al. v. CAINES et al.

(Circuit Court, D. South Carolina. April 20, 1894.)

1. PUBLIC LANDS—STATE AS PROPRIETOR—SUIT AGAINST INDIVIDUALS—BURDEN OF PROOF.

Where the state of South Carolina (which, as successor to the British crown, represents the source of title to all lands within its borders) claims lands as against private parties, she is not, like an individual, required to prove her title in the first instance, the presumption being that she is the proprietor until the contrary is shown; but if it is made to appear by the opposite party that the lands have been granted, either by the crown of Great Britain or by the state herself, this presumption is overcome, and the burden is then upon the state to prove her title.

2. SAME—GRANTS BY STATE.

Marshes and mud shoals on the sides of harbors and streams, within the influence of the tides, may be granted by the state to private parties, when this can be done without interfering with the public rights of navigation in the streams and harbors themselves; and, in South Carolina, marsh lands of this character have always been treated as subject to grant. But as to public, navigable streams, themselves, the sovereign holds them in trust for the public use, and can make no valid grant thereof, such as would hinder or impede the rights of the public therein. *Illinois Cent. R. Co. v. Illinois*, 13 Sup. Ct. 110, 146 U. S. 456.

3. FEDERAL COURTS—RIGHTS OF STATE IN TIDE AND MARSH LANDS—LOCAL LAW.

The question as to the rights of the state of South Carolina in or over marsh and tide lands upon the borders of the sea or its estuaries is a question of local law, to be determined by the decisions of the supreme court of the state. *Shively v. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1, followed.

4. SAME—NAVIGABLE STREAMS—RULE IN FEDERAL COURTS—STATE DECISIONS.

The question as to what is or is not a public, navigable stream is one not of local or statute law, but of general law, as to which the federal courts are entitled to exercise an independent judgment.

5. FEDERAL COURTS—STATE DECISIONS—RULES OF PROPERTY.

Where the rights of a litigant in a federal court have arisen under decisions of state courts establishing a rule of property which has since been impaired or overthrown by a later decision of the state supreme court, the federal court will exercise its own judgment, without considering itself absolutely bound by the later decision.

6. NAVIGABLE STREAMS—TEST OF PUBLIC RIGHTS.

In determining whether streams and arms of the sea traversing marsh lands are public, navigable waters, the test is whether they are, or are capable of becoming, public highways; that is, a means, open to the pub-

lic, of passing from one place, where they have a right to be, to another, in which they have the same right. In other words, there must be a public terminus at each end, and hence partially navigable creeks which open upon a bay, but lead merely into private lands, are not public, navigable water. *Heyward v. Mining Co.* (S. C.) 19 S. E. 963, disapproved.

7. SAME—PUBLIC RIGHTS—PRESCRIPTION.

The fact that for many years the public have gone on creeks traversing private lands, without hindrance, does not create any right; it appearing that the lands have never been inclosed or staked out, and that such trespasses had never been forbidden, so that these acts of the public were not of an adverse character.

This was a bill by Alexander R. Chisolm and others, who held, under lease, a tract of marsh land, intersected by creeks, lying in Winyah Bay, S. C., against Edmund A. Caines and others, to enjoin them from trespassing upon said creeks and marshes, and shooting and driving away the game found thereon. Defendants set up in their answer that these creeks and marshes were subject to a public use. Pending the proceedings the state of South Carolina intervened, and set up title in the state to these creeks and marshes.

O. W. Buchanan, Atty. Gen., intervening on behalf of the state of South Carolina.

Fitzsimons & Moffett, for the motion.

Charles Inglesley, opposed.

SIMONTON, Circuit Judge. In this cause, still pending, the attorney general of the state of South Carolina has intervened by information. He alleges that neither the complainants nor their lessors, nor any of them, have, or ever had, any right, title, or interest in said marshes and creeks hereinbefore described, or any of them (the marshes and creeks set out in the bill of complaint). "On the contrary, the said marshes and beds of said navigable streams are, and have always been, the property of the state of South Carolina, absolute owner in fee simple thereof, and said state is now lawfully seised and possessed of the same as sovereign and source of title, said lands never having been granted." The defendants, in their answers, had denied the title of the complainants, averring that the lands upon which the alleged trespasses were committed were lands affected by public use; that is to say, lands open to use by the whole public. The basis of this contention is that these lands are what is known as "marsh lands," and are the beds of navigable creeks covered by water, certainly at certain times of tide, lying between navigable streams, and permeated by navigable streams; that so they remain always open to public use. The attorney general has come in to assert and vindicate this position, with others, under the authority of section 507 of the General Statutes. The prayer of the intervention was allowed, the state submitting herself to the jurisdiction of the court, and to all orders heretofore made in this cause. The defendants followed up this action by a motion that an issue at law be made up to try the question of title to the lands, and on this issue they ask that the complainants be the actors, and assume the burden of proof.

Under ordinary circumstances, the complainants being in pos-

session under color of title, holding adversely in the right of their lessors, upon ordering such an issue those who dispute their title should take upon themselves the burden of overcoming the presumption of ownership arising from possession. *Patton v. McCants*, 29 S. C. 597, 6 S. E. 848. But it is contended that when the state appears, claiming title to land, she occupies a peculiar position. She exhibits no paper title. Having once been the proprietor—the source of title—of all the lands of the state, she still owns them, unless she has parted with them. She is the sovereign, and upon this *prima facie* showing she can rest, at least until it is removed by a counter showing. *State v. Pacific Guano Co.*, 22 S. C. 74. It is contended, therefore, that in the proposed issue the complainants should be the actors. There can be no doubt that all lands in this state are held under the sovereign,—first the royal authority of Great Britain, and afterwards the state of South Carolina, the successor to all of its rights. And when the state sets up her claim, *prima facie* the right must be in her. To require proof from her that she has not granted the land would require proof of a negative. The argument is plausible enough to be sound. At all events, we are bound by it, as the utterance of the supreme court of the state upon a local law affecting property rights. But the state of South Carolina succeeded to the obligations as well as the rights of the crown. She became, upon the Revolution, the owner of lands not granted by her predecessor. She is bound by those grants. This qualification is admitted even by the case of the Pacific Guano Company, which, under pressure of public opinion, carried the supposed rights of the state to an extreme limit. If it be shown that the lands had once been granted by the crown, the presumption in favor of the state is at an end, and upon those who assert her claims devolves the burden of proving either that the grant was void, or that subsequent thereto she had in some way reacquired title.

Let an issue be made up for trial on the law side of this court, in the form of questions to be submitted to and answered by a jury under instructions of the court: First: Were the lands, the subject-matter in controversy, ever granted by the crown of Great Britain, anterior to the Revolution of 1776? Second. If not, have they ever been granted by the state of South Carolina? (In this question the evidence of such a grant can be derived from prescription. In the evidence leading to the answers to these questions, the burden of proof is on the complainants.) Third. If such grants, or either or any of them, are produced or proved at the trial, then the presumption arising from the possession of the plaintiffs avails them, and the burden is thrown upon the defendants to show better title in some one else.

After the rendition of the foregoing opinion the state withdrew her intervention, and the order for the issue at law was rescinded. The case then came up on the bill, answer, and testimony, the issue being whether these creeks and marshes were subject to a public use.

(January 24, 1895.)

**SIMONTON**, Circuit Judge. This case now comes up for a final hearing upon the pleadings, and all the testimony in the cause. The complainants are in possession, under lease, of a large body of marsh land lying in Winyah Bay, in the state of South Carolina, opposite to the shores of North Island. Winyah Bay opens into the Atlantic Ocean, carries on its waters large commerce, and its channels are great public highways. North Island is at the outer entrance of the bay, on the east, and is a strip of land bounded on the east by the ocean, and on the west by marshes extending to Jones creek, and also by the waters of Winyah Bay, and by a part of that bay known on the chart as "Mud Bay." Mud Bay is a shoal to the right of, and at some distance from, the usual course of vessels going up Winyah Bay; the soundings upon it, at low water, being  $1\frac{1}{2}$  to  $2\frac{1}{2}$  feet, except in two or three places. From North Island to Winyah Bay and Muddy Bay is a vast body of marsh land, of the character shown on the whole coast of South Carolina. The soil is mud, of greater or less hardness, and over it is a growth of marsh, which is generally close together, and of an average height of 3 to  $3\frac{1}{2}$  feet. These marshes are permeated with creeks, some connecting with other creeks, making a continuous passage through the marshes; others rising from obscure sources in the body of the marsh, and emptying in the bay or in other creeks. The tide ebbs and flows in all of them. And the whole body of marsh land overflows with each high tide, the highest or storm tides overlapping the growth on the land. In this margin of marsh land, of greater or less width, thus extending from the North Island to these bays, there is the body of marsh land in question in this case, separated from the North Island marshes by Jones creek. It has on one side of it, the eastern side, towards North Island, Jones creek, which runs along North Island from a small inlet at its northern end, and comes out on Winyah Bay, and which, it is admitted on all sides, is a navigable creek. On the opposite or western side of this land in question in this case is Town creek, which also starts from North Inlet, running westwardly. The coast-survey chart shows that it is a bold creek for some distance. It then becomes very narrow, but it appears to have a continuous channel to a point of junction with Oyster Bay, then going through to Muddy Bay, by a small creek, called "No Man's Friend." Coming from Muddy Bay through this to No Man's Friend, there is an abrupt turn to the east, onto a broad sheet of water in the marsh, known as "Oyster Bay." This Oyster Bay forms the southerly boundary of the land in question. Oyster Bay itself narrows as it extends eastwardly, and it has a connection with Jones creek by a very narrow channel, if it be a channel, called "Noble Slough." All the marsh between these creeks and Oyster Bay is cut up with small creeks, caused probably by the constant flux and reflux of the tide over it, acting as drains of the marsh land. Some of them have names,— "Mud Creek," "Duck Creek," "Bread and Butter Creek," "Sixty Bass Creek," "Cut-Off Creek," etc. One of these creeks drains the land by two entrances into Town creek, some distance apart. Others reach

out in the marsh, close up to the heads of other creeks, some of which empty into Jones creek, and others into Town creek. Of course, at high water, with the whole land flooded, any one, in a small boat, coming out of Town creek up one of these creeks, and going towards its upper end, can push over the marsh, and get into the adjacent creek, and follow that until he gets to Jones creek. These little creeks vary in depth. They are scarcely ever dry, except at low tide, and they will carry a vessel or raft of light draft in many stages of the tide. All the marshes on the coast of South Carolina present the same characteristics. The coast-survey charts give no soundings in any of these creeks.

The body of marsh in question comprises a part of the Carteret barony, and its grant from the crown bears date 1733. The grant refers to a plat, and on that plat the boundary is Winyah Bay. The grant covers the marshes, *eo nomine*. At the trial the original grant was not produced, nor was there any evidence of its existence, beyond an official copy, or of its loss. There was evidence that it was not in the possession, custody, or control of the complainants or the lessors. An exemplification of the grant, out of the office of the secretary of state, under the seal of the state, was put in evidence, and admitted. *Rev. St. S. C. 1893, § 2360; Holmes v. Rochell, 2 Bay, 487; Patterson v. Winn, 5 Pet. 233; U. S. v. Sutter, 21 How. 175.* As has been seen, the boundary of this land is Winyah Bay. Now, between the mainland and Winyah Bay is a navigable stream,—Jones creek,—a natural boundary. So the shore of the mainland cannot be said to be the boundary of the land granted. Beyond Jones creek, and nearer Winyah Bay, is another navigable stream,—a natural boundary. Yet the plat calls for the bay as the boundary. If Winyah Bay washed the shore of the mainland, it might be said that the boundary of the land was high-water mark on that shore. But such is not the case. This grant was direct from the sovereign, and must be recognized by the state,—the successor of the sovereign. *Delassus v. U. S., 9 Pet. 117; Strother v. Lucas, 12 Pet. 410; Jones v. McMasters, 20 How. 8.* It was distinctly recognized by the province of South Carolina, by an act of assembly (*Rev. St. S. C. 1893, § 1876*).

In the answer the title of the complainants is denied. And it is claimed that the marshes and streams in question are the property of the state, subject to the public use. With regard to the question of the title of the complainants, there being no evidence that the title is in a third person, it must be assumed that the title is in the party in possession. *Patton v. McCants, 29 S. C. 597, 6 S. E. 848; Lewis v. Brown, 4 Strob. 293.* At all events, mere possession will maintain an action for trespass on the possession, when defendant does not plead title in himself (*Grimke v. Brandon, 1 Nott & McC. 356*), and therefore will maintain a bill to enjoin repeated trespasses. Indeed, the case of the defendant may be complete even if legal title be in the complainants. His position is this: The marshes and streams in question are navigable waters, over and through which the public has the right to pass. The title of the lands underlying is originally in the state, but is held subject  
v. 67 F. no. 3—19

to this publicum jus. Even if the sovereign has alienated them, its alienee takes subject to the same rights in the public as the state held therein. They are navigable waters because they form a part of the bed of an estuary of the sea,—Winyah Bay. There are two questions involved in this inquiry,—first as to the marshes, and next as to the creeks permeating them.

The right of the sovereign over marsh lands is determined by the local law. In an elaborate opinion, the supreme court, in *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, reviews the law of all the states, and concludes the review thus:

"The foregoing summary of the laws of the original states shows that there is no universal rule on the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy; reserving its own control over such lands or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it is considered for the best interests of the public."

In *Lowndes v. Board*, 153 U. S. 1, 14 Sup. Ct. 758, the court says:

"The questions in this case are mainly of a local character, in respect to which the settled rules of decision in the courts of the state are controlling. They relate to the form of action, the title of the plaintiff to submerged lands in Huntington Bay, and the special defense of the defendant."

See, also, *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838.

The uniform rule in South Carolina has been to treat marsh lands as subject to grant, to grant them, and to tax them when granted. 4 St. at Large, 627; 5 St. at Large, p. 39, § 4; 6 St. at Large, 7; *State v. Pacific Guano Co.*, 22 S. C. 50; *State v. Pinckney*, Id. 488; *Frampton v. Wheat*, 27 S. C. 293, 3 S. E. 462; *Oak Point Mines*, 22 S. C. 593; *Chamberlain v. Railroad Co.* (S. C.) 19 S. E. 743. The grant in question covers the marshes, and has been recognized by the colonial assembly of the province of South Carolina. Nor is this in conflict with the general law. In *Hale's Treatise, De Jure Maris*,—"a great authority" (*Shively v. Bowlby*, 152 U. S., at page 11, 14 Sup. Ct. 548), chapter 6, under the head, "Concerning the Ownership in Property Which a Subject may Have in the Seashore and Maritime Increments, &c.," he says: "The seashore and the maritime increases belong, *prima facie*, to the king; yet they may belong to the subject, in point of propriety, not only by charter or grants thereof, there can be but little doubt, but also by prescription or usage." Discussing the shore of the sea, he says that there are three sorts of shores, according to the various tides: (1) The high spring tides at the equinoctial. The lands they overflow do not, *de jure communi*, belong to the crown; "for such spring tides many times overflow ancient meadows and salt marshes, which yet unquestionably belong to the subject, and this is admitted of all hands." (2) The spring tides, happening monthly. "The lands overflowed by these fluxes ordinarily belong to the subject, *prima facie*, unless the king hath a prescription to the contrary." (3) "Ordinary or neap tides, which happen between the full and change of the moon, and this is what is properly *littus maris*. \* \* \* Touching this kind of shore, viz. that which is covered by the ordinary flux of the sea, is the business of our present inquiry: (1) This may be-

long to a subject; (2) it may not only belong to a subject in gross, but it may be parcel of a manor; (3) it may not only be parcel of a manor, but, de facto, it many times is so. See Note to *Mather v. Chapman*, 16 Am. Rep. 60.

The law in New Jersey is like that in South Carolina:

"All navigable waters within the territorial limits of the state, and the soil under such waters, belong, in actual propriety, to the public. The riparian owner, by the common law, has no peculiar rights to this public domain, as incidents of his estate. The privileges he possesses by local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is that there is no legal obstacle to a grant by the legislature to the defendants of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark." *Stevens v. Railroad Co.*, 34 N. J. Law, 532.

In *City of Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 Sup. Ct. 643, the question was as to the validity of a grant of marsh land in fee for exclusive use of the defendant. After a most elaborate and learned argument, the court gave its opinion, concluding:

"Under this grant the land conveyed is held by the parties on the same terms on which all other lands are held by private persons under absolute titles, and every previous right of the state of New Jersey therein, whether proprietary or sovereign, is transferred and extinguished, except such sovereign rights as the state may lawfully exercise over all other private property."

It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers and highways of commerce, and these mud shoals cast up by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade, and pleasure. The latter can be separated from any public use, and can be vested in individuals or corporations, at the will of the sovereign power. They are not aids to, but obstructions to, navigation, and can be utilized for the public good in any way the sovereign may decide. And, when it can be done without detriment to the lands and waters remaining, they can always be disposed of, and vested absolutely in private persons. *Illinois Cent. R. Co. v. Illinois*, 146 U. S., at pages 456, 457, 13 Sup. Ct. 110.

What of the creeks which penetrate these marshes? Although the sovereign can determine for itself, in the matter of marsh lands, and can grant them to private persons in fee, giving them title to the exclusive use of them, it is not competent for the sovereign to grant the exclusive use of public navigable streams, bays, and harbors, or the beds thereof, so as to prevent the use of them by the public for commerce, travel, or even pleasure. The title of the sovereign in public, navigable streams is subject to the public use. It is held by the sovereign as the representative of the public, and in trust for them,—a part of its prerogative rights, and not as private property. *Martin v. Waddell*, 16 Pet. 367. Nor can the sovereign, by any act, divest itself or the property of this public use. Every grantee from it is affected by the use. The only exception, perhaps, is the erection of docks and wharves, and piers of bridges, and the like, on the beds of navigable streams. See *Dutton v.*



Strong, 1 Black, 23. These are aids to commerce, navigation, and passage, and promote the public good. They are lawful, so long as they do not unreasonably impede the navigability of the stream. See *Atlee v. Packet Co.*, 21 Wall. 389. The crucial question in this case, therefore, is: Are these creeks, or any of them,—those which bound and those which permeate these marshes,—public, navigable streams, or capable of becoming navigable streams? If they are, although they may have passed with the marshes which surround them, they are held subject to the use of the public for passage and navigation. *Shively v. Bowlby*, 152 U. S., at page 13, 14 Sup. Ct. 548.

What is the essential characteristic of a public, navigable stream? Not the bare fact that the tide ebbs and flows therein. *Mayor of Lynn v. Turner*, Cowp. 86; *Glover v. Powell*, 10 N. J. Eq. 223; *State v. Pacific Guano Co.*, 22 S. C. 50. Nor does the answer to this question depend upon its depth, nor upon its width. It may have the capacity to float logs only, and yet may be a navigable stream. *Gould, Waters*, §§ 107–110. Nor does it depend upon an uninterrupted course, nor upon a channel free from obstruction, if these can be removed. *The Montello*, 20 Wall. 430. Nor is it necessary that it shall at all times be passable,—floatable. *Nelson v. Leland*, 22 How. 48. That great interior highway extending along and within the Atlantic coast, behind the sea islands, from Virginia to Florida, constantly used for the purposes of commerce, and of inestimable value in time of war, in very many portions of the creeks, bays, sounds, and flats composing it, goes dry at low water, and in very many others has but an insignificant depth. Yet its waters are navigable waters of the United States. On the other hand, neither its depth nor width, nor uninterrupted course, nor freedom from obstruction, nor constant supply of water, nor an unvarying floatable condition, nor all combined, would in themselves make a navigable water. Else a pond or lake within the domain of a citizen, surrounded on all sides by his land, would be a navigable water. It is evident that to make a body of water a public, navigable stream, it must be accessible to the public. The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway (*Ball v. Herbert*, *infra*),—a means open to the public of passing from one place, where they have a right to be, to another, in which they have the same right. *The Montello*, 11 Wall. 411, 20 Wall. 439. If the stream, in itself, or in connection with others, forms a continuous connection, in whole or in part, between different places in different states, it is a navigable water of the United States. But if it lies wholly within a state, and “is only navigable between different places within a state, then it is not a navigable water of the United States, but only a navigable water of a state.” *The Montello*, 11 Wall. 411. This distinction simply determines the jurisdiction over it. The essential to navigability is the same in both,—a highway between places. In this connection it may be observed that the claim of the defendant that these small creeks are navigable streams rests upon the fact that they are a part of the waters of Winyah Bay, a navigable water of

the United States, and that they open on creeks leading from that bay to the ocean. They also, if navigable streams, must be navigable waters of the United States. In *Ball v. Herbert*, 3 Term R. 253: "When once a river becomes navigable, or, in other words, when it is made a public highway." A public highway must have a public terminus at each end. In *Young v. Cuthbertson*, 1 Macq. H. L. Cas. 455, it is said: "Although a public way may pass through private property, it must have at each end a public terminus." That navigable streams are public highways is proved by abundant authority. In South Carolina they are put on precisely the same footing. Rev. St. 1893, § 1159. In *State v. Duncan*, 1 McCord, 404, the defendant was indicted for obstructing the mouth of a bold creek making out of Ashley river, within the limits of the city of Charleston. It was not disputed that Ashley river was a public highway, but it was not shown that the creek led up to or had a public terminus. This last was held essential to convict the defendant of obstructing a highway. In *State v. Pacific Guano Co.*, 22 S. C. 50, the question at issue was the navigability of certain streams,—among them, Chisolm's creek and Big creek, two large creeks making up from Coosaw river into the Chisolm marshes. The judge below had found, as a matter of fact, that each of these creeks had one terminus on Coosaw river, a broad estuary of the ocean, but that there was no public terminus in either creek. "They are entirely in the private estate of the owners of the island, and made no connections with thoroughfares of travel or trade, and are none themselves. Flowing out of Coosaw river, with the tide, into Chisolm's Island, they lose themselves in the marshes with which they are surrounded." As a conclusion of law from this fact, he held that they were not navigable streams, and the public had no right in them. Page 57. This conclusion was distinctly affirmed by the supreme court. Page 77. In *Attorney General v. Woods*, 108 Mass. 439, the supreme court made the test of navigability neither the size of the streams, nor the character of the vessels on them, nor the motive of the public in using them, but the fact that they were highways through which the public could pass for business or pleasure. And in *Glover v. Powell*, 10 N. J. Eq. 221, it is evident the court entertain the same view. This also seems the ratio decidendi in *Mayor of Lynn v. Turner*, Cowp. 86. Lord Mansfield asks the question, "How does it appear that this is a navigable river?" He answers that the flux and reflux of the tide does not make it so, and then adds, what would seem to him conclusive, "The place in question may be a creek in their own private estate"; that is, being so, it cannot be used by the public as a highway, any more than a road running from a public road into the middle of a man's plantation can be. This same idea of the exclusive rights of a proprietor in a creek or other waters in his own private estate is illustrated in the act of assembly approved 24th December, 1892,—an act amending the act entitled "To prohibit non-residents from hunting, ducking, fishing and gathering oysters and terrapins within the limits of the counties of Georgetown, Charleston, Beaufort, Colleton and Berkeley." The act adds

Horry, and thus embraces every seacoast county in the state,—the only counties having salt marshes and salt-water creeks in which the tide ebbs and flows. The words “fishing, gathering oysters and terrapins” show that it speaks of water courses like these in question,—the home of fish, oysters, and terrapins. This act expressly provides:

“But nothing herein contained shall be construed as prohibiting any land holder from authorizing any person to hunt or shoot ducks or other game or to fish or gather oysters, other shell fish and terrapins within the boundaries of his own land.” 21 St. at Large, 180.

All the cases concur in treating as the test of a navigable stream, that it is or can be used as a highway of commerce, over which trade or travel are or may be conducted in the customary modes of trade or travel on water. *The Daniel Ball*, 10 Wall. 557; *Hickock v. Hine*, 23 Ohio St. 523; *Brown v. Chadbourne*, 31 Me. 9. In order to be of use for the purposes of commerce, trade, or travel, the stream must be a means of intercourse and communication with points between which commerce, trade, or travel is conducted, and conducted by the public. The public may use any highway for any purpose of trade, travel, or pleasure. But it must be a highway. A broad road leading from a public highway through a man's land to his house or barn or fields, however capable it may be of sustaining travel by vehicles of any description, is not a highway. So a waterway into a man's land, surrounded on all its sides by his land, whatever its capacity, cannot be said to be a highway, and so open to the public for its use of trade, travel, or commerce.

There is a case in South Carolina which seems to conflict with these views. *Heyward v. Mining Co.* (S. C.; July 27, 1894) 19 S. E. 963. In that case the supreme court of South Carolina go beyond any case theretofore decided by them, and hold that a creek having an outlet on a navigable stream, and losing itself in the private lands of a citizen, which surrounded it on all sides, without another terminus, is a navigable stream to this extent, at least: that the state owns the phosphate rock in its bed. The decision of this learned tribunal are entitled to, and do receive at the hands of this court, the most profound respect. But this cannot relieve it of the discharge of its own duties. In all decisions pertaining to the construction of the statute laws of the state, of local customs, and rules of property, they will be followed without question. But in questions of general law, and in the application of common-law rules, alone, this court is not bound by state decisions. *Chicago City v. Robbins*, 2 Black, 418; *Yates v. Milwaukee*, 10 Wall. 506. And so, also, if there be a course of decisions upon questions which give rise to a rule of property, this court would follow them. *Gormley v. Clark*, 134 U. S. 348, 10 Sup. Ct. 554. But the question what is or what is not a public, navigable stream is one not of local or statute law, but of general law. Nor is there a course of decisions of the South Carolina courts which have made the result reached in *Heyward v. Mining Co.* a rule of property. That last decision is in clear conflict with other and older decisions of the same learned tribunal, and completely changes the law which was in existence

when the lease in this case was made, and the rights of the lessees had accrued and vested. In all such cases this court decides for itself. Justice Bradley, in the leading case of *Burgess v. Seligman*, 107 U. S., at page 33, 2 Sup. Ct. 10, lays down the rule which governs the federal court:

"The federal courts have an independent jurisdiction, in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

Assuming, then, that to be a navigable stream, open to the public, the creek must be a highway, with a terminus ad quem as well as a terminus a quo, the inquiry is, are the streams in question navigable in this sense? Jones creek and Town creek unquestionably are. They lead in a continuous channel from the ocean, via North Inlet, into Winyah Bay. With regard to Oyster Bay, its name denotes that it is a broad sheet of water in the marsh, of varying depth. The coast-survey chart shows that it rounds itself off towards Jones creek, and is separated from it by Noble slough,—a name indicative of its nature. No doubt, at high water, one being in this bay can push himself over into Jones creek, and, at an unusual state of the tide, a boat can cross between them. But the evidence shows that but one vessel was ever seen to go in them, coming through from North Inlet, and then it was by mistake. It cannot be said, from this evidence, that Oyster Bay is useful for navigation. The same is the case with all the other creeks, except Bread and Butter creek. From the heads of all of them, a duck-

ing boat or an ordinary flat can be pushed over the marsh at certain stages of the tide. But they are not in the ordinary course of travel as highways, and, if anything, were in the nature of cut-offs. There is a strong analogy between this marsh land and a large body of highland bounded by public highways. So long as the land is uninclosed, or the public not forbidden, by signs, to use it, those passing and repassing on the highways can cut across from one to another. This is familiar to any one who lives in this state, and has been outside of incorporated towns. But no one has ever supposed that this sort of use establishes a right in the public to the body of land, as public highway, or that it by this becomes dedicated to the public. With regard to Bread and Butter creek: That leaves Town creek, forms an irregular arc, and returns to it some distance from its first entrance. It has two termini, each on a navigable stream. This meets the requisition, and constitutes it a navigable stream.

As a conclusion from all that has been said, Town creek and Jones creek, with Bread and Butter creek, are navigable streams. In them the public can enter and pass through at will, without let or hindrance. With regard to the other creeks, lying, as they do, wholly within the land of the complainants, with no regular outlet after entering therein, except over their land, they are not navigable streams, and the public have no right to be in them, except with their permission.

Stress has been laid on the fact that, for many years, persons have gone into these creeks, and have shot ducks in them, without hindrance. To create a right, there must be adverse use,—an assumption of the right against some denial of it. *Trustees v. Meetze*, 4 Rich. Law, 50. Speaking technically, no right can grow out of an act, unless the act itself would be a cause of action. Now, these lands have never been inclosed, and until a very recent period they have not been staked, and entry into—trespasses upon—they have not been forbidden. Hunting on uninclosed lands is not such an act as will support a trespass. *Broughton v. Singleton*, 2 Nott & McC. 338. And therefore a continuance of it will not ripen into a right. See, also, *Jackson v. Lewis*, Cheves, 259. Let the injunction be made perpetual as to all the streams but the three mentioned.

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VAN DYKE v. ATLANTIC AVE. R. CO.

(Circuit Court, E. D. New York. April 1, 1895.)

NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, while in the employ of defendant in repairing overhead trolley wires, on a tower wagon, was injured by one of defendant's cars running into such wagon. It appeared that the car had no sand box, and could not be stopped by the brake. The plaintiff gave evidence to show that sand boxes were necessary for safety, and the defendant evidence that many cars were used without them, and that its tracks were sanded instead, but not that they were sanded at the place where the accident happened. *Held*, that it was a question for the jury to determine whether sand boxes were reasonably required, and whether the defendant was negligent in failing to provide proper means for stopping the car.

This was an action by Seymour Van Dyke against the Atlantic Avenue Railroad Company for personal injuries. The jury gave a verdict for the plaintiff. Defendant moved to set the verdict aside.

Raphael J. Moses and Mirabeau L. Towns, for plaintiff.

William S. Cogswell, for defendant.

WHEELER, District Judge. The plaintiff, while in the employ of defendant, repairing overhead trolley wires on a tower wagon, was seriously injured by the running of one of its cars (which had no sand box, and the brake would not stop) against the wagon, and throwing him off. The plaintiff showed, by those familiar, that sand boxes were necessary for safety on cars so run in such places, although not always used. The defendant showed, in the same way, that many cars are used without them, and that its tracks were sanded in dangerous places instead, but not that they were sanded at this place. The defendant claimed direction of a verdict because not bound to provide the best, but only usual, appliances; and, for want of evidence that the tracks were not sanded at this place. The jury were charged, in substance, that the very best appliances were not required, but only such as would be reasonable and prudent in view of what could be provided and of all the circumstances; and that if the lack of a sand box was in that view a defect, and it caused the injury by preventing the stopping of the car sooner, the plaintiff would be entitled to a verdict. The defendant excepted "to that part of the charge where it says the car ought to have had a sand box, or that the track ought to have been sanded," and "to what was said about the track not being sanded." But the charge did not say that the car ought to have had a sand box, or the track ought to have been sanded, nor anything about the track not being sanded. After verdict for the plaintiff, the defendant moved to set it aside, as against law and evidence, and as excessive. This motion has now been heard, but the latter ground has not been pressed. The evidence seems to have been sufficient to well warrant the conclusion that there was something wrong about the appliances for stopping the car, which prevented stopping it soon enough to avoid injury to the plaintiff, and also sufficiently, although not so clearly and satisfactorily, that the want of sand boxes was the defect. That the defendant was bound to have reasonably safe appliances upon the cars for stopping them is not open to question. *Railroad Co. v. Mackey* (Sup. Ct. U. S., March 4, 1895) 15 Sup. Ct. 491. Whether sand boxes were reasonably requisite for safety was a question of fact upon the evidence, which was, and had to be, submitted to the jury. If they were, the want of them was such a structural defect that the defendant would be presumed to have notice of it without further proof.

The issues in the case were essentially ones of fact for the jury, whose finding should not be lightly disturbed. Motion overruled.

HARRISON v. HARTFORD FIRE INS. CO.  
(Circuit Court, S. D. Iowa, E. D. December 4, 1894.)

No. 271.

1. **INSURANCE—ACTION ON POLICY—CONTRACTUAL LIMITATION.**

McClain's Code Iowa, § 3742, providing that where plaintiff falls in an action for a reason other than negligence a new action commenced within six months shall be deemed a continuation of the first for the purposes contemplated by the act, has no application to an action on an insurance policy which by its terms provides that no action shall be maintained thereon unless brought within twelve months of the date of loss, and an action brought after that time is barred, though filed within six months after termination of a former action, in which plaintiff failed, because such action had been prematurely brought.

2. **FEDERAL COURTS—FOLLOWING STATE DECISIONS.**

As McClain's Code Iowa, § 3742, providing that, where plaintiff falls in an action for a reason other than negligence, a new action, commenced within six months, shall be deemed a continuation of the first for the purpose of excepting it from the operation of the statute of limitations, has no application to an action on an insurance policy which by its terms provides that no action shall be maintained thereon after the expiration of twelve months from date of loss, the federal courts, in an action on such policy, are not bound by the construction given such statute in the state courts.

Action by George D. Harrison against the Hartford Fire Insurance Company on a policy. Defendant demurred.

The petition filed herein May 29, 1894, alleges the following facts, material to the question presented by the demurrer: Plaintiff, on June 18, 1890, insured his dwelling house, situated in Louisa county, Iowa, and certain personal property therein, and also his carriage house and barn, in the defendant insurance company, for a term of five years. On October 4, 1892, the buildings insured, together with a large part of the personal property, were destroyed by fire. On January 16, 1893, plaintiff commenced in the district court of Louisa county, Iowa, an action against defendant to recover the loss and damages suffered by him from said fire. Defendant appeared in said action, and removed the same to this court. As one of its defenses, defendant therein alleged that said action had been prematurely commenced,—that is, brought before the expiration of the 90 days from waiver of proofs of loss; and, on trial of said action, the court directed the jury to return a verdict for the defendant, for the said reason that the action had been prematurely brought, and the court did not have jurisdiction to hear and try the same; and on January 20, 1894, the jury rendered such verdict, and judgment was entered against plaintiff accordingly, but without any trial or adjudication of the action on its merits. Plaintiff now brings this suit as a continuation of his said suit, brought, as aforesaid, on January 16, 1893, to recover for his loss by said fire. The policy sued on is attached to said petition as an exhibit. One clause therein reads as follows: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity \* \* \* unless commenced within twelve months next after the fire." Defendant has filed a demurrer to petition, alleging that no right of action exists, nor can this suit be now maintained, because the same was not "commenced within twelve months next after the fire."

D. N. Sprague and A. H. Stutsman, for plaintiff.  
McVey & Cheshire, for defendant.

WOOLSON, District Judge. Can the present action be maintained, under the clause in the policy generally known as the limita-

tion clause or condition? This is the only question to be decided on this hearing. The clause is valid and upheld by the courts. *O'Laughlin v. Insurance Co.*, 3 McCrary, 543, 11 Fed. 280; *Insurance Co. v. Stanchfield*, 1 Dill. 424, Fed. Cas. No. 6,660; *Riddlesbarger v. Insurance Co.*, 7 Wall. 386. The fire occurred October 4, 1892. The petition herein was filed on May 29, 1894. If this clause be literally and strictly applied to these dates, manifestly this action is barred, and cannot be maintained. On the argument, as in the petition, this is substantially confessed by counsel for plaintiff; and there, as here, the attempt is made to avoid the force of this conclusion by reference to a former action instituted on the policy in suit. Such former action was pending in this court. Upon January 20, 1894, in an action brought on this policy, and wherein the present plaintiff sought to recover thereon from the defendant company for the loss herein complained of, this court directed a verdict for the defendant. 59 Fed. 732. The court found, from the uncontradicted evidence submitted therein, that plaintiff, contrary to the terms of the Iowa statute (section 1734, McClain's Iowa Code), had begun his action within 90 days after proofs of loss had been waived by defendant. No proofs of loss had been furnished. The action thus determined by direction of the court, solely because of its having been prematurely brought, was begun January 16, 1893.

Section 3742, McClain's Iowa Code, is as follows:

"If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first."

Plaintiff's contention is that this section entitles the maintenance of the present action, notwithstanding the contract limitation clause. The reasoning is that the said former suit failed, but not for negligence in its prosecution; that the present is a new suit, brought within six months after the failure of the former action; and that this suit is therefore a continuation of the first action; consequently, it is, in contemplation of law, begun within the 12-months period named in the policy. To what extent, if at all, does this section apply to the pending action?

The supreme court of the United States had occasion to consider a statute of the state of Missouri which tended in the same general direction, viz. granting the exceptional right, notwithstanding the general statutes of limitation of that state, to maintain an action which but for this exception would have been barred. This Missouri statute allowed a party who "suffers a nonsuit" in an action to bring a new action for the same cause, within one year afterwards. In *Riddlesbarger v. Insurance Co.*, 7 Wall. 396, the policy contained a clause which required suit to be brought, if at all, within 12 months from loss. The supreme court, in considering the question of the applicability of this statute, last stated, to the contract clause in the policy therein in suit, declare:

"The rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also."



The subsequent language of the opinion just quoted is, perhaps, yet stronger. Having called attention to the fact that the Missouri statute was applicable only to cases of involuntary nonsuit, the court declare, as to the limitation clause in the contract or policy:

"The action mentioned, which must be commenced within twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any source cannot alter the case. The contract declares that an action shall not be sustained unless such action—not some previous action—shall be commenced within the period designated."

In *O'Laughlin v. Insurance Co.*, 3 *McCrary*, 543, 11 Fed. 280, Circuit Judge *McCrary*, in an action involving the same statute, applies and follows the *Riddlesbarger Case*, the policy involved containing a like contract-limitation clause. When the circuit judge of this circuit thus closely follows and applies the ruling of the supreme court, there would seem little opportunity for our dissent. Yet, using the language of Judge *McCrary* in the case just cited, "I have not much sympathy with this sort of a defense in a suit of this kind;" and especially under the circumstances disclosed herein by the allegations of the petition. The former action was decided adversely to plaintiff because brought too soon; and we are now asked to decide this action against plaintiff, because, as claimed, it is brought too late. There appears no evidence of laches on part of plaintiff in bringing this suit. But, as said by the learned circuit judge in the *O'Laughlin Case*, *supra*, the *Riddlesbarger Case* furnishes "the law which must be administered here," unless its force can be broken by showing that it is not here applicable. If the language of the Missouri and Iowa statutes on this point were identical, the case would be here closed.

But plaintiff calls special attention to the fact that the Iowa statute is peculiarly dissimilar in phraseology, in that it declares that the "new suit," if brought within six months from the failure of the former action, is to be "deemed a continuation of the first"; and the contention, therefore, is that the argument in the *Riddlesbarger* and *O'Laughlin Cases* does not apply, because in the case at bar, the "action commenced," to wit, "the one which is to be prosecuted to judgment," was commenced within the 12 months of the limitation clause; therefore, per force of the statute, it is the continuation of the suit actually commenced within such 12 months; and thus the contract clause is met. But it may well be asked, if the new suit is thus to be regarded as having been commenced at the time of the original suit, do we not face the same difficulty which presented itself in the old suit? 59 Fed. 732. Does not this argument and application bring us, of necessity, to fix the commencement of this action as within the 90 days after waiver of proofs of loss, and therefore as violating the statute which prohibits the action from being commenced within such 90 days? If, for purpose of fixing the commencement within the 12-months contract limitation clause, the new suit is a continuation of the old suit, and was thus commenced within the pendency of that suit, how can we escape the conclusion that its commencement must be the commencement of the old suit? And must not the doctrine which,—applied to the old suit compelled judgment

against plaintiff—be applied here, with no less disastrous effect on plaintiff's present action?

Looking at the Iowa section (section 3742, McClain's Code), with a view to determine from its own terms its proper application, we are impressed with its phraseology, and the intent apparent therefrom, as to such application. The section is found in that chapter of the Code which is entitled and which treats of "Limitations of Actions." The general provisions of the statute of limitations is in the opening section of the chapter. Following this appear the sections which are exceptions to this general statute, and among these exceptions appears section 3742. Now, the very phraseology of the section apparently limits the continuation, which it establishes as a proposition of statutory law, to "the purposes herein contemplated." What purposes are herein contemplated? Manifestly, the intent of the legislature in enacting the section was to ingraft on the general statute of limitations an exception whose terms should save from the destruction provided by the general statute a cause of action which failed from other reasons than negligence in its prosecution. Do not the words "the purposes herein contemplated" restrict the "continuation of the first" action to that of such continuation, as regards the general statute of limitations, so that, if the first action was timely, this continuation shall also be timely? And is not this application of the section the only one reasonable under the circumstances? If this be the correct construction, we are ready to determine what application the section has to the case at bar,—to the policy in suit; and adopting the language of the supreme court, as voiced by Justice Field in the Riddlesbarger Case, *supra*, and as also adopted by Circuit Judge McCrary in the O'Laughlin Case, *supra*:

"The rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also."

Our attention is called to the case of *Jacobs v. Insurance Co.*, 53 N. W. 101, decided by the supreme court of Iowa. Jacobs brought suit at law to recover loss from fire. On the trial it was discovered that the policy misdescribed the premises, and recovery on the policy as it then stood could not be had. Immediately, and by leave of court, he filed a substitute petition, in equity, asking reformation of the policy. Decree of reformation was duly entered. Thereupon he began a new suit, also in equity, against the company, but on the policy as reformed by the decree. The new suit was not begun "within one year from the date of loss," as required by the limitation contract in the policy. This is set up as a defense. With reference to such defense the court say:

"There was an action commenced on the policy within the year. In consequence of a mistake in the policy, discovered during the pendency of that suit, the character of the action was changed, and a reformation of the contract was sought and obtained. [Here the court quote section 3742 McClain's Iowa Code.] The discovery of the mistake and the change in the character of the action caused a failure to obtain judgment in the suit on the policy. We think the provision of the policy and the section of the statute must be construed together. Thus construed, there is little doubt that,

unless there was negligence in the prosecution of the first suit, this one is not barred."

Later on in the opinion appears the following:

"The law, however, does contemplate that in cases where suit is brought the plaintiff may fall therein without negligence, and then another suit shall be deemed a continuation of the first; and this, we think, is such a case."

I have thus quoted at length, and all of the opinion which attempts to deal in any wise with the point above considered as to the applicability of section 3742, McClain's Iowa Code, to policies such as in case at bar. It may be here remarked that the result obtained was unquestionably correct, viz. the sustaining of the right of Jacobs to maintain his action for recovery on the reformed policy. That would be a singular court of equity, indeed, which would so uphold, construe, and enforce the limitation clause in the policy as to forbid the insured to bring and maintain suit on the reformed policy, when no laches are shown, and the mistake in the policy as to description of premises was mutual, and not discovered by either party until during the trial in the first action. Perhaps the fact that the result reached was so eminently just and beyond question equitable may account for the apparently brief and limited consideration given to this point in the decision. There seems to have been no spirited contest by counsel, as there was no extended discussion in the opinion filed, and the point is not shown to have received any specially close examination by the court. The Riddlebarger and O'Laughlin Cases apparently were not brought by counsel to the attention of the court, nor the reasoning therein considered by the court. It would seem probable that if the question shall hereafter be fully presented, and the court brought to re-examine the point anew, such court will adopt the view of the federal courts as above presented in the extracts quoted, and hold that the contract clause is to be substituted, not only for the general statute of limitations, but as well for the exceptions thereto.

If we accept the Jacobs Case, as stated in the opinion cited, as giving the construction of section 3742 which is to obtain in the supreme court of Iowa with reference to actions on policies containing limitation clauses as in policy in suit, there is manifest a decided difference in the holdings on this point between the federal and state courts. Which construction is binding on this court? There can be no contention but that in causes founded on state statutes this court is bound to accept and enforce the construction put thereon by the supreme court of the state. This is a general proposition; while in matters of general law, in the construction and application of general principles, of matters not dependent on nor to be governed by state statute, the courts of the United States are not bound by the decisions of the state courts; and this though the federal courts strive to make their decision in harmony with the decisions of the courts of the state wherein they sit. As was well said in *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, when considering the question of construction of commercial law and like matters:

"Even in such cases, for the sake of harmony, and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."

The decision in the Jacobs Case, *supra*, was made subsequently to these cases decided by the supreme court and circuit court of the United States to which we have at length above referred. If the decision to be herein reached is to be based on the state statute, this court must follow this (later) decision of the state court. Such is the generally established doctrine of the federal courts. But, if the federal decisions above cited are of binding authority on this court, then the point now under consideration is easily settled. These cases are decided on the construction therein given to the limitation clause of the policy. They are based on general principles. And it is therein expressly declared:

"The rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also."

And hence it becomes immaterial in this action what construction is to obtain as to the state statute in question. This action is relieved from the operation of that statute. The rights of the parties, flowing, as they do, "from the contract," must be determined without reference to the statute.

According to the statements contained in the petition herein, this action was not "commenced within twelve months next after the fire," as required by the limitation clause of the policy. It is not therefore sustainable, under the contract the parties themselves have made with reference thereto; and, as a necessary result, the demurrer to petition must be sustained. Let an order be entered accordingly, with exceptions thereto saved to plaintiff; and plaintiff is given until January 1, 1895, to amend if he be so advised, or to stand on his petition if he so elect.

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OBLENIS et al. v. CREETH.

(Circuit Court, S. D. New York. April 23, 1895.)

**DEEDS—DESCRIPTION—BOUNDARY ON TIDE WATER.**

A grant, made in 1666, of a portion of Manhattan Island, after defining a north and south line, running from the Hudson to the East river, and forming the westerly boundary of the lands granted, proceeded to convey to the grantees all lands "lyeing and being within the said lyne, to draw north and south as aforesaid, eastward to the end of the towne and Harlem Ryver, or any part of the said ryver on which this island doth abutt, and likewise on ye North and East Ryvers within the lymitts aforementioned." *Held*, that the eastern boundary of the grant was the Harlem river, and, that river being tide water, the grant carried only the land to high-water mark.

This was an action of ejectment by Henry P. Oblenis and others against Thomas J. Creeth, submitted to the court without a jury, upon an agreed statement of facts.

Woodville Flemming, Phillips & McKinny, and John B. Jones for plaintiffs.

H. W. Ingersoll and Robert G. Ingersoll, for defendant.

LACOMBE, Circuit Judge (orally). This is an action of ejectment, the property being located at about 124th street and Pleasant avenue. It is conceded by the stipulation that the property, in 1666, was below high-water mark on Harlem river, and that the plaintiffs are the successors in title to the original grant upon which the plaintiffs rely, viz. a certain patent granted by Richard Nicolls, governor of the province, under date of October 11, 1666. The patent bears date of execution at Fort James, in New York, on Manhattan Island, a circumstance which enables us to determine what is meant by the words "hence" or "hither," wherever occurring. It recites that there is a certain town or village upon this island (Manhattan) commonly called and known by the name of New Harlem; that there are certain inhabitants there, who have built, etc.; that it is the intention to confirm them in the possession and enjoyment of their premises, and to encourage them in further improvement of the lands; and the grant is as follows:

"I have given, ratified, confirmed, and granted, and by these presents due give, ratifye, confirm and grant unto Thomas Delavall, Esq., John Vervelen, Daniel Turner, Joost Oblene, and Resolved Waldron, as pattentees, for and in behalf of themselves and their associates, the freeholders and inhabitants of the said towne, their heires, successors and assigns, All that tract together with the several parcellls of land, which already have or hereafter shall be purchased or procured for and on ye behalfe of the said towne within the bounds and lymitts hereafter set forth and exprest, (vizd.) That is to say, from the west syde of the fence of the said towne, a lyne being runne due west fower hundred English poles, without variation of the compasse, and at the end thereof another lyne being drawne acrossse the island north and south, with the variation, that is to say, north from the end of a certaine piece of meadow ground, commonly called the Round Meadow, near or adjoining unto Hudson's or North Ryver, and south to ye place where formerly stood the saw mills, over against Vercheus or Hogg Island, in the Sound or East Ryver, shall be the western bounds of their lands, and all the lands lying and being within the said lyne, to draw north and south as aforesaid, eastward to the end of the towne and Harlem Ryver, or any parte of the said ryver on which this island doth abutt, and likewise on ye North and East Ryvers within the lymitts aforementioned, described, doth and shall belonge to the said towne; as also fower lotts of meadow ground upon the Maine, mark't with No. 1, 2, 3, 4, lying over against ye springe, where a passage hath been used to ford over from this island to the maine and from thence hither, with a small island, commonly called Stoney Island, lying to the east of ye towne and Harlem Ryver, goeing through Bronckx Kill by ye little and great Barne's Islands, upon which there are also fower other lotts of meadow ground, mark't with No. 1, 2, 3, 4, together with all ye soyles, creeks, quarryes, woods, meadows, pastures, marshes, waters, lakes, fishing, hawking, hunting and fowling, and all other profits, commodities, emoluments, and hereditaments to ye said lands and premises within ye said bounds and lymitts set forth, belonging or in any wise apperteyning, and also freedom of commonage for range and feed of cattle and horses, further west into ye woods upon this island, as well without as within their bounds and lymitts."

The rules for the construction of grants of this kind are simple, and there is no dispute, as I understand it, between counsel upon that branch of the case. A grant of lands running to tide water, or bounded by tide water, or extending unto tide water, or within the limits of tide water, conveys only to high-water mark. Where, however, there is a tract of land conveyed by metes and bounds, and within the tract thus exactly defined there is a portion of tide

water, then the grant carries the land under the water, subject to the right of navigation over it, and the continuance of the waters conditions there prevailing. The first of these propositions finds sufficient authority in the case of *Mayor, etc., v. Hart*, 95 N. Y. 443, in which, construing this very grant, it was held that the terms "to the river" carried only to high-water mark. Support for the other proposition, viz. that a conveyance by metes and bounds carries all the land in it, whether there is tide water over the land or not, is found in *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, and *Lowndes v. Board*, 153 U. S. 1, 14 Sup. Ct. 758. The difficulty, however, with this grant is that there is no eastern boundary laid out, other than the river itself; nor is there any effort to lay out or to designate any eastern boundary to the east of the Harlem river. The language of the description is as follows: Beginning at a fence in the town, then running a line 400 poles west to another line drawn across the island north and south, with the variations; that is to say, north from the end of a certain piece of meadow adjoining the North or Hudson's river, south to the place where the sawmills formerly stood over against Hogg Island (now Blackwell's Island), in the East river. This locates a line on the upland drawn from high water to high water from the Hudson to the Harlem or East river, and such line is declared to be the western bound of the lands conveyed. The patent then goes on to convey—

"And all the lands lyeing and being within the said lyne, eastward to the end of the towne and Harlem Ryver, or any part of the said ryver on which this island doth abutt, and likewise on ye North and East Ryvers."

Now, that is a conveyance of the entire upper or northern end of Manhattan Island, from this line between New York and Harlem, which is the western boundary, to high-water mark all around. It is a grant complete and compact in itself, comprehensive, including all the upland to high-water mark. Having thus conveyed the northern end of Manhattan Island, the grant deals with some outlying pieces of property, the first of which is thus described:

"As also fower lotts of meadow ground upon the Maine, mark't with No. 1, 2, 3, 4, lying over against ye springe [which both sides concede to be Spuyten Duyvil] where a passage hath been used to ford over from this island to the maine and from thence hither."

Now, the words "from thence hither" do not apply to any eastern boundary. They are descriptive of the ford. It is the ford from the island to the main and from the main back to the island,— "where a passage hath been used to ford over from this island to the maine and from thence hither." That is the first parcel,—the four meadow lots up by Spuyten Duyvil, or the spring where this ford is. Those meadow lots are on the east side of Harlem river. The second of the outlying parcels is "a small island, commonly called Stoney Island." And the location of that island is thus described: "Lyeing to the east of ye towne and Harlem Ryver, goeing through Bronckx Kill by ye little and great Barne's Islands." Inspection of the map shows perfectly well what the draftsman had in mind. He is describing the island as lying not only east of the Harlem river proper, but as east of that part of the Harlem river which

goes through Bronckx Kill, being known by that name, by little and great Barne's Islands. That phraseology, "going through Bronckx Kill by ye little and great Barne's Islands," does not refer to any eastern boundary running down to any place, but is used as a method of designating that Stony Island lies east not only of the Harlem river proper, but also of that branch of the Harlem river which is known as "Bronckx Kill." And that interpretation is fortified by the next clause, "upon which [i. e. upon Stony Island] there are also fower other lotts of meadow ground, mark't with No. 1, 2, 3, 4;" for we find by the record that some 15 years or so later there was a dispute between Daniel Tourneur and Lewis Morris about this very Stony Island, in which it appears that the defendant was lawfully possessed of a certain lot of meadow marked "No. 3,"—one of these four lots described as lying on Stony Island.

It seems perfectly plain, then, that this deed conveys, in the first place, the upper end of Manhattan Island from this north and south line known as the "western boundary" out to the water all around, which (the water being tide water) takes to high-water mark; and it then conveys two outlying plots, one a plot of four meadow lots, over by the spring at Spuyten Duyvil, and the other Stony Island, which is described as lying to the east of the Harlem River and of the branch of the Harlem River which is known as the "Bronckx Kill," and which runs by little and great Barne's Islands. To the adoption of this construction in the case at bar, it might be objected that it is contrary to the language of the stipulation as to the facts, for both sides seem to have agreed in the seventh clause that there was an eastern boundary of the whole tract laid out beyond Harlem river under this Nicolls patent, and that such eastern boundary did run from a point on the east bank by Spuyten Duyvil to Stony Island, and thence east of the two Barne's Islands back to Manhattan Island. But the stipulation, although in form an agreement as to facts, is not so in this particular. The deed being in evidence, its interpretation is a matter of law for the court; and a stipulation of the parties that the deed means thus and so cannot control the court's interpretation. Therefore, despite that concession by the defendant that this Nicolls patent did undertake to lay out some sort of an eastern boundary east of the Harlem river, the case must be disposed of under the interpretation which the court gives to the grant.

Verdict directed in favor of the defendant. Plaintiffs except to the ruling, and ask for a stay of 60 days, which is granted.

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Ex parte KYLE.

(District Court, W. D. Arkansas. April 12, 1895.)

1. INDIAN TERRITORY—CRIMINAL JURISDICTION OF INDIANS — EFFECT OF NATURALIZATION.

If a Cherokee court has acquired jurisdiction of a case where a citizen of that country is charged with larceny, the fact that such citizen is naturalized under the following act of congress: "That any member of

any Indian Tribe or Nation, residing in the Indian Territory, may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof, and shall hear and determine such application as provided in the statutes of the United States. \* \* \* Provided, that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy, or are entitled to, as members of the Tribe or Nation to which they belong" (Act Cong. May 2, 1890),—does not, after jurisdiction has once attached, divest the court of jurisdiction.

2. CRIMINAL LAW—CONTINUING JURISDICTION.

When jurisdiction of a court has once vested, it is not divested by a change of circumstances. The jurisdiction depending on the condition of a party is governed by that condition as it was at the commencement of the prosecution by finding the indictment.

3. CONSTRUCTION OF STATUTES.

Statutes should be construed in the interest of the enforcement of laws, and, if possible, so as to protect the rights of every one subject to them, as well as the rights of communities which may be seriously affected by a wrong construction of the law.

(Syllabus by the Court.)

Petition by Elijah Kyle for a writ of habeas corpus. Dismissed.

The facts in this case, as set up in the petition for the writ of habeas corpus, show that the petitioner stands charged before the district court of Sequoyah district, Cherokee Nation, with the crime of larceny; and, according to the allegations in the indictment against him, the crime was committed about the 1st of February, 1893. On the 7th of November, 1894, he was arrested, and subsequently indicted for said crime. On July 2, 1894, he was tried by the said court for the alleged offense. The jury disagreed. On January 7, 1895, he was again tried for the offense. The jury again disagreed. The case was then continued to February 11, 1895. While the case was pending on said continuance the petitioner filed his petition in the United States court for the Indian Territory, asking that under the act of congress of May 2, 1890, he be naturalized, so that he might become a citizen of the United States; the facts as to his status being that he was formerly a white man, a citizen of the United States, but that he became an adopted citizen of the Cherokee Nation by marriage. On the 1st of February, 1895, he was naturalized by the said court, and made a citizen of the United States, in pursuance of the above-named act of congress, which provides, by section 43: "That any member of any Indian Tribe or Nation, residing in the Indian Territory, may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof, and shall hear and determine such application as provided in the statutes of the United States. \* \* \* Provided, that the Indians who become citizens of the United States under the provisions of this act do not forfeit or lose any rights or privileges they enjoy, or are entitled to, as members of the Tribe or Nation to which they belong."

Grace & Forrester, for petitioner.

Cravens & Cravens, for the Cherokee Nation.

PARKER, District Judge (after stating the facts). The first question that presents itself is as to what is the true construction of this act. It seems, by its language, to undertake to make a man a citizen of the United States, and at the same time to leave him an Indian citizen. This, however, in my judgment, would not be a reasonable construction of the statute. It is a canon of construction that we must always, if possible, construe a statute in harmony with reason. Taking that view of it, the effect of the statute, to me, seems to be to give the naturalized citizen of the



United States, who before naturalization was an Indian citizen, the rights of a political and jurisdictional citizen of the United States. That is to say, if he has lived in a place where he would have a right to vote and hold office, and to exercise all other political rights, his condition by naturalization is such that he is entitled to these rights, that he also, by such naturalization, has conferred upon him jurisdictional citizenship; that is to say, he can go into the courts of the United States, and invoke the aid of their laws for his protection, and he may be subjected in such courts to such laws. But by the reasonable construction of the terms of the proviso he still retains any property rights that he may have had because of his former relation to the Indian Tribe or Nation to which he belonged. It seems to me that this is the only reasonable construction that can be given to the statute.

The remaining question in this case is, what effect does this statute have toward divesting the jurisdiction of the Indian court in this case, when that jurisdiction had already attached; for before suing out this writ he had been arrested, and twice tried. Can his act by which he obtained naturalization on the 1st of February, 1895, subsequent to his indictment and trial, divest the Indian court of jurisdiction? We are to construe statutes in the interest of the enforcement of the law, and, if possible, are to so construe them as to protect the rights of every one subject to them, as well as the rights of communities which may be seriously affected by a wrong construction of the law. If it be true that by naturalization a citizen of the Indian country can divest the jurisdiction of courts of crimes with which he may be charged after that jurisdiction has attached, will not the most serious consequences to the peace of that country ensue? The Indian Nations are making an honest effort to enforce the law, especially for the protection of life. This can be especially said with reference to the Cherokee Nation. If the petitioner in this case can escape the exercise of jurisdiction over him by becoming naturalized after that jurisdiction has attached, any man who is indicted for murder in an Indian court, after such indictment has been found, and while the same is pending against him, may do the same thing. And, in order to escape conviction and punishment, of course, they would all do it. The courts of the United States could not punish him, because they had no jurisdiction of him at the time of the commission of the crime, and the consequence would be that by becoming a citizen of the United States he would escape all punishment. Such a privilege was never intended to be attached by the congress of the United States to the great right of citizenship under this government. And, looking at the consequences that would ensue from a construction of the statute so as to give the party a right to a discharge in this case, the most powerful reasons exist why the law should not be construed so as to divest the Indian court of jurisdiction after it has once attached. I do not conceive that there is any trouble upon this question, as it has been many times decided by the courts of the country. In the case of *U. S. v. Dawson*, 15 How. 467, the principle which had been often decided before by the supreme

court of the United States was fully recognized,—that, “where the jurisdiction of a court over the subject-matter is once vested, it is not divested by subsequent change of circumstances.” That was a case which grew out of the following facts: In 1844 the congress of the United States passed a law attaching the Indian country to the district of Arkansas, giving to the United States district court of Arkansas, holding its sessions at Little Rock, jurisdiction to hear and determine such cases of crimes occurring in the Indian country as any court of the United States had jurisdiction over. In 1851, after Dawson et al. had been indicted, and while the case was pending in the United States court for the district of Arkansas, congress passed a law establishing the Western district of Arkansas, and attaching the Indian country, for jurisdictional purposes, to the Western district; and the question was whether or not the United States district court of the district of Arkansas retained jurisdiction of the Case of Dawson. Upon that state of facts the court held that the status of the party at the time the jurisdiction was acquired determined the jurisdiction, and, if the jurisdiction over the subject-matter had vested, that a subsequent change of circumstances did not affect that jurisdiction. In the case of *Connolly v. Taylor*, 2 Pet. 556, the supreme court held, where there is no change of party, the jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. And in *Mollan v. Torrance*, 9 Wheat. 537, the court declared that the jurisdiction depends upon the state of things at the time of the action brought, and, after it is once vested, cannot be ousted by subsequent change of residence of either of the parties. And in *Dunn v. Clarke*, 8 Pet. 1, the court held that any change in the residence or condition of the parties cannot take away jurisdiction which has once attached. In the case of *Morgan v. Morgan*, 2 Wheat. 299, the court said, “We are all of opinion that the jurisdiction, having once vested, did not divest by the change of residence of either of the parties.” In the case of *Culver v. Woodruff Co.*, reported in 5 Dill. 392, Fed. Cas. No. 3,469, the court held that where the status of the parties is such as to give the federal court jurisdiction, a change of such status pending the suit does not affect the jurisdiction. It seems to me that this principle of the law applies to the case of the petitioner. Public policy demands this construction. It is in harmony with reason, and such a construction is an encouragement for the Indian Nations to enforce the law against all persons over whom their courts have jurisdiction; and, if this construction is not to prevail, they enter upon its enforcement with the probability that, before the law can be vindicated, a party charged with a crime will swear himself away from their courts by becoming a naturalized citizen of the United States. According to my judgment, the petitioner could not divest the Cherokee court of jurisdiction over him in this way. The writ of habeas corpus is therefore ordered dismissed.

**CONTINENTAL INS. CO. v. BOARD OF FIRE UNDERWRITERS OF THE PACIFIC et al.**

(Circuit Court, N. D. California. March 25, 1895.)

**1. CONSPIRACY—COMBINATION OF FIRE UNDERWRITERS—INJUNCTION.**

An association of fire underwriters, formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents, and nonintercourse with companies not members, is not an illegal conspiracy, and the accomplishment of its purposes by lawful means will not be enjoined at the instance of a company not a member of the association.

**2. SAME.**

The dismissal of an agent by one of the associated companies for refusal to represent such companies exclusively, and a refusal to place insurance for outside companies, are lawful means to accomplish the purposes of the association.

**3. SAME—BOYCOTT.**

The advertisement by an agent of certain of the associated companies that he had authority to cancel policies of outside companies, and rewrite them at lower rates, when in fact he had no such authority, and threats to boycott the agents and customers of such outside companies unless they withdrew their patronage, are illegal, and will be enjoined.

Bill for an injunction brought by the Continental Insurance Company against the Board of Fire Underwriters of the Pacific and others.

Delmas & Shortridge, for complainant.

Page & Eells and T. O. Coogan, for defendants.

**McKENNA**, Circuit Judge. The nature of the action will be developed as I proceed. The case has been very elaborately argued, and the interests involved are great, and the opinion, therefore, will be quite lengthy. The bill is long, and alleges, substantially:

That the Board of Fire Underwriters of the Pacific is a secret association composed of the representatives of certain fire insurance companies, and that it has adopted a constitution providing, among other things, for (1) regulation of premium rates (two-thirds membership fixing these); (2) prevention of rebates; (3) compensation of agents; (4) nonintercourse with companies not members. The penalty for violation of these provisions is the cancellation and prohibition to writ or place, within one year, the risk or risks covered, and the rate or rates effected shall be increased 15 per cent. Compensation to agents not to exceed 15 per cent., with certain exceptions. The nonintercourse clause of the constitution is as follows:

"Sec. 5. No member shall permit any company under his control to be represented by the agent of any company not represented in this board, nor shall he reinsure, nor accept from, nor place or cause to be placed, whether by reinsurance or otherwise, any business in any company or agency not represented in this board, except with the consent of the executive committee. In presence of nonboard or unconstitutional competition, a member may protect his business in accordance with the general rules, and any rate of premium necessary, and not otherwise: provided, he immediately reports the facts in writing to the executive committee, who shall grant relief, the charges of unconstitutional competition being sustained by a majority of the executive committee."

And the pledge taken by the members is as follows:

"I hereby agree, with each and all of the signers of this agreement, to observe, in good faith, without evasion or mental reservation of any kind, all of the provisions of the constitution and rules and regulations of the Board of Fire Underwriters of the Pacific, as they now are or may be hereafter constitutionally amended, holding myself faithfully to the spirit as well as to the letter of this agreement. My signature is also understood as binding upon my associates in management, special agents, and all other employes of my office. Also that I will not regard myself as relieved from any obligation assumed, notwithstanding the violation of such obligation by another member, except upon written resignation, sent not less than fourteen days nor more than twenty-one days after service of written notice of my intention to resign, and until after all assessments shall have been paid, except that upon demand, agreed upon by a majority vote of the entire membership, such vote being confirmed at a subsequent meeting not less than five days later, my name may be stricken from the roll without further notice."

That the purpose of the association is to coerce plaintiff and others transacting business of like character to become members, and to obstruct and annoy it and its agents and assureds, in granting insurance, because it is not a member, with a view to induce it to become such, and that the said association is designed to interfere with plaintiff's freedom in the proper management of its business, and that it assumes to dictate upon what terms the business shall be conducted, by means of threats of injury or loss. And it is also alleged that the object of the board and the defendants is to interfere with plaintiff's perfect freedom of action; that the board and its associates have entered into a conspiracy to prevent plaintiff from following its business, and that such conspiracy is unlawful, and has a tendency to prejudice the public or oppress individuals, and unjustly subject them to the power of the confederates; that the said board and its associates have attempted and are attempting to boycott plaintiff, in its business, by inducing its servants to abandon its service because it will not make its rates conform to those fixed by the board, and for the express purpose of injury to its business, and that they have threatened its assureds with a boycott in case they continue their patronage of plaintiff, and attempt, by coercion, to destroy competition, and that their purpose is to coerce it and all other nonmembers to become members; and that the said board is designed to prevent a just discrimination between the ability and industry of agents.

The particular acts complained of are as follows:

(1) That the Fireman's Fund Insurance Company sent to certain of its agents, who were also agents of plaintiff, the following letter:

"San Francisco, February, 1895.

"Wooster & Ensign, Agents, San José, Cal.: As has already been notified to you, we are members of the Board of Fire Underwriters of the Pacific,—an organization for the bettering of our common business, including the reduction of the fire loss by the improvement of fire equipment of the various cities and towns of this coast, and the promotion of safe construction of buildings. The members of the board pay the expenses incidental to this work, and consider it unjust that any insurance company should participate in benefits, only to be gained by co-operation, without contributing its share of the necessary expense. We have decided that it is impracticable for us to be represented by the representatives of companies

which pursue a business policy totally at variance with ours. We are informed that the following company is in your agency: Continental Insurance Company. Regretting the circumstances which compel us to put you to any trouble, we have to urgently request you to decide at once whether it is for your better interest to continue to act as our agent, exclusively, or as agent of companies not represented in the board. We inclose addressed envelope for your answer. Hoping that you will see that your interests are concurrent with our decision, and that your reply to that effect will be immediate, we remain,

"Yours, truly,

Fireman's Fund Ins. Co.

"Louis Weinmann, Ass't Secretary."

(2) Threats, through their representatives at Salt Lake City, of "boycotting" (to quote the bill) "the public, firms, individuals, and assureds who patronized your orator's said business with their custom, and hold policies from your orator and other so-called 'nonboard' companies and corporations, unless such assureds forthwith cancel such policies."

(3) That defendant's representative at San José, Cal., to wit, Messrs. Rucker & Co., of that city, caused to be inserted in the San José Mercury, a paper of great influence and circulation, the following advertisement:

"Have you a policy in any of the following companies? Home, of New York; Phoenix, of Hartford; Northwestern National; Continental, of New York; Franklin, of Pa.; Williamsburg City, N. Y.? If you have, bring them to our office without delay, as we have authority to cancel and rewrite them at any rate necessary to get the business.

Rucker & Co.,

"No. 8 North First Street.

The answer of the defendant denies that the board is a secret association, and denies the formation of a conspiracy for the purpose and design of coercion, vexation, dictation, and interference, or boycott, imputed to them by plaintiff, or a purpose to compel plaintiff or others to join said board, or that the object of the board is to oppress or coerce, or that it does or will oppress or coerce, the public or individuals. They allege that the board was created for, and its object is, to regulate the business of its members, and to prevent, whenever possible, by arrangement between themselves, a ruinous competition of rates, and that they, in common with other companies, have attempted and attempt to obtain business for their respective offices, and seek to obtain business which is placed in other offices, and that such conduct is now, and always has been, followed by the plaintiff. Replying to the specific acts alleged by plaintiff, defendant denies that the defendant addressed or threatened plaintiff's agent, but avers, in effect, that in cases where the agents of plaintiff were also agents of some of the defendant companies, the latter, on account of the business antagonism between them and plaintiff, advised or required an election of said agents between them; that some such agents preferred plaintiff, and some the defendant companies. The circular letter is admitted, and it is averred that it is the sole ground of the charges of conspiracy, contained in the bill, to prevent plaintiff from employing agents. The charge of boycotting at Salt Lake City is denied on information and belief. The advertisement in the San José Mercury is admitted, but it is denied it was published as a result of an unlawful combination or conspiracy, or

by the representatives of defendant, or in any manner to boycott the plaintiff, or other nonmembers of the board. It is admitted that Rucker & Co. are the agents of various members of said board, but not of a large number, as alleged in the bill, and it is averred that the notice was printed because plaintiff and other nonboard companies had attempted and were attempting, by offers of low rates of insurance, to take from said Rucker & Co. their customers, patrons of the companies represented by them, and that the act of Rucker & Co. was lawful, and done to meet the competition of plaintiff and others in insurance business. The answer concludes with the allegation, substantially, that defendant has done no act, and that it does not contemplate any act, which will damage plaintiff, other than such as may arise from competition, and that the acts of defendants have been done as individuals, to protect, respectively, their business against competition offered, and have not been done under any conspiracy or combination whatever; that their association is to promote the safety and success of their business; that it is voluntary, and is not designed to admit or exclude from its membership the plaintiff or any person, or to compel it or other companies to join the same.

Numerous affidavits have been filed. They respectively affirm and deny the formation of a conspiracy, and the boycotting purposes of the board. In all else there is very little contradiction, and whatever there is can be easily reconciled without imputation of discredit to the makers. They display, as the pleadings do, a bitter business antagonism and warfare. The contention between the parties is quite clearly defined. The bill is—omitting repetitions and amplifications—that the defendant has unlawfully combined to stifle competition, and to prevent plaintiff from carrying on its business, and that it did prevent it, by coercing plaintiff's agents and customers, and by unjust discrimination. The defendants deny the charges, and assert that the combination is a lawful one to promote their business interests, and that the acts of nonintercourse and non-dealing with plaintiff and others are intended to meet the antagonism and competition of business adversaries. It is necessary, therefore, to consider the character of the combination, and the character of the means used.

It may be said, in the beginning, that there is no proof of any act done by the board. The acts proved are those of individual companies, and, unless these can be imputed to the board, the latter cannot be said to have done anything. It was admitted at the oral argument that some of the acts of the defendant companies were lawful, of themselves. For instance, it was admitted that it was competent and lawful for a board company to choose to be served, or not to be served, by an agent who was also agent of the plaintiff; that it was competent and lawful for it to accept or refuse reinsurance from the plaintiff or its customers, or anybody, or join or not join in insurance with either. These, it was conceded, were business privileges which might have various and justifiable motives, but it was contended that, the combination being unlawful, these acts lost their privilege, and became unlawful, too. This makes the first,

if not the principal, inquiry the character of the combination. Was it unlawful? To put it more narrowly, and hence more precisely, for our purpose, was it so far illegal that the plaintiff may complain of it, and enjoin it, or its acts, without regard to the quality of the latter? To a like inquiry, in an almost similar case, a negative answer was given in *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544, and 23 Q. B. Div. 598, also [1892] App. Cas. 25. The original decision was made by Lord Chief Justice Coleridge, and affirmed by the court of appeals, queen's bench division, and subsequently by the house of lords. From the distinguished character of the judges and tribunals who decided it, and the consideration it received, and its approval by American cases, it must be regarded as high authority. An outline of its facts is as follows: The plaintiffs were a shipping company, incorporated to acquire, and they did acquire, shares in certain steamships built for and employed in the Chinese and Australian trades. The defendants were an associated body of shipowners, trading, among other places, between China and London, who formed themselves into a conference or association for the purpose of keeping up the rate of freight between China and Europe, and securing that trade to themselves. The defendants alleged, and it was found true, that the large profits derived from the tea freight alone enabled them to keep up a regular line of communication all the year round between England and China, and that, without a practical monopoly of the tea trade, they must cease to do so. The plaintiffs were admitted to the benefits of this conference for the season of 1884, when a circular was widely distributed, notifying those who shipped in the association's steamers that they would be allowed a rebate of 5 per cent. on the freight charged, exporters to sign a declaration that they had not been interested in shipments by other lines; shipments by an outside steamer at any of the ports of China and Hong Kong to exclude the firm making such shipments from participation in returns during the whole six-monthly period within which made, even although its other branches may have given entire support to the above lines. In May, 1885, another circular was issued, which excluded plaintiffs from the benefit of the conference. The acts of which the plaintiffs particularly complained were as follows: (1) The circular of May, 1885, offering a rebate to shippers who would not deal with plaintiffs; such rebate to be lost if they did. (2) Sending special ships to Han Kow, in order, by competition, to deprive plaintiff's vessels of profitable freights. (3) The offer, at Han Kow, of freights at a figure which would not repay a shipowner for his adventure, in order to "smash" freights, and frighten plaintiffs from the field. (4) Pressure on defendants' agents, who were also agents of other lines, to induce them to ship only by defendants' vessels, and not by those of plaintiffs. The resemblance between this case and the one at bar is obvious. The defendants combined, excluding plaintiffs, to engross the tea trade from China, and maintain freights which a free competition would have lowered. The means by which it was to be done were: (1) Lowering of freights against competitors, and granting rebates to their own customers. (2) Sending special ships to compete with opposing ships, to take

freight at any rate. (3) Preventing its agents from being agents of other companies. In both cases there is a combination to keep up rates,—in one of freight, and in the other of insurance,—and competition was pushed in both by an inducement of favorable rates to customers, or threats of unfavorable rates against them, and by the exclusion of agents from a joint representation of the contending parties. The opinions in the case are too long to quote at length, but extracts from them will be instructive. Each elaborately considered the law of conspiracy, and its application to the facts, and also considered in what sense the law regards the legality of contracts in restraint of trade. A clear distinction was also drawn between acts which had inducement in malice or ill will, and those which had inducement of business competition and rivalry. Speaking of the combination, Lord Chief Justice Coleridge said:

"The law may be put thus: If the combination is unlawful, then the parties to it commit a misdemeanor, and are offenders against the state; and if, as the result of such unlawful combination and misdemeanor, a private person received a private injury, that gives such person a right of private action. It is therefore, no doubt, necessary to consider the object of the combination, as well as the means employed to effect the object, in order to determine the legality or illegality of the combination. And in this case it is clear that if the object were unlawful, or if the object were lawful, but the means employed to effect it were unlawful, and if there were a combination either to effect the unlawful object, or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants, and a person injured by their misdemeanor has an action in respect of his injury."

And he further said:

"I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case, at the suit of one who suffered injury from them. The question comes at last to this: What was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders, with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavor, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them, rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively, by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribing, I see no evidence; of 'inducing,' in the sense in which that word is used in the class of cases to which *Lumley v. Gye* [2 El. & Bl. 216] belongs, I see none either. \* \* \* But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede that if the premises are established the conclusion follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was, then, this combination such? The answer to this question has given me much trouble, and I



confess to the weakness of having long doubted and hesitated before I could make up my mind. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters showed the importance they attached to the matter, their resolute purpose to exclude the plaintiffs if they could, and to do so without any consideration for the results to the plaintiffs, if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is, and must be, in a sense, selfish. Trade not being infinite, nay, the trade of a particular place or district being possibly very limited, what one man gains another loses. In the hand to hand war of commerce, as in the conflicts of public life, whether at the bar, in parliament, in medicine, in engineering (I give examples only), men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sydney with his cup of water, will not stoop to take an advantage, if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Sir Philip Sydneys; but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world, as pursued by ordinary men of business. The line is, in words, difficult to draw, but I cannot see that these defendants have in fact passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference. In 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill will to the plaintiffs, as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come in and share it they thought—and honestly, and, as it turns out, correctly thought—that for a time, at least, there would be an end of their gains. \* \* \* On the whole, I come to the conclusion that the combination was not wrongful and malicious, and that the defendants were not guilty of a misdemeanor. I think that the acts done in pursuance of the combination were not hurtful, not wrongful, not malicious, and that, therefore, the defendants are entitled to my judgment." *Steamship Co. v. McGregor*, 21 Q. B. Div. 544.

In the court of appeals these views were enlarged upon and confirmed, and variously illustrated. Of illegal contracts, Lord Justice Bowen said:

"Lastly, we were asked to hold the defendants' conference or association illegal, as being in restraint of trade. The term 'illegal,' here, is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal, in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts. It merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of *Crompton, J.*, in *Hilton v. Eckersley* [6 EL & BL 47], is, I think, not to be supported. No action at common law will lie, or has ever lain, against any individual or individuals, for entering into a contract, merely because it is in restraint of trade. Lord Eldon's equity decision in *Cousins v. Smith*, [13 Ves. 542] is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his 'Lives of the Chancellors.' If, indeed, it could be plainly proved that the mere formation of 'conferences,' 'trusts,' or 'associations,' such as these, were always necessarily injurious to the public,—a view which involves, perhaps, the disputable assumption that in a country of free trade, and one which is not under the iron regime of statutory monopolies, such confederation can ever be really successful,—and if the evil of them were not sufficiently dealt with by the common-law rule which holds such agreements to be void, as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound, common-sense principles some further remedy commensurate with

the mischief. Neither of these assumptions is, to my mind, at all evident, nor is it the province of judges to mold and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law."

To the same effect, Lord Justice Fry expressed himself as follows:

"But if one man may, by competition, strive to drive his rival out of the field, is it lawful or unlawful for several persons to combine together to drive from the field their competitor in trade? It is said that such an agreement is in restraint of trade, and therefore illegal. Be it so. But in what sense is the word 'illegal' used in such a proposition? In my opinion, it means that the agreement is one upon which no action can be sustained, and no relief at law or in equity had, but it does not mean that the entering into the agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. \* \* \* The language of all the judges in the cases of *Hornby v. Close* [L. R. 2 Q. B. 153] and *Farrer v. Close* [L. R. 4 Q. B. 602] is consonant with that of Lord Campbell and Erle, J., in *Hilton v. Eckersley* [6 El. & Bl. 47], and *Crompton, J.*, I believe, is the only judge who has hitherto held such contracts illegal as well as void." 23 Q. B. Div. 620.

There was but one dissenting opinion,—that of Lord Esher, master of the rolls. He held that the combination was unlawful, and indictable as a conspiracy, and "that when it was carried out to its immediate and intended effect," to quote his language, "which was an injury to the plaintiffs' right to a free course of trade, the plaintiffs had a good cause of action." But the learned justice based the right, not on the injury to the public, nor on the monopoly of the tea trade, nor on the favoritism to customers, nor on the restraints of agents, but on the acts of defendants in lowering freights far beyond a lowering for any purpose of trade; that is to say, he observed, "so low that if they continued it they themselves could not carry on trade," which he held was an act done to interfere with defendants' free course of trade,—a right which could hardly be urged by the plaintiff in this case.

In support of the English case, the following American cases may be cited: *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 96 Mass. 499; *In re Greene*, 52 Fed. 119; *Carew v. Rutherford*, 106 Mass. 14; *Insurance Co. v. State*, 86 Tex. 250, 24 S. W. 397; *Manufacturing Co. v. Hollis* (Minn.) 55 N. W. 1119. A review of these cases would be demanded, if time permitted, and if it were not necessary to review those claimed by plaintiff's counsel to oppose and countervail their authority.

Counsel urge, "It is against public policy to enter into any agreement or combination, the object of which is in restraint of trade, or the obtaining of a monopoly of any article or commodity for the purpose of stifling competition and enhancing the price." In considering this, and the broader contentions of counsel, and the cases cited by them, we must not overlook that it is not the abstract quality of defendant's association and acts, or their relations with the general public, or with one another, but the rights, injuries, and remedies of the plaintiff, which will be regarded.

Broader considerations than these I may not indulge or yield to. My function is not of that kind or degree which may assent to or oppose all the views urged, and eloquently urged, by counsel. No doubt, many methods which business competition or advantage uses may, if contemplated from one aspect, seem to call for legal repression; and, as Lord Justice Bowen says, "legal puzzles which might well distract a theorist may easily be conceived, of imaginary conflicts between a group of individuals and the obvious well-being of other members of the community." These reflections admonish us not to judge from a too abstract contemplation of evils, not to attempt to distinguish fair and unfair competition from debatable considerations of political economy, but to adhere to and decide the questions in the case by legal precedents. This, though it may seem narrow, from some points of view, is as broad as a legal tribunal may indulge, whose confined function is, as has often been said, to administer the law as it is, not as it ought to be. In this disposition I have reviewed the cases already quoted, and shall review those cited by defendant's counsel.

In the case of *Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, the action was between the parties, to enforce what the court held to be illegal contracts in restraint of trade, to wit, the enhancement of the price of lumber; and the court said, "Their execution will be left to the volition of the parties thereto." But this is the doctrine of *Steamship Co. v. McGregor*, supra. "The law does not prohibit such contracts," said Lord Justice Bowen; "it merely declines to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public."

*Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36, was, like *Lumber Co. v. Hayes* (Cal.) 18 Pac. 391, an action between the parties to an illegal contract, and may be classed by the same comment.

The case of *People v. Sheldon* (N. Y. App.) 34 N. E. 785, was a criminal action under the Penal Code of the state. Section 168 of the Code of that state makes it a misdemeanor for two or more persons to conspire "to commit any act injurious to the public health, to public morals, or to trade, or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws." The defendant entered into an agreement with others, comprising all the retail dealers in the city of Lakeport, except one, to organize the Lakeport Coal Exchange. The agreement between its members constituted the exchange the sole authority to fix the price which should be charged by the members, individually, for the coal sold by them. The court held that this was an act "injurious to trade or commerce," within the meaning of those words in the statutes. No conclusion applicable to the case at bar can be drawn from this case. The act was one which, without the statute, was legal. It was made a misdemeanor by the statutes, and hence became what Lord Chief Justice Coleridge said the defendants' acts were not in the *Mogul Case*. It may be said, in passing, that there is no such statute in this state.

*Judd v. Harrington* (N. Y. App.) 34 N. E. 790, was an action to en-

force an illegal contract, by the parties to it. It is, therefore, in the category of California cases *supra*.

Of *U. S. v. Jellico Mountain, etc., Co.*, 46 Fed. 432, so far as we are concerned with it, it is only necessary to say that it was an action to enjoin defendants from unlawfully continuing to restrain interstate commerce in coal at Nashville, contrary to the provisions of the anti-trust law of 1890. The petition was filed against the Nashville Coal Exchange, under the authority of section 4 of the act, for violations of sections 1 and 2, by which every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, is declared illegal, and "every person who shall monopolize, or combine, or conspire with another person or persons to monopolize any part of the trade or commerce among the several states \* \* \* shall be guilty of a misdemeanor." In other words, the statute made the combination not only a crime, but gave a civil action in equity to the United States to restrain violations of the statute. The case is obviously not similar to the one at bar.

*State v. Donaldson*, 32 N. J. Law, 152, was a criminal action, and the decision of the court was made on motion to quash the indictment. The indictment alleged that the defendants and divers other evil-disposed persons, etc., being journeymen workmen employed by Richmond Ward, John C. Little, and others, who were then and there engaged together in the manufacture of patent leather, and as carriers, maliciously to control, injure, terrify, and impoverish their said employers, and force and compel them to dismiss from their said employment certain persons, to wit, Charles Briggan and William Pendergast, then and there retained by their said employers as journeymen and workmen for them, and to injure said Charles Briggan and William Pendergast, unlawfully did conspire, combine, confederate, and agree together to quit, leave, and turn out from their said employment until and unless the said last-mentioned journeymen and workmen should be dismissed by their said employers; and the indictment further charges that they did quit and remain away until their demand was complied with. The decision was undoubtedly based on the malicious character of defendants' acts, these having no just cause or excuse, being of no benefit to defendants, and oppressive to those against whom they were directed; and it is so quoted by Judge Taft in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 734. If not so based, it is opposed to other cases. This element was recognized in the *Mogul Case*, *supra*, as raising different questions from acts induced by a benefit to the doer. Lord Justice Bowen said (23 Q. B. Div. 613; quoting the case of *Rogers v. Dutt*, 13 Moore, P. C. 209), to make conduct actionable as a tort, it is not enough "that it will, however, directly do a man harm in his interests," and, continuing, said:

"What, then, were the rights of the plaintiffs, as traders, as against the defendants? The plaintiffs had a right to be protected against certain kinds of conduct, and we have to consider what conduct would pass this legal boundary. Now, intentionally to do that which is calculated, in the ordinary

course of events, to damage, and which in fact damages, another, in that other person's property or trade, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a 'malicious wrong.' "

See *Bromage v. Prosser*, 4 Barn. & C. 247; *Bank v. Henty* (per Lord Blackburn) 7 App. Cas. 741, at page 772.

So Judge Taft said in his very able opinion in *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 54 Fed. 738, such combinations are said to be unlawful conspiracies, though the acts, in themselves, and considered singly, are innocent, when the acts are done with malice, i. e. with intention to injure another without lawful cause. Whether, in the pending case, the defendants' acts have just cause or excuse, will be considered hereafter.

*State v. Glidden*, 55 Conn. 46, 8 Atl. 890, was a criminal action for conspiracy, based on a state statute which provided as follows:

"Every person who shall threaten and use any means to intimidate any person to compel him to do or abstain from doing any act which he has a legal right to do, or shall injure or threaten to injure his property with intent to so intimidate him shall be liable to a fine not exceeding one hundred dollars, or imprisonment in the county jail six months."

The information fully charged threats, intimidation, and boycott; and, applying it, the court said:

"Do the acts which it is alleged the defendants conspired to do fall within the prohibition of the act of 1878? They proposed to threaten and use means (to boycott) to intimidate the Carrington Publishing Company to commit, against its will, to abstain from doing an act (to keep in its employ workmen of its own choice) which it had a legal right to do, and to do an act (employ the defendants and such persons as they should name) which it had a legal right to abstain from doing. There can be but one answer to the question,—the acts proposed are clearly prohibited by the statute."

The court could have stopped there, as the court said it could have, but, as the argument had taken a wide range, it considered and stated the law of criminal conspiracy, and said:

"If we were to attempt to give a rule applicable to this branch of the subject, we should say that it is a criminal offense for two or more persons, corruptly or maliciously, to confederate and agree together to deprive another of his liberty or property. Such a rule is proximately correct and practically just." "Now, if we look at this transaction as it appears on the face of this information, we shall be satisfied that the defendants' purpose was to deprive the Carrington Publishing Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was a selfish one,—to gain an advantage unjustly, and at the expense of others,—and therefore the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, and therefore it was malicious."

Without concurring with or dissenting from the comments or conclusions from the rule the learned court applied, it is sufficient to say, besides what has been said, that the facts of the case, as well as those of the cases of *Sinsheimer v. United Government Workers* (Sup.) 26 N. Y. Supp. 152, and *Carey v. Typographical Union*, 45 Fed. 135, distinguish it and them from the case at bar, in some of the charges; and whether in all, we shall consider hereafter. In all of them the acts complained of were not acts of the

defendants, directly, in relation to the plaintiffs, but acts influencing, or of intimidation and threats against, the customers of the plaintiffs,—not acts which the defendants might lawfully do or not do, but acts, it may be, of violence, constraining the will of others, and forcing obedience by threats. In other words, the defendants, in these cases, were strangers to the business of the plaintiffs,—intermeddled with it and harassed it.

My attention has also been directed to *Queen Ins. Co. v. State* (Tex. Civ. App.) 22 S. W. 1048, notwithstanding it was reversed on appeal. The combination complained of in that case, like the one in the case at bar, was of insurance companies, and for not dissimilar purposes. The suit was by the attorney general of the state, under a statute of the state, or rather supposed statute. The statute was held inoperative, but the action was sustained, nevertheless, the lower court saying that "it is too plain for argument that the purposes and objects of the organization sued are hateful and injurious to the public." The case, as I have said, was reversed on appeal; the court holding that the organization was not in "restraint of trade," as these words are defined at common law, and was not unlawful. The decision is elaborate, and carefully reviews the whole subject. A distinction is made, and asserted to have been recognized at common law, between articles of prime necessity and others, as affecting and distinguishing combinations to secure a monopoly in them. This distinction is criticised by counsel as narrow and arbitrary. I am not sure that the distinction is more arbitrary or narrow than others which the law makes, and necessarily makes. But it is not necessary to say. It is enough for the present purpose to remark that the case has an important distinction from the case at bar. It was a suit by the attorney general, in the name of the state, directly against the organization, and the lower court found warrant for it in the laws and constitution of the state, and not a suit of a private individual, which is governed by other considerations, as I have shown. If, however, the reasoning of the lower court be considered broad enough to cover a suit by a private individual, it cannot be considered authority, as against its reversal by the court of appeals, or the other cases which I have cited. *Queen Ins. Co. v. State*, (Tex. Civ. App.) 22 S. W. 1048.

It will be observed that all the cases regard the motive as important, as determining the absence or presence of malice.

The bill in this case alleges that:

"The Board of Fire Underwriters of the Pacific is an association and combination whereof the above-named defendants are the active members, agents, and officials, designed to coerce your orator, and others transacting business of a like character, \* \* \* to interfere with, obstruct, vex, or annoy your orator, its employes and assureds, \* \* \* with a view to induce your orator, its employes and agents, \* \* \* to become members of said board, and \* \* \* designed to interfere with your orator's perfect freedom of action, \* \* \* dictate the terms upon which the business of your orator shall be conducted, by means of threats of injury or loss, as hereinafter set forth."

And in the tenth paragraph of the bill it is alleged "that the said board and defendants, with its associates, or some or any two

or more of them, have entered into a conspiracy to prevent your orator from following his aforesaid lawful business," etc.

I shall assume that by these allegations the plaintiff intends to charge that the board was organized, and a conspiracy was formed, for the purposes mentioned. If the charges were true, there could be no doubt about the judgment which should follow them. But I do not think the proof sustains them. I do not think the board was organized or formed for such purposes. It was induced by trade reasons, in which the co-operation of all companies was undoubtedly desired; and necessarily, against their opposition, a plan of competition was provided for and executed. It would be extremely inconsequential to say that the organization had no other purpose, or had the chief purpose to intermeddle with plaintiff's business, or compel its action in any way, or was influenced by personal malice or ill will. We hence come to the consideration of the means employed by defendant. Did they transcend the bounds of a competition "waged [by the defendant] in the interest of their own trade"? Beginning this head of inquiry, it may be said "it is not enough" (as Lord Chief Justice Coleridge said) "that the combination be unlawful. There must be damage to the plaintiff before an action will lie." And, as he further observed, "damage means legal injury. Mere loss or disadvantage will not sustain the action." And Lord Justice Bowen said, "It is the damage wrongfully done, and not the conspiracy, that is the gist of the action on the case for conspiracy." Chief Justice Nelson, speaking for the court in *Hutchins v. Hutchins*, 7 Hill, 107, said, "A simple conspiracy, however atrocious, unless it resulted in actual damage to the party, never was the subject of a court action, not even when the old form of a writ of conspiracy, in its limited and most technical character, was in use." The language and doctrine is quoted and approved in *Herron v. Hughes*, 25 Cal. 555. In *Bowen v. Matheson*, 96 Mass. 502, Justice Chapman said: "The gist of the plaintiff's action is not the conspiracy alleged, or the declaration, but the damage done to the plaintiff by the alleged acts of the defendants, and the averment that the acts were done in pursuance of a conspiracy does not change the nature of the action. *Parker v. Huntington*, 2 Gray, 124. In order to be good, the declaration must allege against the defendant the commission of illegal acts." The conclusion from these cases is, there must be damage done by illegal means. For a board company to dismiss its agent, because an agent of the plaintiff, or to put him to an election of service, is not an illegal act; nor can a court of equity restrain it, if done (and I need go no further than this) without malice. The same comment may be made on the act of any such company in placing or refusing to place insurance for plaintiff or its customers. Neither act is a naked transgression against plaintiff. Obviously, many trade reasons induce it.

The act of *Rucker & Co.*, as agents for certain of the board companies, advertising that they had authority to cancel policies of plaintiff's companies and certain other nonboard companies, I am inclined to think, is within the prohibition of the cases. It is

claimed, however, it was a competitive retaliation for the act of the agent of the Continental in cutting rates and soliciting the owners of a store in San José, called the "City Store," to cancel the policies of the board companies represented by said Rucker & Co. But the advertisement exceeds proper competition, and advertises to the public that which is not true, to wit, that said Rucker & Co. had the right to cancel policies issued by plaintiff.

The acts of defendant, at Salt Lake, threatening certain agents and customers of plaintiff, are unlawful; nor were they attempted to be justified by defendant's counsel. The charge was attempted to be met by affidavits of agents of certain board companies that they had not made, and did not know of any one who had made, threats, or had heard of threats. This is not a very satisfactory denial of acts so inimical and unjustifiable. I think, therefore, the restraining order should be continued, as to them. It is only just, however, to say that the president of the board and the defendants positively deny that they have issued threats of any kind against anybody, or that threats have been issued by their consent and knowledge. Injunction continued, as herein indicated,—that is, against the advertisements at San José, or like advertisements elsewhere, and against acts at Salt Lake, and like acts elsewhere,—and in all other particulars it is dissolved.

## UNITED STATES v. ROSENWALD et al.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

## No. 18.

## 1. CUSTOMS DUTIES—CLASSIFICATION OF LEAF TOBACCO — UNIT OF CLASSIFICATION.

In determining the classification of leaf tobacco under paragraph 246 of the act of March 3, 1883, the unit to which the percentage test is to be applied is the commercial bale. *U. S. v. Blumlein*, 5 C. C. A. 142, 55 Fed. 383, followed; *Falk v. Robertson*, 11 Sup. Ct. 41, 137 U. S. 225, and *Erhardt v. Schroeder*, 15 Sup. Ct. 45, 155 U. S. 124, distinguished.

## 2. SAME—SUFFICIENCY OF EXAMINATION BY COLLECTOR—BURDEN OF PROOF.

The burden is not upon the government to show that the collector's classification is correct, but the presumption is in favor of its correctness, and the burden is upon the importer to show that it is not correct; and this burden is not sustained by the fact that the collector's examination was only of 10 hands of tobacco, drawn from representative bales, nor by showing that a method was pursued which was wholly inadequate to ascertain what percentage in any bale consisted of a higher grade, and that the method was erroneous because it sought to determine the percentage, not by aggregating the leaves in the whole number of hands examined, but by aggregating the hands containing the higher grade. 59 Fed. 765, reversed; *Erhardt v. Schroeder*, 15 Sup. Ct. 45, 155 U. S. 124, followed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Wallace Macfarlane, U. S. Atty.

Charles Curie, David Ives Mackie, and W. Wickham Smith, for appellees.



**Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.**

**WALLACE, Circuit Judge.** This is an appeal from an adjudication of the United States circuit court for the Southern district of New York reversing a decision of the board of United States general appraisers which affirmed the decision of the collector of the port of New York as to the classification for duty of certain merchandise imported into the port of New York by the appellees in June, 1890. 59 Fed. 765. The importation consisted of 54 bales of Sumatra leaf tobacco, unstemmed, 28 bales being the product of one plantation, and 26 of another plantation. Part of the tobacco was classified and subjected to duty by the collector under that provision of schedule F of the tariff act of March 3, 1883, which reads as follows:

"246. Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound."

The rest of the tobacco was classified and subjected to duty under the provision of the same schedule which reads as follows:

"247. All other tobacco in leaf, unmanufactured and not stemmed, thirty-five cents per pound."

The importers, being dissatisfied with the decision of the collector, duly protested, claiming, in substance, that all of the tobacco was dutiable at only 35 cents per pound, because 85 per cent. thereof was not of the requisite size and of the necessary fineness to be suitable for wrappers, and less than 100 leaves were required to weigh a pound. The board of general appraisers having affirmed the decision of the collector, the importers appealed to the circuit court, and upon that appeal evidence was taken in behalf of the importers and of the government. That evidence, together with the evidence which was before the board of general appraisers, established the following facts: The 54 bales comprised 7 different lots of tobacco, each lot representing a different quality. Of these lots 2 contained more than 10 bales each, and the others contained from 3 to 10 bales each. For the purpose of ascertaining under which of the two provisions the tobacco should be classified, the collector designated for examination 1 bale out of each lot which did not contain more than 10 bales, and 2 bales out of each of the other lots, in all 9 bales. The examiner opened each bale, and drew indiscriminately from different parts of the bale 10 hands of tobacco. Each bale contained from 500 to 700 hands, and the hands contained from 12 to 50 leaves. He ascertained by inspection of the leaves whether the tobacco was of the requisite size and fineness suitable for wrappers. He then weighed the hands separately, to ascertain whether the leaves ran over or under 100 to the pound, determining the ratio according to a standard of estimate adopted by the treasury department. Having found all the tobacco in all the hands to be suitable for wrappers, he then divided

the hands into two classes, one consisting of those in which the leaves were more than 100 to the pound, and the other of those in which they were less. So many tenths of the bale as there were hands of the former class were returned as dutiable at 75 cents per pound, and so many as there were hands of the latter class were returned as dutiable at 35 cents per pound. As appears by a stipulation in the record, all the leaves in all the hands thus examined were of the size and fineness of texture suitable for wrappers, and the examiner correctly ascertained the percentages of light and heavy leaves in the hands. As a result of this examination, each lot of bales was classified according to the percentages found and returned in the representative bales examined. Thus, the examiner having reported that one bale, representing a lot of 4 bales, contained wholly tobacco of more than 100 leaves to the pound, all the tobacco in that lot was assessed at 75 cents per pound; having reported that another bale, representing a lot of 10 bales, contained 90 per cent. of tobacco having more than 100 leaves to the pound, and 10 per cent. having less, duty was assessed upon 90 per cent. of the tobacco in that lot at 75 cents per pound, and upon 10 per cent. at 35 cents per pound; and having reported that another bale, representing a lot of 3 bales, contained 70 per cent. of tobacco having more than 100 leaves to the pound, and 30 per cent. having less, duty was assessed on 70 per cent. at 75 cents per pound, and on 30 per cent. at 35 cents per pound. The detailed result of the examination was as follows: Out of one lot of 17 bales, from which 2 representative bales were opened, the proportion in one bale was found to be 70 per cent. of lower grade and 30 per cent. of higher grade, and in the other bale 50 per cent. of lower grade and 50 per cent. of higher grade. Out of another lot of 4 bales, from which 1 bale was opened, the proportions were found to be 10 per cent. of lower grade and 90 per cent. of higher grade. Out of another lot of 3 bales, from which 1 bale was opened, the proportions were found to be 30 per cent. of lower grade and 70 per cent. of higher grade. Out of another lot of 4 bales, from which 1 bale was opened, the proportions were found to be 20 per cent. of lower grade and 80 per cent. of higher grade. Out of another lot of 12 bales, from which 2 bales were opened, in one bale the proportions were found to be 80 per cent. of lower grade and 20 per cent. of higher grade, and in the other, 10 per cent. of lower grade and 90 per cent. of higher grade. Out of another lot of 4 bales, from which 1 bale was opened, all the tobacco was found to be of the higher grade. Out of another lot of 10 bales, from which 1 bale was opened, the proportions were found to be 10 per cent. of lower grade and 90 per cent. of higher grade.

Upon this evidence the circuit court adjudged that the classification of the collector was erroneous, and that all the tobacco should have been subjected to duty at 35 cents per pound. This decision proceeded upon the theory that the examination upon which the classification was based was insufficient, and did not show that any single bale of the tobacco was of a character to entitle it to be classified for duty at 75 cents per pound.

The provision of the tariff act imposing the 75 cents per pound duty has been considered in several adjudications. The principal subject of discussion has been in respect to the unit for the computation of the 85 per cent. In *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. 41, tobacco was imported in bales, each of which contained a quantity of Sumatra leaf tobacco answering the description of the tariff provision, except that it formed only about 83 per cent. of the contents of the bale. The rest of the bale consisted of inferior leaf tobacco, which was separated from the other tobacco by strips of paper or cloth. The two kinds being thus readily separable on the opening of the bale, the court held that the 83 per cent. of the contents of the bale was dutiable under the provision, and that the contents of the bale as a whole were not dutiable at 35 cents per pound. In the opinion the court said:

"In the present case, the carefully separated and distinguishable quantity of tobacco in the bale which was of the specified size, fineness, and weight was the whole of it,—that is, one hundred per cent.,—and more than eighty-five per cent. of that size, fineness, and weight; and all of it fell under the description of what was dutiable at seventy-five cents per pound. The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purpose of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remain entirely distinct. The association of them in the bale was evidently only for the purpose of avoiding the higher duty imposed on the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market."

In *Re Blumlein*, 5 C. C. A. 142, 55 Fed. 383, the provision was under consideration by this court after the decision in *Falk v. Robertson*, and it was determined that the 75-cent duty is applicable to that grade of unstemmed leaf tobacco of which 85 per cent. of the commercial bale is of the requisite size and fineness suitable for wrappers, and contains more than 100 leaves to the pound. The court was of the opinion that the unit contemplated by congress was that aggregation of leaves in the permanent commercial form in which leaf tobacco is imported and bought and sold, which is the bale; and that *Falk v. Robertson* was not inconsistent with this conclusion, because the observations in that case in respect to the bale not being the unit were directed to a bale prepared only for the purposes of avoiding duty, and not to a commercial bale. Since the decision of *In re Blumlein*, the supreme court has again considered the provision in *Erhardt v. Schroeder*, 155 U. S. 124, 15 Sup. Ct. 45. In that case, referring to the question whether the bale was to be treated as the unit, the court used this language:

"The proper answer to this question seems to depend upon the particular circumstances of a given case. It appears in the testimony on both sides in this case that leaf tobacco is divided into two classes, known as the 'wrapper class' and the 'filler class.' \* \* \* If, then, a bale, or other separate and concrete quantity, of leaf tobacco, contained only leaves of such uniformity of character as to be in their collective form of one class, the bale, or other separate collection, would be the unit contemplated in the percentage and weight tests. On the other hand, if the bale contained tobacco of two classes, the unit would be the ascertained quantity of either class. \* \* \* All the tobacco in question in this case, as the evidence on both sides shows, was raised in the same country, and was all of the

class known to the trade as 'wrappers.' Therefore, any bales, or indeed the whole invoice, if it might conveniently be treated as a whole for the purpose, was just such a unit as was indicated by the statute."

We do not understand this adjudication to be antagonistic to the judgment in *Re Blumlein*, that the commercial bale is to be deemed the unit upon which the percentage of 85 per cent. is to be found. The case was one in which it appeared that out of 429 bales imported, consisting of 13 plantation lots, 30 bales were designated for examination by the collector; that 4 of these lots, containing respectively 10, 27, 20, and 10 bales, were represented in the 10 bales in controversy; and that among the 30 bales designated by the collector was 1 bale from each of the 4 lots. The court below had decided that, there having been examined less than 1 bale out of every 10 of the invoice, the collector had not complied with section 2939 of the United States Revised Statutes, and therefore the exaction of duty was illegal. The court held this section to be permissive, and not mandatory. It became necessary also to determine whether the evidence would have justified a verdict for the importer, and in this view the question was considered whether the testimony in respect to the percentages of higher-grade and lower-grade tobacco tended to show an erroneous classification by the collector. The decision was:

"That the court below was in error in directing a verdict for the importers, and that the judgment of that court ought to be reversed, and the case remanded, with directions to set aside the verdict, and to order a new trial, in order that a jury may pass upon the real character of the tobacco contained in the ten bales withdrawn by the importers."

Incidentally, the court considered certain other questions. It was assumed in the opinion that an examination of all the tobacco in all the bales was not necessary in order to ascertain whether it answered the requisites of the higher grade, and that the examination of a representative quantity, such as 10 hands, in a bale, might be sufficient to determine the grade of the bale. And in respect to such an examination the court said:

"If the character of the tobacco is to be learned from an examination of a representative quantity therefrom, such as ten hands, the hands should be separated, and the statutory tests applied to the general collection of all the representative leaves, irrespective of their casual association in the respective hands."

This statement was prefaced by observations in the opinion which leave no doubt of its meaning, and which were as follows:

"In such a case, if separate hands taken from a bale containing only leaves of one class were treated as units, the result might be an inaccurate conclusion. Doubtless in the hands classed as containing tobacco dutiable at the lower rate there would be leaves having all the requisites of the higher grade, while in the hands ascertained to be taxable at the higher rate would be leaves of the lower grade. This might have the effect of making a division of tobacco of one commercial class into two grades with respect to taxation,—a division which we do not believe to have been contemplated by the statute."

It is to be presumed, unless the contrary is made to appear, that there was a sufficient examination of the tobacco to enable the collector to determine what percentage of the whole was suitable for

wrappers, and composed of more than 100 leaves to the pound. Whenever it is alleged by the importer that the collector has exacted a duty based upon an improper classification of merchandise, the burden of proof is upon him to prove the allegation. Where the classification of merchandise depends upon the existence of specified characteristics descriptive of its qualities, it is to be presumed, in favor of a correct classification, that those characteristics were found by the officers of the customs. These officers "are selected by law for the express purpose of deciding these questions. They are appointed and required to pronounce a judgment in each case, and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness." *Arthur v. Unkhart*, 96 U. S. 118.

In the present case, as in *Erhardt v. Schroeder*, the presumption of a valid classification is not overthrown by the fact that the examination was not of all the tobacco in all the bales of the different lots, nor of all the tobacco in the representative bales designated by the collector, nor because it was only of 10 hands from the representative bales; and in this case, as was done by the court in that, the evidence must be considered to ascertain whether the importers have shown that the necessary percentage of higher-grade tobacco was not present in any of the bales in controversy. If there had been an examination of only the most superficial character, it would still be incumbent upon the importers to show that the tobacco was not of the requisite characteristics to support the classification. The only evidence to meet this burden is the testimony and report of the examiner, which shows that a method was pursued which was wholly inadequate to ascertain what percentage in any bale of the tobacco consisted of the higher grade; not only because, as was observed in the opinion of the court below, the variances were too great, "even in the tobacco from the same plantation, to warrant the assumption that the other fifty-nine sixtieths of the examined bale, as well as the contents of the unexamined bale, contained tobacco of both grades in the proportion found to exist in the trifling amount examined," but also because it was sought to determine the percentage, not by aggregating the leaves in the whole number of hands examined, but by aggregating the hands containing the higher grade. Indeed, the protest of the importers proceeded principally upon the ground of an insufficient examination to determine the percentage. The protest contains this statement:

"That no sufficient examination of the tobacco was made to ascertain whether eighty-five per cent. was of the requisite size and fineness of texture to be suitable for wrappers, and whether more than one hundred leaves were required to weigh a pound."

All the hands examined in one bale, a representative bale of a lot of four bales (Nos. 2,613 to 2,616), were found to be wholly composed of the higher-grade tobacco. It may be reasonably assumed, therefore, that the bale and the lot were composed exclusively of the higher grade, and as to this lot the result was not affected by the erroneous method; but, except as to this lot, the evidence does

not supply the necessary data for the computation of the percentage. It is not disputed that all the tobacco in all the hands examined was suitable for wrappers, in respect to size and necessary fineness of texture, but there is no legitimate evidence which enables us to determine whether the requisite percentage did or did not exist in any of the bales in controversy, aside from those wholly composed of the higher grade. So far as appears, the importers may have escaped with payment of less duty upon their importation than was actually due. Because the judgment of the court below can only be sustained upon the theory that the burden was upon the government to show that the classification of the tobacco in controversy was lawful, instead of upon the importer to show the contrary, we conclude that the judgment should be reversed. It is accordingly so ordered.

(March 6, 1895.)

SHIPMAN, Circuit Judge. Inasmuch as the supreme court has held in the Schroeder Case, 155 U. S. 124, 15 Sup. Ct. 45, that the burden of proof was upon the importer to show the incorrectness of the collector's ascertainment of the qualities and characteristics of the tobacco, the decision of the circuit court must be reversed. But the opinion in this case properly affirms the construction of paragraph 246 of the tariff act of March 3, 1883, which was given in the Blumlein Case, 5 C. C. A. 142, 55 Fed. 383. I think, therefore, that, with the reversal, the cause should be remanded to the circuit court, with instructions to direct that the rate of duty should be assessed upon the merchandise in the case in accordance with the principles of that decision. The assignment of errors directly presents the question of the proper amount of duty, if the Blumlein decision is affirmed. The burden of proving the inaccuracy of the qualities of the tobacco with respect to size, fineness, and lightness of weight not having been successfully sustained by the importer, the correctness of the collector's estimate must be assumed; and there are, in my opinion, adequate data in the record and in the customhouse papers to enable the collector to reliquidate with accuracy in accordance with the rule that the commercial bale is the unit of classification. In the Soby Case, 49 Fed. 234, and in the various reliquidations since the Blumlein decision, no difficulty was apparently found in the ascertainment from the customhouse documents of the proper amount of duty in accordance with the court's construction of paragraph 246. In my opinion, it is not to be presumed or supposed hereafter that there is any inherent difficulty in a reliquidation.

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AMERICAN FIBRE CHAMOIS CO. v. DE LEE et al.

(Circuit Court, N. D. Illinois. May 4, 1895.)

**1. TRADE-MARK—FIBRE CHAMOIS.**

The words "Fibre Chamois," used to designate a fabric used as interlining for dresses, constitute a valid trade-mark.

**2. INJUNCTION—CORPORATION—PARTNERSHIP.**

The fact that a firm becomes incorporated pending a suit against the copartners for an injunction is no ground for refusing the injunction, where one partner is an active manager of the corporation's business, and the other is not shown to have parted with his interest and control.

**In Equity.** On motion for preliminary injunction.

Bill for injunction by the American Fibre Chamois Company against the firm of De Lee & Dernberg.

Lothrop S. Hodges and Banning & Banning, for complainant.

Moses, Pam & Kennedy, for defendants.

**SHOWALTER**, Circuit Judge. Complainant, a New York corporation, makes a fabric used as an interlining for women's dresses, now widely known and dealt in as an article of merchandise. Complainant marks its said product with the words "Fibre Chamois," averred to be, as applied to said goods, a fanciful and arbitrary mark and designation; and by that mark, and under that name, said goods are known and identified in the world of trade as having been made by complainant. At the time of the adoption of said mark by complainant, said words had never been so used, it is said, in connection with any similar fabric. It is sworn in affidavits presented by defendants that like goods by other makers are now distinguished by marks also used as names; and specimens of such goods marked, respectively, "Fiber Fabric," "Fiberine," and "Buckskin Fibre," were produced at the hearing of this motion. Defendants are merchants in Chicago. It is stated by one of them, in an affidavit, that all these goods are called "Fibre Chamois"; but, in view of other affidavits on both sides, I cannot find, as a fact, that "Fibre Chamois" is a generic name for goods of this class. From the affidavits presented by defendants themselves, as already stated, it appears that these fabrics are known and distinguished, even in defendants' store, and by their own employes, each by its appropriate name or mark, as above. When "Fibre Chamois" is called for in defendants' store, it is there understood that the fabric made by complainant is the article desired by the customer. The alleged ground of action is that defendants, in sales to customers at their store in Chicago, are falsely substituting the product of another manufacturer for that of the complainant. Specific instances, not satisfactorily denied or explained by defendants, are shown in which, at defendants' store, upon calls for "Fibre Chamois," an article similar in appearance, but not made by complainant, was sold and delivered as the fabric made by complainant, to wit, "Fibre Chamois." In one instance, the spurious article was billed to the purchaser as "Chamois Fibre," and on two other occasions the article was billed to the purchaser as "Chamois." The case is like *Enoch Morgan's Sons Co. v. Wendover*, 43 Fed. 420. There, on calls for the product of complainant, a similar article made by another manufacturer was, without explanation, sold and delivered to customers by defendant. In the present instance, on a call, by the name of "Fibre Chamois," for the goods made by complainant, goods of another manufacturer were represented to

be, and were sold as, "Fibre Chamois;" so that here, as may be said also of the case cited, there was a sort of constructive application by defendants of complainant's trade name, or mark, to the goods of another manufacturer. It is argued that the words "Fibre Chamois" are descriptive of the manufactured article, and also that they contain the false representation that said article is chamois leather. Said combined words would not be spontaneously used as descriptive of chamois leather, or of any fabric having the appearance of chamois leather; but, the association of ideas whereby a manufacturer might select and combine these words to mark and distinguish, as made by himself, a fabric having an appearance somewhat similar to parchment, or chamois leather, and useful as an interlining for clothing, can be understood. Many artificial words, or combinations of words, coined or used as trade-marks or trade-names, are suggestive in this way. Assuming that words in a sense descriptive of an article of merchandise may not also, in a given case, have a secondary significance, as marking the origin or manufacture of such article, the words "Fibre Chamois," combined as here, I should say, need not be disallowed as a trade-mark or trade-name. If said words, as here combined, have any sense, as descriptive of the class of goods in question, it is not so pronounced, obvious, and usual as to make said combined words unfit, inappropriate, or misleading, as a name, sign, or mark of origin for complainant's goods, nor will such secondary import interfere with or abridge the use of said words, or either of them, by any person, in any possible way, except as a mark of origin for similar goods. The showing here seems to be that said combined words do in fact have a significance as an arbitrary mark and name whereby the goods made by this complainant are identified and distinguished in the trade as carried on, even in defendants' store, and within the understanding of defendants' employes, from like goods of other makers marked as already mentioned.

The firm of De Lee & Dernberg, it is said, has become incorporated, presumptively, since the bill was filed. Dernberg is shown to be at present an active manager of the business, and it does not appear that De Lee has parted with his interest and control. A preliminary injunction will issue as prayed, upon bond as usual in such cases.

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VAN ORDEN v. MAYOR, ETC., OF NASHVILLE.

BRICKILL et al. v. SAME.

(Circuit Court, M. D. Tennessee. May 4, 1895.)

Nos. 2,862, 2,859.

1. PARTIES TO PATENT SUITS—ACTIONS AT LAW.

A part owner of a patent cannot maintain alone an action at law for infringement, but must join all the co-owners, so as to have the entire legal title represented; for only one suit can be maintained for the same infringement. Nor can a part owner, in such action, make his co-owners parties defendant on the ground that they have refused to join as plaintiffs.

2. SAME—PLEADING—DEMURRER.

The nonjoinder as parties plaintiff of all the part owners of a patent may be taken advantage of by demurrer when the defect appears on the face of the declaration.

These were actions at law, brought, respectively, by Edward Van Orden and William A. Brickill, against the mayor and city council of Nashville, to re-



cover damages for the infringement of letters patent No. 81,132, issued to said Brickill, August 8, 1868, for an improvement in feed-water heaters for steam fire engines. The cases were heard upon demurrer to the declaration because of nonjoinder of parties plaintiff.

J. W. Gaines and Everett McKins, for Van Orden.

Raphael J. Moses, James A. Hudson, and J. W. Bonner, for Brickill et al.

Frank Slemmons, Claude Waller, and Lellyett & Barr, for mayor and city council of Nashville.

CLARK, District Judge. These are actions at law brought for alleged infringement of patent. In the first case Van Orden sues as the assignee of an undivided fourth interest in the invention, and makes the city of Nashville, with Brickill, the patentee, and others, defendants, it being averred that Brickill still owns a one-fourth share of the patent, and the other defendants (except the city) the remaining half thereof. The infringement alleged and damages claimed are against the city only, and the reason stated for making the owners of the other undivided parts defendants, instead of joining them as coplaintiffs, is that they "have declined to join with the plaintiff." In the second case Brickill and those made defendants with him in the first case, as owning three-fourths of the patent right, sue the city and Van Orden, stating that Van Orden declines to join with them as a plaintiff in this suit.

This condition of things stands without explanation, further than that they decline to join in one suit. The demurrer in each case raises the question whether a party owning less than the whole interest can maintain an action at law for infringement without joining the other co-owners as plaintiffs. It is quite apparent that, if each part owner may sue separately, as many as four suits might have been brought upon the facts in these cases, and the number that might be maintained against a single defendant for an infringement in any case would be limited only by the parts into which the patent right may have been divided and subdivided. It is not to be supposed that a rule so contrary to all analogy exists, unless there is something peculiar to this class of cases. In *Gayler v. Wilder*, 10 How. 493, Chief Justice Taney, speaking of the nature of a patent right, said: "Now, the monopoly granted to the patentee is for one entire thing. It is the exclusive right of making, using, and vending to others to be used, the improvement he has invented, and for which the patent is granted. The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it, cannot be regulated by the rules of the common law. It is created by the act of congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes."

And, referring to assignments of sectional or part interests, and their effect, it was observed: "For it was, obviously, not the intention of the legislature to permit several monopolies to be made out of one and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his rights, used the invention without authority, to be harassed by a multiplicity of suits, instead of one, and to successive recoveries of damages by different persons holding different portions of the patent right in the same place."

Whatever may be the rule elsewhere, and in respect to other rights, I think it is settled that in an action at law for infringement in the courts of the United States a part owner cannot sue alone, but must join all the co-owners, so as to have the entire legal title represented by the plaintiff or plaintiffs, and that but one suit can be maintained for the same infringement. *Blanchard*

v. Eldridge, 1 Wall. Jr. 337, Fed. Cas. No. 1,510; Gayler v. Wilder, *supra*; Waterman v. Mackenzie, 138 U. S. 255, 11 Sup. Ct. 334; Moore v. Marsh, 7 Wall. 515; Curt. Pat. §§ 344, 347. In Waterman v. Mackenzie, Mr. Justice Gray, giving the opinion of the court, said: "The patentee or his assigns may, by instrument in writing, assign, grant, and convey either (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right, under the patent, within and throughout a specified part of the United States. Rev. St. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers,—in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone." A transfer of the second kind is the one which the court is here dealing with, and Waterman v. Mackenzie was approved and followed in Pope Manuf'g Co. v. Gormully & Jeffery Manuf'g Co., 144 U. S. 251, 12 Sup. Ct. 641. This point was made and sustained by the court below in Campbell v. Haverhill, 155 U. S. 610, 15 Sup. Ct. 217, but the supreme court of the United States held that the objection had been waived, and that court, on the merits, decided for the first time that the statute of limitations of the several states applies to actions at law for the infringement of letters patent. In an action at law, in any character of case, that a joint owner of a right or fund can sue his co-owners as defendants, instead of joining them as plaintiffs, as is here done, I am not by any means prepared to admit. And the objection of nonjoinder may be taken advantage of by demurrer where the defect appears on the face of the declaration. Farni v. Tesson, 1 Black, 309. For the reasons indicated, the first cause assigned in the original demurrer is sustained, and both suits dismissed, with costs.

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#### HEARFIELD v. BRIDGE et al.

(Circuit Court, N. D. California. April 8, 1895.)

No. 11,662.

#### 1. EXECUTORS AND ADMINISTRATORS—FORECLOSURE OF MORTGAGES—PARTIES.

Under the California statute which authorized actions founded on contracts to be maintained against executors and administrators where such actions could have been maintained against their decedents, the widow and heirs of a deceased mortgagor were not necessary parties to an action against his administrator to foreclose the mortgage. Bayly v. Muehe, 3 Pac. 487, 4 Pac. 486, and 65 Cal. 345, followed.

#### 2. COURTS—FOLLOWING STATE PRACTICE—QUIETING TITLE.

Though the federal courts may not be bound by a state law authorizing an action to foreclose a mortgage to be maintained against the administrator of a deceased mortgagor without joining his widow and heirs, they will not, in an action to quiet title, overturn a title acquired under a foreclosure in the state courts, to which the widow and heirs were not parties.

#### 3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—FORECLOSURE OF MORTGAGES OF DECEDENTS.

Though, under the California statute which authorized actions founded on contracts to be maintained against executors and administrators where such actions could have been maintained against their decedents, the widow and heirs of a deceased mortgagor were not necessary parties to an action against his administrator to foreclose a mortgage on community property, they were not deprived of their property without due process of law.

Bill to quiet title brought by David Hearfield against I. W. Bridge and others.

Boyd & Fifield, for complainant.

Taylor & Goodfellow, for respondents.

McKENNA, Circuit Judge. This is an action to quiet title. Both parties derive title from John H. Daly, who died after executing the mortgage hereinafter mentioned, leaving surviving him a wife, Anne Daly, and certain heirs. Some of these died, the others succeeding to their interests, if they had any. The plaintiff derives title from Mrs. Daly and these heirs; the defendants, through a mortgage executed by Daly in his lifetime, and foreclosure proceedings thereon after his death. His administrator was alone made a party to the foreclosure suit. The contention of the plaintiff is that this suit did not affect the interests of Mrs. Daly and the heirs, and that the defendants' grantors received no title by the sale. The statute of the state of California, at the time of the action, provided that "all actions founded upon contracts may be maintained by and against executors and administrators in all cases in which the same might have been maintained by and against their respective intestates." Act May 1, 1851, p. 473. And the supreme court of the state, in *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, and 4 Pac. 486, decided that under the statute the heirs of a deceased mortgagor were not necessary parties to an action against the administrator. The facts were, as stated by Justice Ross, as follows: One Baker owned a tract of land which he mortgaged to one Livermore, and then died intestate, leaving surviving him certain heirs at law. An administratrix of his estate was appointed, to whom the mortgage claim was presented, and the same was duly approved and allowed. Livermore then commenced suit against the administratrix to foreclose the mortgage. To this suit none of the heirs were made parties. The proceedings in the action were regularly had and taken, and resulted in the entry of a decree of foreclosure and sale in the usual form, the issuance of an order of sale, the sale of the mortgaged premises pursuant to its direction, and the execution of the sheriff's deed in due course of time. "The question is," the learned justice said, "did the title to the property pass to the purchaser under the foreclosure sale?" The answer was that it did pass. Counsel for plaintiff recognizes this case as an impediment to his views, and squarely meets it by contending (1) that it opposes decisions made before and after it, and, quoting and applying the language of the supreme court of the United States of another case, counsel say, "It stands out, as far as we are advised, in unenviable solitude and notoriety;" (2) that it is opposed to the general principles of equity jurisprudence, and is not, therefore, authoritative to the independence of a federal court; (3) if the statute is properly construed by it, the statute is unconstitutional.

These contentions were supported by counsel in able oral and written arguments, to which I have given careful consideration.

That Bayly v. Muehe is opposed to precedent decisions we may disregard, if it is not opposed by subsequent ones, and the contention that it is not justified. In *Monterey Co. v. Cushing*, 83 Cal. 507, 23 Pac. 700, it is cited to justify a proceeding to condemn land brought by the county of Monterey against an executor of an estate. It is obvious that this is a more extreme application of the statute than the foreclosure of a mortgage against an estate. A mortgage is an obligation of a deceased, and in fact as well as in potentiality of law could have been maintained against him. Condemnation proceedings against an executrix have no connection with her testator whatever. They are instituted subsequent to his death, and against property which, according to counsel, had become vested, by operation of law, in heirs. It does not appear from the decision in *Monterey Co. v. Cushing* whether the land condemned in that case was or was not community property, or that this would have made any difference. The right of an heir, or the right of a wife, even, though differently derived, would have been equally vested, as far as the county was concerned. Bayly v. Muehe was again cited and affirmed in *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1085. The action was brought to vacate a judgment of foreclosure and all proceedings thereunder, including the sale and conveyances. One of the points made was that the plaintiffs, who were heirs of Lemuel P. Collins, were not made parties to the suit which was brought against his administrator. The court said, "As heirs at law of Lemuel P. Collins, these plaintiffs were not necessary parties to the action to foreclose," and cited Bayly v. Muehe and *Monterey Co. v. Cushing*, and, continuing, said, "and whether or not they were made parties defendant in that action is of no moment." The decision is unmistakable, and I have not been referred to any case which, directly passing on the question, and under the same conditions, reverses or modifies it. Counsel for plaintiff refers to *Burton v. Lies*, 21 Cal. 88; *Enos v. Cook*, 65 Cal. 178, 3 Pac. 632; *Association v. Chalmers*, 75 Cal. 332, 17 Pac. 229; and other cases. These cases have elements in them which are not in Bayly v. Muehe and the cases quoted as supporting it, *supra*, and that which appears inconsistent between them and the latter must be accounted for and reconciled by these differences. If, however, the rule that all persons interested in the mortgaged property must be made parties, finds in Bayly v. Muehe and *Collins v. Scott* arbitrary exception of surviving wives and heirs in an action to foreclose a mortgage made by a testator or intestate, these cases also fix the exception as the law of California; and, as the exception has been invariably applied to all the cases falling within it, I am bound by it, as a rule of property. If the court had wavered in the application of the exception, if it be an exception, I might exercise an independent judgment, as counsel urges I may when state decisions are inconsistent. But, as I have said, the court has not wavered; and regarding the practice which it justified, and the titles obtained under it, to reject its authority now would be absolutely ruthless.

To the second objection made, that, the question being one of general equity jurisdiction, the California cases furnish no rule for a federal court, the reply is that this might be tenable if it was attempted in this court to foreclose a mortgage without making a surviving wife or heirs parties to the action. This, however, is very different from disregarding a judgment, and a title acquired under it, rendered in an action in the state court, to which, under the state law, the proper persons were made parties. This is so obvious that it need not be dwelt on.

The third point urged by plaintiff, that the California statute, as interpreted by *Bayly v. Muehe*, is unconstitutional, as depriving a person of property without due process of law, is also untenable. What is community property, how derived, how it shall descend, and what subject to, are matters of state policy and regulation. The California law invested Daly with the power to incumber the community property of himself and wife. If it could give this power, it was certainly competent to provide that it should continue after his death, and to provide how it could be made effectual to the holder. I have assumed that the property was community property, and hence have not considered the contention of defendants that it was Daly's separate property. The complainant's bill will be dismissed.

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**TROY LAUNDRY MACH. CO. et al. v. AP REES et al.**

(Circuit Court of Appeals, Second Circuit. April 22, 1895.)

No. 114.

**1. PATENTS—WHAT CONSTITUTES INVENTION.**

There is no invention in producing an ironing machine having a heated hard roller and two soft-pressure rollers with parallel lines of contact, some distance apart, so as to form an enlarged ironing surface upon that part of the fabric stretched between them; it appearing that there were old ironing machines having a hard roller and one soft-pressure roller, and other old machines having a large heated roller with three small hard rollers disposed upon its surface, with parallel lines of contact.

**2. SAME—IRONING MACHINES.**

The Baldwin patent, No. 204,701, for an improved ironing machine, held void as to its first and second claims for want of patentable invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill by the Troy Laundry Machinery Company and another against William Ap Rees and another, for infringement of the first and second claims of letters patent No. 204,701, issued June 11, 1878, to James F. Baldwin, for an improved mangle or ironing machine. The circuit court dismissed the bill for want of patentable novelty in the combination. Complainants appeal.

Esek Cowen, for appellants.

Robert H. Parkinson, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Prior to Baldwin's invention, an apparatus called the "French" ironer was commonly used, which consisted essentially of a heated cylinder and a stationary steam-heated box, having a large concave surface adapted to the periphery of the cylinder. The fabric to be ironed passed between the stationary box and the cylinder. The machine was slow in operation, had an extended ironing surface, and the friction wrinkled the fabric. Other machines had a hard, hot, ironing roll, and one or more cold or heated hard-pressure rolls, but the objection to this class of machines was that if the articles to be ironed had seams or hems or buttons, or were of unequal thickness, the inequalities were torn or crushed between the unyielding surfaces. The devices described in the Taylor & Cohn patent, No. 97,245, dated November 23, 1869, and in the Shafer patent, No. 21,450, dated September 7, 1858, are examples of this class. A heated hard roll, with an elastic pressure roll, thus utilizing the ironing board of the laundress, was also used, which prevented the destructive action of the hard rolls. An example of such a machine is found in letters patent to Frank A. Desloge, No. 91,095, dated June 8, 1869. The patentee says in his specification that the objection to pre-existing ironers with elastic rolls is that "the point of contact between the polishing and elastic feed or pressure roll is only a single line, of such limited width that practically little ironing surface is obtained, and the machine, in effect, is simply a heated mangle." He further says that the object of his invention was to combine the advantages of the heated polishing and soft-pressure rolls and the extended ironing surface of the French machine, and he does this by the use of a single heated polishing roll, and two or more pressure rolls having an elastic surface. These pressure rolls are at a little distance from each other, and bear upon the heated cylinder in parallel lines, so that they retain the articles in contact with quite a large intermediate ironing surface.

The first two claims of the patent are as follows:

"(1) The within-described improvement in ironing, consisting in subjecting the articles to the action of a heated cylinder and elastic-faced rolls, which bear upon the cylinder on parallel lines, y, y, and retain the articles as they pass between said lines in contact with the intermediate heated ironing face, substantially as set forth.

"(2) The combination of the heated cylinder a and elastic-faced rolls, d, d'', having parallel points of contact with the cylinder, and operating to stretch the goods over the ironing surface between said points, as set forth."

The circuit court, in discussing the validity of the first claim, said that, prior to the date of the Baldwin invention, it was an old device to make an elastic-faced roll, "in order that at every line of contact there should be one hard and one yielding surface." The correctness of this statement is admitted by the defendants' counsel, who also concedes that, if the Baldwin improvement merely consisted in double elastic rolls or two pairs of such rolls, it would be merely a repetition of the Desloge invention. But he says the gist of the Baldwin invention was the introduction between two elastic-faced rolls of the intermediate surface of a large smooth-faced heated ironing roller, over which intermediate surface the cloth was car-

ried, so that a large portion of the surface of the ironing roller was used for ironing purposes. He relies upon the use of this space for ironing, as a patentable advantage over the use of a narrower space, or merely the line of contact between the pressure and the heated roller, so that the question under the first claim, is whether this enlarged ironing surface, and the holding of the article to be ironed throughout the extent of surface between the parallel lines of the elastic roller, was a patentable invention. A single ironing heated hard roller and a single elastic roller were old, and the importance of the use of the yielding ironing board of the laundress was therefore well known. A single hard-heated roller and two or more hot or cold hard-pressure rollers were old, and there was no invention in putting an elastic jacket upon the pressure rollers.

The ironing surface of a single-heated roller, and the pressure surface of two or more hard rollers, had been abundantly shown, and the single point which was before the patentee in the improvement of the first claim was how to place his double-pressure rollers to the best advantage,—whether to have two or three, or to be content with two, and, if two only were used, how near together or how far apart they were to be placed. But the expert for the complainant, as well as its counsel, lays great stress upon the fact that in the creation of a large area of ironing surfaces, by means of the separated pressure rolls, there was a departure from the principle of pre-existing machines.

In view of the Leonard machine, which was made in 1873 or 1874, and was in actual use and did "fairly good work" on sheets and similar articles, and which consisted of a large steam cylinder about 12 or 14 inches in diameter, with six small 3-inch hard rollers arranged upon the outer surface, placed within about 1 inch of each other, and so constructed that a part of them could be taken out and have the remaining ones further apart, there does not seem to have been a substantial newness of principle in the Baldwin machine. Leonard had the idea of holding the article upon a large area of heated surface, but the exact mechanical relations which the cylinders should bear to each other could probably have been improved. Inasmuch as the patentee had before his eye the old heating hard roller, and the old soft roller, and the old hard-pressure rollers in pairs or in series, and as it is conceded that no genius was required in the substitution of soft for hard rollers, the particular spot in which the two or more elastic rollers should be placed, in order to produce the most efficient contact with the ironing surface, was the office of the mechanic. The reason for the use of two or more, rather than of one, was obvious; and it was also obvious that they should not be placed side by side, but should be separated. The character of mind which was required for this part of the improvement has been overestimated. The selection of the proper size of the different rollers, and of their proper location with reference to each other, was a work requiring skill, but it was the skill of the mechanic, and not of the inventor.

The appellant next insists that the second claim describes, as a part of the invention, that the elastic-faced rolls operate to stretch

the articles over the ironing surface between the parallel points of contact with the cylinder; that the means for stretching consisted in the increased diameter of one of the small rolls, whereby the speed of the rolls was differentiated; and that the stretching feature gave patentability to the claim. While the means by which stretching is produced are not pointed out in the specification, it is said that any mechanic would know that it could be effected by giving an increased diameter to one roll, or to make one roll revolve more rapidly than the other. The history of the Baldwin patent does not favor this construction of the claim. The stretching suggestion was introduced in the last amendment which was presented to the patent office. A patent for means by which a differential velocity was given to the pressure rolls was applied for, as a new invention, by Baldwin, on April 15, 1880, and was granted February 14, 1882. It is thus apparent that the rolls in the machine of the first patent were not of different diameter, and had the same velocity. The validity of the second patent was examined in the suit of Baldwin v. Haynes, 28 Fed. 99, in the First circuit, and was decided by Judge Colt adversely to it, as appears from his opinion offered in evidence by the complainant, because the improvement simply applied an old and obvious remedy to the defect of the mangle of the first patent. Whatever stretching there was in the first Baldwin machine was produced by the action of two elastic-faced rolls of the same size, and moving at the same rate of speed, upon the article, and, as has already been said, the combination of hard and elastic rolls constituted no invention. The differential speed of the pressure rolls seems to have been a familiar idea. It is found in the unpatented Leonard machine, in which the last small roll was speeded faster than the others, in order to stretch the articles. The decree of the circuit court is affirmed, with costs of this court.

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KENNEDY v. PENN IRON & COAL CO. et al.

(Circuit Court, N. D. Ohio, E. D. April 15, 1895.)

No. 5,366.

**1. PATENTS—PRELIMINARY INJUNCTION.**

Where long acquiescence in a patent has been shown, and infringement is clear, complainant's right to a preliminary injunction is not taken away by the fact that he has, to some extent, issued licenses for the use of the invention, when it appears that he has made it his business to personally superintend the construction of the device where licenses were not issued.

**2. SAME—NONRESIDENT DEFENDANT.**

A nonresident of the district may be enjoined from committing acts of infringement within the district when he comes into it for that purpose, although he may not be subject to service of process therein, or to be sued as a defendant.

**3. SAME—HOT-BLAST STOVES.**

The Kennedy patent, No. 244,997, for an improvement in constructing hot-blast stoves, held valid on motion for preliminary injunction.



This was a suit in equity by Julian Kennedy against the Penn Iron & Coal Company and Frank C. Roberts for alleged infringement of a patent relating to the construction of fire-brick, hot-blast stoves. Complainant moved for a preliminary injunction.

Thomas W. Bakewell, for complainant.

William L. Pierce, for defendants.

RICKS, District Judge. This case is before the court upon a preliminary injunction, which the plaintiff prays may be granted him, restraining the defendant the Penn Iron & Coal Company from constructing fire-brick, hot-blast stoves, which he claims are an infringement of his letters patent, No. 244,997, dated August 2, 1881. The plaintiff relies for his claim for an injunction—First, upon the strong presumption of the validity of his patent arising from a long-continued and general public recognition; second, from the deliberate infringement of the defendant; third, from complainant's promptness and diligence in asserting his rights, and the peculiar circumstances of the case, under which a preliminary injunction, while of great benefit to the plaintiff, would work no real hardship to the Penn Iron & Coal Company. The complainant issued his first license under his patent in 1881. During the last 14 years, according to the affidavits in support of the motion, iron manufacturers and furnace men have very generally conceded and recognized the validity of said patent, and its value as a new improvement in constructing hot-blast stoves. I am satisfied, from the affidavits of the experts, and practical furnace men, that the complainant's patent met a want which was long recognized. Hot-blast stoves, as theretofore constructed, built in regular, horizontal courses of brick laid in mortar, contended with difficulties, growing out of the intense heat to which they were subjected, which could not be overcome. The brick were frequently forced out of their alignment, so as to protrude inwardly, impair the smooth inward surface of the hot-blast cylinder, causing it to catch dust and dirt, and necessarily to somewhat impede the free and easy flow of the air sent through the heated cylinders. These difficulties seemed to be insuperable. They made the hot-air stoves of shorter life, more expensive to take care of, and less satisfactory in their practical working. Kennedy's invention overcame all these difficulties. He did this, as stated in the first claim of the patent in suit, by securing vertical alignment to the flues, by building them with bricks having a symmetrical horizontal section, and laid with horizontal courses, breaking joint in all directions laterally. By this process, workmen were enabled to build these stoves without any special care or skill, and easily secure a perfect vertical alignment of the flues, altogether preventing the matter of creeping of the bricks, so that the flues will maintain themselves straight without internal projections, unaffected by the expansion and contraction of the great heat and cold to which they are subjected. The bricks can expand freely in a vertical direction, and cannot creep laterally, with reference to each other.

This patent is not anticipated by the several patents offered by the defendants, nor by the previous and long-established custom of

laying brick in horizontal courses, breaking joint in the direction of the strain to be overcome. The resistance of this sort of strain is not what Kennedy undertook to overcome. His construction contemplates freedom to expand, but to do so without disturbing or altering the original relative positions in which the bricks are placed. I think the defendants' proposed construction is a clear infringement of complainant's patent, both of the hexagonal brick, and of those described in Fig. 4 of the drawings of the patent.

I see no reason why an exception should be made in this case to the rule generally adopted in this district, where the infringement is plain, and the plaintiff's patent has either been established by the adjudication of a circuit court, or by such long public acquiescence as the courts recognize as a sufficient reason for relief such as the plaintiff now seeks in this case. The fact that the plaintiff has issued licenses, to some extent, does not compel him to be satisfied with such license fee as a remedy for infringement. It appears that the plaintiff has made it his business to personally superintend the construction of these furnaces, where licenses were not issued, and I think he ought to be permitted to carry on his business as he has heretofore done.

While it is true that Roberts is not a resident of this district, it is nevertheless true that he may be enjoined in this district from infringing the plaintiff's patent by the construction of a hot-air stove such as is proposed in the works of the Penn Iron & Coal Company. This court has heretofore held that, though a defendant may not be subject to service of process in this district, and be sued as a defendant, he may be enjoined from committing acts of infringement in the district, when he comes in here for that purpose. It would be strange if such power did not exist in a court. The preliminary injunction may therefore issue, as prayed for in the bill.

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BARNEY DUMPING-BOAT CO. v. NIAGARA FIRE INS. CO.

(Circuit Court of Appeals, Second Circuit. March 18, 1895.)

1. MARINE INSURANCE—"SUE AND LABOR" CLAUSE.

An insurance company is not liable under the "sue and labor" clause of a marine policy for expenses incurred by the assured in sending out a tug to look for insured dumping scows, which were reported to have gone adrift, but which in fact were at the time tied up in a safe place.

2. SAME—CONTRACT.

The agents of a marine insurance company were notified by the owners of certain insured scows that the same were reported to be adrift, with the inquiry what should be done about it. The agents replied that, if the scows were adrift, the best thing was to send a tug out for them. *Held*, that this did not constitute a contract, outside the terms of the policy, which would render the company liable for the tug's expenses, it appearing that the scows had not in fact gone adrift, but were tied up in a safe place.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the Barney Dumping-Boat Company against the Niagara Fire Insurance Company to recover the amount of

certain expenses incurred in sending out a tugboat to look for some of its scows which were insured by defendant, and which were reported to have gone adrift. In the district court the libel was dismissed, and the libelant appeals.

The policy of insurance contained the following provisions: "In case of loss, damage, detriment, hurt, or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants, and assigns, to sue, labor, and travel for, in, and about the defense, safeguard, and recovery of the said vessel or any part thereof, without prejudice to this insurance, and to the reasonable and just charges thereof this company will contribute in proportion as the amount herein insured bears to the valuation of said vessel as expressed in this policy. No claim for partial loss or particular average shall in any case be paid unless the amount of such claim equals or exceeds the sum of \$100 on each vessel, and said sum of \$100 is to be deducted therefrom, in lieu of average on each vessel." The insurance was effected through Carpenter & Baker, who, as Mr. Carpenter testified, were the local marine agents of the defendant company for New York, having charge of the marine business in reference to insurance effected through that company, "subject to approval." The barges were chartered by the libelant company to the street cleaning department of New York City. On the morning of January 30, 1894, the street-cleaning department received notice from the life saving station at Rockaway that the Barney Dumping Company's boats were adrift out at sea. The street-cleaning department notified the dumping company of the receipt of this information, and the latter then called up by telephone Carpenter & Baker, and communicated to them the information received. The secretary of the dumping company testified that he simply reported the information that two dumpers had gone adrift, and asked the agents what should be done about it; and that the latter replied directing them to get the best tug they could, and send for the barges immediately. Mr. Carpenter, with whom the conversation was had, testified that he said in answer to the question: "Certainly, if those boats are adrift, the best thing is to send a tug to look for them." The dumping company accordingly employed a tug, which spent 48 hours in searching for the boats, but did not find them. It was afterwards ascertained that the boats had not in fact gone adrift, but were tied up in a safe place on the shore of Staten Island. The bill for the hire of the tug was presented to Carpenter & Baker, and they refused to pay it, on the ground that the insurance company was not liable under the policy.

Peter S. Carter, for appellant.

Anson B. Stewart, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Libelant cannot recover under the "sue and labor" clause of the policy, as there was no necessity to defend, safeguard, or recover the property. Nor did the instructions of Carpenter & Baker, even if they be considered agents of the respondent, authorize the sending of a tug to look for the boats, since those instructions were qualified with the proviso that such action should be taken only if the boats were adrift.

The decree of the district court is affirmed, with costs.

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GABRIELSON v. WAYDELL et al.

(Circuit Court, E. D. New York. April 26, 1895.)

1. RES JUDICATA—JUDGMENT ON DEFAULT.

Plaintiff recovered a judgment, in a state court, against defendant, which was reversed on appeal, and a judgment by default afterwards.

entered by defendant, for costs. *Held*, that such judgment was not a bar to a new action by plaintiff, for the same cause, in the federal court.

1. SHIPPING—RESPONSIBILITY OF OWNERS FOR MASTER'S ACTS.

The master of a vessel, though in a sense an officer of the law for maintaining discipline, derives all his authority as such from his appointment by the owners, whom he represents as to everything about the crew, and such owners are responsible for failure of the master to give a seaman proper care and cure in sickness, or for his violent maltreatment of a seaman while sick.

2. SAME—GROUND OF LIABILITY—STATUTE OF LIMITATIONS.

An action for damages for violent maltreatment of a seaman by the master is based rather upon breach of the duty of good treatment and care than upon violation of the person, and a statute limiting the time for bringing actions for assault and battery does not apply.

This was an action by Charles G. Gabrielson against Frederic Waydell and others, owners of the bark Rebecca Caruana, to recover damages for injuries done to the plaintiff by the master of the bark. A verdict was rendered for the plaintiff. Defendants moved in arrest of judgment.

George P. Gordel, for plaintiff.

Robert D. Benedict, for defendants.

WHEELER, District Judge. The principal question in this case is whether the defendants, as owners of the bark Rebecca Caruana, are liable to the plaintiff, a seaman, for injuries violently done to him when sick, by the master, on the high seas. The plaintiff brought suit in the courts of the state for the same injuries, and a judgment in his favor was reversed by the court of appeals as not maintainable against the defendants. *Gabrielson v. Waydell*, 135 N. Y. 1, 31 N. E. 969. A judgment on default was afterwards taken by the defendants in the court below for their costs. That judgment is set up and relied upon here as a bar to this suit, or a conclusive authority against it, with the statute of limitations of the state. That the judgment is not a conclusive bar is clear, for it was for costs only on default, and not upon the merits. Not being conclusive as a bar, as the cause of action did not accrue within the state, it can be nothing more than an authority of a high court entitled to great respect. As such it was based upon conclusions reached by a bare majority against a strong dissent, and in express repudiation of principles relating to agency and service held in somewhat analogous cases by the supreme court of the United States, which this court is, of course, bound to follow. *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184. By the statutes of this state, actions for assault and battery are limited to two years. Code, § 384. That such statute applies to the courts of the United States sitting in the state seems to be well settled. *Metcalf v. City of Watertown*, 153 U. S. 671, 14 Sup. Ct. 947; *Campbell v. Haverhill*, 155 U. S. 610, 15 Sup. Ct. 217. So, if this was such an action, as it was not brought within two years, that statute would seem to be a bar. But the action may be considered as, and recovery has been had, rather for breach of duty of good treatment and care than for violation of the person, and as such it does not seem to be barred.

That the master of a ship at sea is agent for the owners as to everything about the crew, or that the seamen are entitled to care and cure in sickness from disease or injury, at their expense, within reasonable bounds, is not disputed or disputable. *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047; *Peterson v. The Chandos*, 4 Fed. 645; *Desty*, Adm. § 154. What was to be done for the plaintiff in this behalf must be done by the captain, as the agent of the defendants, in command of their ship for them. If in any case an agent could represent the principal about the treatment of a servant, a shipmaster would seem to represent the owners about the treatment of a seaman. In *Croucher v. Oakman*, 3 Allen, 185, the owners were held liable to the mate for the consequential damages from shooting by the master. In *The A. Heaton*, before Mr. Justice Gray and Judge Colt in the circuit court for the district of Massachusetts, 43 Fed. 592, the schooner was held liable to a seaman for the negligence of the captain about the rigging, against an argument for the owners that they were not liable for the acts of the captain. In the opinion by Mr. Justice Gray, the authorities, including the cases afterwards disregarded by the court of appeals, as before mentioned, were thoroughly reviewed; and the principles of the latter, as well as of the others, were applied. To wrongfully make a seaman sick, or sicker, would seem to be as much of a breach of the duty to cure as wrongful neglect to cure existing sickness would be.

But the counsel for the defendants insists in argument that shipmasters are, beyond being the agents of the owners, officers of the law for maintaining discipline and securing safety, and that the personal treatment of the seamen by the master on board is done in his office, and not in his agency. Many authorities, ancient and modern,—rather more of the former than of the latter,—are cited to show this official character of the master; and also that his conduct towards the seamen has always been regarded as within his office by the absence of any statement of liability of the owners on account of his agency for it. *Cleirac*, 8; *Molloy*, 322; *Pardessus*, 81; 1 *Boul. P. Dr. Com.* 383; *Abb. Shipp.* 163; 2 *Pars. Shipp.* 391; 1 *Mande & P. Shipp.* 127; *MacL. Shipp.* 121. *Sunday v. Gordon*, 1 *Blatchf. & H.* 574, Fed. Cas. No. 13,616, which was brought against the owners, and in which they were held not to be liable, for damages for wrongfully bringing the plaintiff off from the coast of Africa, and for wages afterwards, is cited as being nearest to this. In it *Betts, J.*, said:

"If the libelant was tortiously brought off from Africa, that was exclusively the act of the deceased master. There is no evidence that he was authorized to obtain by hiring, force, or stratagem negroes on the coast, for the purpose of bringing them to this country, or that the owner afterwards approved of the act; and the owner accordingly would not be chargeable for any act of trespass, false imprisonment, or kidnapping perpetrated by the master."

This act of the master, from which the owners were so exonerated, was begun wholly outside of the ship, and was perpetrated upon one not connected with the ship, but who was wholly outside of the business of the ship, and of the master's agency or

office. The remarks quoted seem to imply, rather than to deny, that the owners might be liable for similar wrongs done by the master to those within the scope of his authority. While the master is in some sense an officer, and is often referred to as such in authorities and cases of the sea, he is appointed to his place solely by the owners, and what is called his official capacity seems to be only the large scope of authority going with the appointment from the policy and necessities of the case. By whatever name the authority of the master may be known, it appears to come from the owners. That cases were not brought by seamen for acts done under this authority shows the understanding of the profession, which is of great weight, but does not show what would have been done with them if they had been brought. Actions upon the liability of principals for acts done by agents placed over others are of comparatively modern origin, although the principles underlying them are fundamental; and these principles may have slept, for want of being brought into application, as well in this class of cases as in others. Motion overruled, and let judgment be entered on the verdict.

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THE ADVANCE.

THE ALLIANCA.

THE SEGURANCA.

THE VIGILANCIA.

HIGGINS et al. v. ATLANTIC TRUST CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

**MARITIME LIENS—INSURANCE PREMIUMS—STATE LAWS—SUBROGATION.**

Certain New York insurance brokers procured from English insurers, through English brokers, policies upon ships owned by an American steamship company. The company having failed to pay the premiums, the New York brokers were allowed to retain the policies, and finally, after the premiums were many months overdue, to cancel and surrender them. They thereupon, from their own funds, remitted the premiums due, to the London brokers, and within 30 days thereafter filed specifications of lien under the New York statute, which gives a lien upon vessels for certain debts, including insurance premiums, contracted within the state, provided that specifications of lien be filed within 30 days after the debt is contracted. Laws 1862, c. 482, as amended by Laws 1886, c. 88. *Held*, that the New York brokers obtained no lien, for, if they made the payment by request of the steamship company, it was merely a loan to that company, which was not brought within the statute by the fact that it was for the purpose of paying a debt for insurance premiums; and if, on the other hand, the New York brokers were sureties for the steamship company, their payment of the premiums would merely subrogate them to the rights of the English brokers, who had no lien whatever. 61 Fed. 507, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by A. Foster Higgins, William Krebs, John D. Barrett, John H. Gourlie, James B. Dickson, and Stephen Loines against the steamships Advance, Allianca, Seguranca, and Vigilan-

cia, the Atlantic Trust Company, trustee, claimant, to enforce an alleged lien under the New York statute. Laws 1862, c. 482, as amended by Laws 1886, c. 88. The circuit court dismissed the libel. 61 Fed. 507. Libelants appealed.

Robert D. Benedict (H. Putnam, of counsel), for appellants.  
Carter & Ledyard, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is one of four causes in which the question is whether the libelants acquired a lien against certain vessels belonging to the United States & Brazil Mail Steamship Company. They were heard together in the district court, the evidence in one being treated as the evidence in the others, and the respective libels were dismissed. The appeals from the decrees dismissing the libels have been argued together in this court, and the four causes may be conveniently considered as one for the purpose of disposing of the questions presented.

The lien claimed by the libelants is founded upon the New York statute "for the collection of demands against ships and vessels" (Laws 1862, c. 482, as amended by Laws 1886, c. 88), which, among other things, provides that whenever a debt amounting to \$50 or upwards shall be contracted by the owner "on account of the insurance or premiums of insurance of or on" the vessel, such debt shall be a lien upon the vessel; but in all cases such debt shall cease to be a lien upon the vessel unless the person having the lien shall within "thirty days after the said debt is contracted" cause a specification of such lien to be filed, duly verified, in the clerk's office of the county in which the debt has been contracted. The libelants, insurance brokers at New York City, had procured through Tyson & Co., insurance brokers in London, previous to the fall of 1892, several policies of insurance for the steamship company covering risks upon its vessels, upon which, at the time the policies were obtained, premiums became due and payable from the steamship company, either to Tyson & Co., or to the libelants, aggregating a large debt. The steamship company was dilatory in paying the premiums, and allowed the libelants to retain the policies, in order that if a loss happened within the policies the insurance could be collected, and the premiums deducted therefrom, and also in order that the libelants, if they saw fit, might at any time cancel and surrender the policies, in which event a considerable sum for unearned premiums would be restored by the underwriters. In February, 1893, after unsuccessful efforts to obtain payment of the premiums from the steamship company, the libelants canceled the policies, and remitted to Tyson & Co. the amount of the premiums, less that of the unearned premiums. Within 30 days thereafter, the libelants filed specifications of lien against several of the vessels of the steamship company insured by the policies, among them one against the *Advance*. Inasmuch as the debt for the insurance was contracted several months before the filing of the specifications of lien, instead of within 30 days, the theory that the lien survived seems to be so

destitute of any color of merit as hardly to justify discussion. In deference, however, to the argument of the learned counsel for the libelants, we will consider his contention. It is insisted (1) that the payment made by them to Tyson & Co. in February, 1893, was made at the request of the steamship company, and their debt accrued at that time; and (2) that the libelants were sureties for the payment of the company's debt to Tyson & Co., and the payment was made by them in discharge of their obligation as sureties; and it is argued that in either event the case for the libelants is within the statute. It is sufficient to dispose of the first contention that the evidence does not establish that the payment was made at the request of the steamship company. The facts were, the libelants made it because Tyson & Co. considered them personally liable for the premiums, either primarily or as guarantors. They were apprehensive that they might have to respond, and they hoped by making the payment to recover it by enforcing a lien against the vessels for the amount. The circumstances of the company were so desperate that it could no longer carry the insurance, and the only resource of the libelants was to save what they could out of the debt owing by the company to them, or to Tyson & Co., by canceling the policies and obtaining the unearned premiums. But if the money was paid for the steamship company, at its request, to Tyson & Co., the libelants not being liable to Tyson & Co. themselves, the debt for insurance was not contracted then. It had existed for months, and the only debt which accrued to the libelants was one for money loaned. It certainly was not the intention of the statute to give a lien for money advanced to a vessel owner to pay his debts months overdue, even if the debts were originally contracted for insurance. Such a construction would put it in his power to revive at any time against other lienors a secret lien, which has become defunct by lapse of time, and give it priority over their claims. If the libelants stood in the relation of sureties for the steamship company, their payment to Tyson & Co. would merely subrogate them to the rights of the latter. They could obtain no better right to enforce the debt then belonging to Tyson & Co. It is the object of the statute, by requiring a public registration of the claims against vessels, to discountenance the existence of secret liens beyond 30 days. That would be wholly defeated if the vessel owner, or other parties interested, could revive defunct liens by new promises to pay old debts, or the substitution of new obligations in their place. The district court properly dismissed the libel, and the decree is affirmed, with costs.

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MAYOR, ETC., OF CITY OF NEW YORK et al. v. WORKMAN.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

No. 118.

1. ADMIRALTY—RESPONSIBILITY FOR MARINE TORT.

Although an injury has been done by a vessel, as the direct instrumentality of harm, such vessel cannot be held responsible, in admiralty more than at common law, unless the owner is accountable for the injury, either personally or upon the principle of agency.



**2. MUNICIPAL CORPORATIONS — LIABILITY FOR NEGLIGENCE OF FIRE DEPARTMENT.**

A municipal corporation is not liable for the negligence of the members of its paid fire department in the management of their apparatus or the performance of their other duties about the extinguishment of fires, such duties being a public service for the general welfare, in which the corporation has no private interest.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Robert W. Workman against the mayor, aldermen, and commonalty of the city of New York, the fire department of that city, and James A. Gallagher, for damages caused by a collision. The district court rendered a decree for the libelant against the mayor, etc., and Gallagher. 63 Fed. 298. Respondents appeal.

Francis M. Scott and David J. Dean, for appellant mayor, etc., of city of New York.

George L. Sterling, for appellant J. A. Gallagher.

Chas. C. Burlingame and Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The evidence in the record adequately supports the conclusion of the court below that the injuries caused to the libelant's vessel by the impact of the fire boat were caused by the negligent management of the fire boat while the latter was trying to reach a convenient location to play upon a burning building near the pier at which the libelant's vessel was moored. The case, then, presents the legal question whether the municipal corporation, the mayor, etc., of the city of New York, is responsible for the negligence of the members of its fire department, committed while attempting to extinguish a fire within the corporate limits. That the suit is brought in a court of admiralty instead of a common-law court, and that the negligence consisted in the improper navigation of the vessel, are considerations which cannot affect the conclusion. Although the vessel may have been the direct instrumentality, the offending thing, in effecting a marine tort, neither the vessel nor her owners can be held responsible by reason of that circumstance alone. The common case of a collision of a vessel in tow of another and a third vessel, produced by the negligence of the towing vessel, is a sufficient illustration. If the vessel in tow is free from negligence, neither she nor her owner is liable for the injury. Accountability, either personally or upon the principle of agency, must concur with injury to give a cause of action in any tribunal, equally in admiralty as at common law. If the city of New York would not have been liable if one of its steam fire engines, manned by the members of the fire department, had, by want of due care, while endeavoring to reach a conflagration, injured an individual or his property, it cannot be liable in the present suit.

It is familiar law that the officers selected by a municipal corporation to perform a public service for the general welfare of the in-

habitants or the community, in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, are not to be regarded as the servants or agents of the municipality, and for their negligence or want of skill it cannot be held liable. This is so, notwithstanding such officers derive their appointment from, and are paid by, the corporation itself. In selecting and employing them, the municipality merely performs a political or governmental function; the duties intrusted to them do not relate to the exercise of corporate powers; and hence they are the agents or servants of the public at large. Upon this principle it has uniformly been decided by the courts that municipal corporations are not liable for the negligence or wrongful acts of the officers of the police or health departments, committed in the course of their ordinary employment. Unless the duties of the officers of the fire department are of a different complexion, and they are the servants of the municipality because they are engaged in performing one of its corporate functions, the same principle must extend immunity to the municipality for the negligent acts of these officers and their subordinates. A municipal corporation, like a private corporation, is liable to any person who has sustained injury in consequence of its neglect to perform a corporate duty; but because the duties of municipal corporations in respect to protecting their citizens from the dangers of fires are governmental, and not corporate, they are not liable to the owner of property injured by fire in consequence of their neglect to provide suitable fire apparatus, or to provide and keep in repair public cisterns, or the failure of their firemen to use proper efforts. *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Patch v. Covington*, 17 B. Mon. 722; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Weightman v. Washington*, 1 Black, 39, 49; *Kies v. City of Erie*, 135 Pa. St. 144, 19 Atl. 942; *Heller v. Sedalia*, 53 Mo. 159; *Robinson v. Evansville*, 87 Ind. 334. So uniform and numerous are the authorities against the proposition that a municipal corporation is liable for the negligent acts of these officers that to discuss it as an original question would seem to be inappropriate. In one of the most recent textbooks on the law of municipal corporations, the rule is thus stated: "Municipal corporations are not liable for the negligence of their firemen, although they may be appointed and removed by the city, and the performance of their duties are wholly subject to its control." *Tied. Mun. Corp.* § 333. A reference to the following adjudicated cases, in which the rule has been applied, will suffice to show how universally it obtains in the courts of this country: *Hafford v. New Bedford*, 16 Gray, 297, in which a hose carriage on its way to a fire ran over the plaintiff; *Fisher v. Boston*, 104 Mass. 87, in which the injury was caused from the bursting of hose; *Burrill v. Augusta*, 78 Me. 118, 3 Atl. 177, in which a horse was frightened by escaping steam from an engine left in the street; *Wild v. Paterson*, 47 N. J. Law, 406, 1 Atl. 490, in which the injury was caused from a defect in the brake of an engine; *Hayes v. Oshkosh*, 33 Wis. 314, in which damage was sustained by the negligent management of an engine in allowing the escape of sparks;

Wilcox v. City of Chicago, 107 Ill. 334, a case of collision with a hook and ladder wagon; Edgerly v. Concord, 59 N. H. 78, a case of the negligent testing of a hydrant; Howard v. San Francisco, 51 Cal. 52, a case of collision with an engine; McKenna v. St. Louis, 6 Mo. App. 320, a case of the negligent management of hose carriage; Jewett v. New Haven, 38 Conn. 368, a similar case; Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228, a similar case; Welch v. Rutland, 56 Vt. 228, a case of injury from slipping on ice caused by the escape of water from fire hydrant; Greenwood v. Louisville, 13 Bush, 226, in which plaintiff was negligently run over on the sidewalk by an engine; Freeman v. City of Philadelphia, 7 Wkly. Notes Cas. 45, and Knight v. City of Philadelphia, 15 Wkly. Notes Cas. 307, cases of careless driving of fire engine; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, a case of injury by the negligent projection of a ladder from an engine house; Simon v. Atlanta, 67 Ga. 618, a case of injury from a rope stretched across the street by the fire department.

It is quite immaterial that the duties of these officers are defined and the offices created by the charter or organic law of the municipality. The test of corporate liability for the acts of the officers of the municipality depends upon the nature of the duties with which they are charged. If these, being for the general good of the public as individual citizens, are governmental, they act for the state. If they are those which primarily and legitimately devolve upon the municipality itself, they are its agents. Thus in Mead v. New Haven, 40 Conn. 72, the city, pursuant to its charter, appointed an inspector of steam boilers, and passed a by-law which imposed a penalty on any person who should use a boiler without having it tested by an inspector. In a suit for the negligent act of the inspector, the court said:

"The duty of inspection of boilers is governmental. The object of the inspection is to protect all citizens from danger who may come in contact with the boiler, or may be exposed in any way to danger from its unsafe condition. The city, as such, has no pecuniary or individual or private interest in the matter; and although the power of the city over the subject is conferred by the charter, and not by the general law, yet the city must, we think, be regarded as the agent of the government, and acting for the state, and not for itself, in making the appointment of inspectors, and therefore not liable for the inspector's negligence."

The fire department of the city of New York derives its origin and defined powers from the same organic law as do the commissioners of charities and correction and the department of public instruction, and the officers of each are constituted by the appointment of the executive officers of the city. Of the commissioners of charities and correction the court of appeals said in *Maximilian v. Mayor, etc.*, 62 N. Y. 160:

"It is seen at once that the powers and duties of the commissioners of charities and correction are not to be exercised and performed for the especial benefit of the defendant. It gets no emolument therefrom, nor any good as a corporation. It is the public, or individuals as members of the commonalty, who are interested in the due exercise of these powers, and the proper performance of their duties. \* \* \* These chief officers, though in a sense its officers, as having no power unless after appointment by it, and

as mainly confined within its territorial boundaries, are yet officers of the state government, in the sense that they perform its functions within a designated political division of the state."

Of the department of public instruction, the court of appeals said in *Ham v. Mayor, etc.*, 70 N. Y. 459:

"Although formally constituted a department of the municipal government, the duties which it was required to discharge were not local or corporate, but related and belonged to an important branch of the administrative department of the state government."

It was held in each of these cases that the city of New York was not liable for the negligence of an employé of one of these departments. And in *Thompson v. Mayor, etc.*, 52 N. Y. Super. Ct. 427, it was held that the city was not liable for the negligent conduct of the employés of the fire department, as at present constituted. We entertain no doubt that the city was not liable for the negligent management of the fire boat in the present case, and that the libel against the mayor, etc., should have been dismissed by the district court. It is accordingly ordered that the cause be remitted to the district court, with instructions to dismiss the libel against the mayor, etc., with costs of this court and of the district court, and to affirm the decree against the respondent Gallagher, with costs.

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#### HENDRICKS v. GONZALEZ.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

No. 104.

#### 1. SHIPPING — REFUSAL OF CLEARANCE — INSTRUCTIONS OF SECRETARY OF THE TREASURY.

It is no justification to a collector of customs, for refusing clearance to a vessel and her cargo, that he acted under instructions from the secretary of the treasury in refusing such clearance, unless such instructions were authorized by law.

#### 2. NEUTRALITY LAWS—REFUSAL OF CLEARANCE—TRANSPORTING MUNITIONS OF WAR.

It is not enough to justify a collector of customs in refusing clearance to a vessel and her cargo, under Rev. St. § 5290, that it is the purpose of her intended voyage to transport arms and munitions of war for the use of an insurrectionary party in a country with which the United States are at peace.

In error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Francisco Gonzalez against Francis Hendricks, collector of the port of New York, to recover damages for the detention of a vessel of which the plaintiff was the charterer. Judgment was rendered in the circuit court for the plaintiff. Defendant brings error.

Wallace Macfarlane, U. S. Atty., and Charles Duane Baker, Asst. U. S. Atty., for plaintiff in error.

Louis C. Raegener, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff, rendered upon the verdict of a jury. The action was for damages for the detention of a vessel, the steamer South Portland, of which the plaintiff was the charterer, by reason of the refusal of the defendant, who at the time was collector of the port of New York, to grant a clearance. The defense was a justification that the defendant acted in obedience to the instructions of the secretary of the treasury, and rightfully refused a clearance because he had reasonable cause to believe that the vessel was about to engage in a violation of the neutrality laws of the United States. It appeared in evidence that September 9, 1892, the defendant was advised by the secretary of the treasury that the minister of Venezuela had informed the state department that the steamer was to leave New York the next day for Trinidad, with arms for rebels in Venezuela, and had asked that clearance be refused until the matter should be investigated. This advice was accompanied by an instruction from the secretary of the treasury to refuse a clearance pending further investigation. September 10th the plaintiff applied to the defendant for a clearance, and was refused. Pending an investigation which had been instituted by the defendant, and on September 12th, he received further instructions from the secretary of the treasury, as follows: "Case of steamer South Portland will be considered here. You will report as early as practicable." September 13th the defendant forwarded his official report to the secretary of the treasury, informing him of the facts which had come to his knowledge, and transmitting various documents which he had obtained. The report closed with the statement that, so far as the defendant had been able to discover, the vessel was not at that time fitted out as a war vessel. September 17th the defendant was notified by the secretary of the treasury that the secretary of state desired the detention of the steamer to continue until the 19th, and instructed to consult with the department before releasing her. September 21st the defendant received an instruction from the secretary of the treasury that no further action would be taken against the vessel, and to detain her no longer. The next day the clearance was granted, and the vessel was permitted to sail. From September 10th until September 21st, the plaintiff, through his counsel, was endeavoring to procure the release of the vessel by direct communication with the secretary of state, the secretary of the treasury, and the president. The facts brought to the information of the collector in respect to the vessel and the purposes of her voyage were that she was an ordinary merchant steamer, but her cargo consisted wholly of arms and munitions of war; that the charterer was in sympathy with the Venezuelan insurgents; that she was bound for a port near the seat of hostilities; but that she was not at the time manned, or in a state of preparation otherwise, for belligerent operations. Information had also been communicated to him tending to show that the war materials on board the vessel were destined for the ultimate use of the insurgent forces. The trial judge submitted to the jury the question

of fact whether the defendant had reasonable cause to believe from the circumstances that the vessel was intended to be used in committing hostilities against the government of Venezuela, and instructed them that, if he had, he was justified in refusing a clearance and was entitled to a verdict.

Error has been assigned of the refusal of the trial judge to rule that the defendant was exonerated from liability for his acts by his instructions from the secretary of the treasury, and also of the refusal to instruct the jury that, if the defendant had reasonable cause to believe that the vessel was chartered and loaded for the purpose of transporting arms and munitions of war to the insurgents of Venezuela, he was justified in refusing a clearance.

The questions presented by the assignments of error seem to us entirely free from doubt. The plaintiff having complied with the conditions entitling him to clearance by the law of congress (Rev. St. § 4197), it was the duty of the defendant, as collector of the port, to grant a clearance for the vessel and her cargo, unless he was justified in refusing to do so by some other statutory authority. Neither the secretary of the treasury nor the president could nullify the statute, and, though the defendant may have thought himself bound to obey the instructions of the former, his mistaken sense of duty could not justify his refusal of the clearance, and these instructions afforded him no protection unless they were authorized by law. *Little v. Bareme*, 2 Cranch, 170; *Otis v. Bacon*, 7 Cranch, 589. It is provided by statute (Rev. St. U. S. § 995) that when a recovery is had in any suit against a collector or other officer of the revenue for any act done by him in the performance of his official duty, and the court certifies that he acted under the directions of the secretary of the treasury, no execution shall issue, but the amount recovered shall be paid from the treasury. It was to provide for a case like the present that this statute was enacted, and the statute would have been wholly unnecessary except that the order of a superior officer is no defense to an inferior for the unlawful performance of an official act.

The neutrality laws of the United States (Rev. St. § 5290) authorize collectors of customs to detain, until the decision of the president is had thereon, "any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances render it probable that such vessel is intended to be employed by the owners to cruise or to commit hostilities upon the subjects, citizens or property of any foreign prince or state, or of any colony, district or people with whom the United States are at peace." The defendant's justification must be found under the authority of this statute, or it cannot be found at all. That it is not found there is almost too plain for argument. The vessel was not "manifestly built for warlike purposes," but was an ordinary merchant steamship. If she had been built for warlike purposes, that fact alone would not have authorized her detention by the collector, because the statute does not permit even such a vessel to be detained unless the number

of men shipped on board or other circumstances render it probable that she is intended to be employed "to cruise or commit hostilities," or, in other words, engage in naval warfare, against the subjects or property of a friendly power. It is not an infraction of international obligation to permit an armed vessel to sail or munitions of war to be sent from a neutral country to a belligerent port, for sale as articles of commerce; and neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerents, articles which are contraband of war. It is the right of the other belligerent power to seize and capture such property in transit; but the right of the neutral state to sell and transport, and of the hostile power to seize, are conflicting rights, and neither can impute misconduct to the other. The penalty which affects contraband merchandise is not extended to the vessel which carries it, unless ship and cargo belong to the same owner, or the owner of the ship is privy to the contraband carriage; and ordinarily the punishment of the ship is satisfied by visiting upon her the loss of time, freight, and expenses which she incurs in consequence of her complicity. On the other hand, it is the duty of every government to prevent the fitting out, arming, or equipping of vessels which it has reasonable ground to believe are intended to engage in naval warfare with a power with which it is at peace. These are familiar rules of international obligation, in the light of which the particular statute is to be read. It is intended to prevent the departure from our ports of any vessel intended to carry on war, when the vessel has been specially adapted, wholly or in part, within this jurisdiction, to warlike use. There was not a particle of evidence brought to the attention of the collector tending to show that the vessel was intended to be employed in acts of war. It is not enough that it was the purpose of her intended voyage to transport arms and munitions of war for the use of the insurrectionary party in Venezuela. *The Florida*, 4 Ben. 452, Fed. Cas. No. 4,887; *The Carondelet*, 37 Fed. 799; *The Conserva*, 38 Fed. 431; *U. S. v. Trumbull*, 48 Fed. 99.

There was no error prejudicial to the defendant in the rulings of the trial judge. Indeed, if, instead of submitting the question of probable cause to the jury, he had ruled, as matter of law, that the evidence did not make out a case of probable cause, we think he would have been justified in doing so. The judgment is affirmed.

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HARRISON et al. v. SMITH.

(Circuit Court of Appeals, Third Circuit. April 26, 1895.)

No. 8.

DEMURRAGE—DISCHARGE OF CARGO—"CUSTOMARY QUICK DISPATCH"—METHOD OF WEIGHING.

"Customary quick dispatch" at the port of Philadelphia, in unloading a cargo of sugar, requires the use of platform scales for weighing, and is not complied with by the use of the tedious method of weighing on "sticks." 50 Fed. 565, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by George Smith, master of the steamship Black Prince, against Charles C. Harrison and others, trading as Harrison, Frazier & Co., to recover demurrage because of alleged failure to receive cargo with "customary quick dispatch." The district court rendered a decree for the libelant. 50 Fed. 565. Respondents appeal.

G. Heide Norris and Henry R. Edmunds, for appellants.

Horace L. Cheyney and John F. Lewis, for appellee.

Before ACHESON, Circuit Judge, and GREEN and BUFFINGTON, District Judges.

ACHESON, Circuit Judge. The steamship Black Prince was chartered to carry a cargo of sugar from Cuba to the port of Philadelphia, under a charter party which provided that the vessel was "to be discharged with customary quick dispatch at port of discharge." The charter stipulated that for each day's detention the vessel should receive a specified sum, and it gave the charterers the right to designate the wharf where the discharge should take place, and to name the stevedore. The vessel, with a cargo of 14,533 bags of sugar, weighing about 2,000 tons, arrived at the port of Philadelphia on Saturday, March 8, 1890, and was entered at the customhouse, and notice of her arrival duly given about 3 o'clock on the afternoon of the same day. The vessel was not ordered to a berth until 3 o'clock on the afternoon of the following Monday, March 10th. By 6 o'clock the same afternoon the vessel was moored at the wharf to which she was ordered, with all necessary preparations made to discharge from four hatches. The discharge of cargo did not begin until 1 o'clock on Tuesday afternoon, March 11th, and was not completed until Thursday, March 20th, at noon. The commissioner to whom the case was referred to fix the demurrage, and whose conclusions the court below approved, reported:

"A careful consideration of the evidence convinces the commissioner that at least 5,000 bags each day could have been discharged from this vessel from one hatch by the use of platform scales, and with ordinary energy and diligence."

Upon that basis it was held that the discharge of cargo should have been completed by the close of Thursday, March 13th, and demurrage was decreed against the appellants for all detention beyond that date.

Instead of using platform scales, the appellants weighed the sugar, as it was taken from the vessel, on "sticks," which was a very tedious method, and the discharge was only from one hatch at a time. The owners of the ship, it is to be noted, had no interest whatever in the weighing of the sugar. That was a matter between the appellants and the United States government. Now, the stipulation here, it will be perceived, was not to give the vessel simply ordinary dispatch or customary dispatch. Something more



was intended and provided for. The agreement was that the vessel should "be discharged with customary quick dispatch at port of discharge." The stipulation contemplated haste, and, if the sugar was to be weighed as taken from the vessel, required the resort to such well-known, approved, and commonly practiced method of weighing at the port of discharge as would secure to the vessel ordinary quick dispatch. The learned district judge found as a fact that customary quick dispatch at the port of Philadelphia, in the discharge of sugar, where the cargo is to be weighed as delivered, is such dispatch as can only be afforded by the use of platform scales in weighing. The evidence fully justifies that finding. At the date of this charter party, and for at least two years previously, it was the almost universal practice at the port of Philadelphia to weigh sugar as discharged from vessels on platform scales, and not more than one cargo in twenty was weighed on sticks. The testimony of the experienced witnesses examined in this case quite satisfies us that the appellants did not give to the *Black Prince* the customary quick dispatch for which her owners had contracted.

The amount of demurrage allowed seems to us to be entirely reasonable, under the evidence.

We find no error in this record, and therefore the decree of the district court is affirmed.

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#### THE TIMOR.

NELSON et al. v. NORDLINGER et al.

(Circuit Court of Appeals, Second Circuit. April 22, 1895.)

No. 121.

#### SHIPPING—DAMAGE TO CARGO BY RATS—BILL OF LADING.

A cargo of beans in sacks was shipped from Fiume, Austria, to New York, under a bill of lading containing exceptions of damage from vermin. On arrival at New York the cargo was found to have been badly damaged by rats. The vessel was of iron, and it was shown that her holds were thoroughly scrubbed before her arrival at Fiume, and that no rats were discoverable; that there were no hiding places for them; and that they came on board at Fiume, without the knowledge of the officers. It appeared further that the character of Fiume as a seaport frequented by rats is well known. The vessel had five cats during the voyage, which had abundant access to the cargo, and the testimony showed that, if the cats proved active and vigilant, this was an adequate number. *Held*, that the injury was within the excepted clause, and that the evidence failed to show that the damage was attributable to the neglect of the vessel to exercise ordinary and reasonable precautions. 46 Fed. 859, reversed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Jacob D. Nordlinger and others against Nelson, Donkin, and others, owners of the ship *Timor*, to recover damage for injuries caused by rats to a cargo of beans. The district court entered a decree for libelants. 46 Fed. 859. The cause was then

referred to a commissioner to assess damages, and was afterwards heard upon exceptions to the commissioner's report. 61 Fed. 633. Defendants appealed.

J. Parker Kirlin, for appellants.

Charles C. Burlingham, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelants shipped on board the British ship Timor, an iron steamship, 325 feet in length, at Fiume, Austria, 3,700 sacks of beans, for safe transportation to New York, damage from vermin excepted. On arrival of the vessel in New York this part of the cargo was found to have been badly damaged by rats during the voyage. It is not doubted that an injury thus created is within the excepted clause. The owners of the cargo thereupon filed their libel against the owners of the ship to recover for the damage, upon the ground that it was caused by the negligence of the officers in not taking proper precautions at Fiume or during the voyage, and that it could have been avoided by proper and the usual care and skill on their part. It was not denied by the libelants that, in view of the exceptions contained in the bills of lading, the burden of establishing this negligence rested upon them. Clark v. Barnwell, 12 How. 272; Transportation Co. v. Downer, 11 Wall. 129. The libel averred that the negligence consisted in not fumigating the vessel for her voyage. It is conceded by the libelants that on the proofs the omission to fumigate would not justify a finding of negligence, and on the trial they relied upon an insufficiency of cats and of traps. The district court was impressed with the extraordinary extent of the damage, and thought that the ship could not have taken the necessary and usual precautions, or such an amount of injury would not have occurred. The testimony that the holds of the iron vessel were thoroughly washed and scrubbed before its arrival at Fiume, that no rats were discoverable, that there were no hiding places for them, and that they came on board, without the knowledge of the officers, from the wharf at Fiume, is satisfactory. It furthermore appears that the character of Fiume as a seaport frequented by rats is well known. In this state of affairs, when the holds are free from rats before the cargo is taken on board, and there is no knowledge on the subject, but the probability is that vermin have come in with the cargo, the principal reliance of captains is upon the presence of cats on board the vessel. The Timor had five cats from the Mediterranean to New York, which had abundant access to the cargo, and the sum of the testimony is that, if the cats proved to be active and vigilant, this was an adequate number. The precautions taken by the Timor were of the usual fullness, which had ordinarily proved to be adequate, and the libelants' charge of negligence was not sustained. They had taken bills of lading which excepted the owners from liability for damage by vermin, and, in our judgment, failed to show that the loss was attributable to the neglect or failure of the officers of the vessel to exercise ordinary or reasonable precautions to rid the ship

of the presence of this source of danger. The decree of the district court is reversed, with costs, and the cause is remanded, with instructions to dismiss the libel, with costs.

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THE WANDRAHM.

MERRITT et al. v. MORSE.

(Circuit Court of Appeals, Second Circuit. April 22, 1895.)

No. 109.

**MARITIME LIENS—LABOR AND MATERIAL—CONTRACTS WITH STRANGER TO THE VESSEL.**

When a person, whose relation to the vessel is unknown, but who is not the apparent agent of the owners (who are unknown, but who can readily be ascertained), makes a contract for something to be done upon the vessel in the line of his known business as a mechanic, the co-contracting party is put upon inquiry to ascertain the powers which he possesses. If no inquiry is made, and nothing is said about the credit of the vessel, the inference is that the co-contracting party is satisfied with the security of his debtor, and his mere subsequent declaration that he relied upon the credit of the vessel will give him no lien. 62 Fed. 935, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was a libel by Israel J. Merritt and Israel J. Merritt, Jr., against the steamer Wandrahm, Edward T. Morse, claimant, to enforce an alleged lien for labor and materials. The district court dismissed the libel. 62 Fed. 935. Libelants appeal.

E. G. Benedict, for appellants.

Hyland & Zabriskie, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The facts in this case are peculiar. In June, 1893, the steamship Wandrahm, owned by the Hamburg American Packet Company, a German corporation, was lying, in a damaged condition, in the port of Quebec, Canada. The owner thereupon made a written contract with the shipsmiths and machinists known as the Morse Iron Works Company, hereinafter called the Morse Company, a partnership in the city of Brooklyn, N. Y., to take the steamship from the St. Lawrence river, tow her to New York, and completely repair and restore her, within a specified time, for the sum of \$63,000. The contract was thereafter completely executed, and the contract price was paid. On June 24, 1893, Edward P. Morse, one of said firm, wrote the following letter to the libelants:

"Morse Iron Works Co.,

"Shipsmiths, Machinists, and Boilermakers.

"New York, June 24, 1893.

"The Merritt Wrecking Co.—Gentlemen: Kindly send me approximate estimate for furnishing 3 wrecking pumps, with boilers and all gear; also

3 engineers and 2 firemen, 1 diver and tender and foreman. I want your charge per day. We have a steamer in St. Lawrence river, which we propose to bring to New York. We will furnish all transportation and other charges. Steamer has been ashore, but we will make temporary repairs before leaving there, and will only need your men and pumps in case of emergency. Kindly send estimate by bearer, as we have very little time to spare.  
E. P. Morse."

The libelants returned a memorandum upon the back of the letter giving the estimate asked for. Apparently the negotiations ended with this correspondence. On June 27th the libelants and the Morse Company entered into a written contract for the pay of the men and material to be sent to Quebec. The contract was silent in regard to any credit to be given to the vessel. The men and material went to Quebec, and some services were rendered for or upon the vessel. The libelants did not know, when they entered into the contract, who was the owner of the Wandrahm, did not know the Morse Company, and neither made inquiries as to their credit nor about the ownership of the vessel. The bill was made out against the Morse Company. Edward P. Morse appeared as claimant, and answered the libel, which was dismissed by the district court upon the ground that the evidence showed that the libelants relied on the credit of the Morse Company alone. The district judge says in his opinion:

"In view of all the circumstances, the situation of the vessel, and the fact that the libelants' contract with the Morse Iron Works made no allusion to the credit of the vessel, I am of the opinion that the evidence does not justify holding that the libelants furnished the labor and material on the credit of the vessel, but, on the contrary, shows that the libelants relied on the credit of the Morse Iron Works alone. Upon this ground the libel is dismissed."

It is apparent that the Morse Company were the contractors for the repairs of the steamship; that the owners had given them no power to make contracts which should bind the vessel, and that the libelants were, in fact, subcontractors, who had agreed with the contractors to perform some services upon the vessel at the port of Quebec. By the maritime law, apart from state statutes, when materials are furnished by a subcontractor, to be used upon a vessel, in pursuance of a contract made by him with the person who is known to be the contractor for the repairs of the vessel, and not to be the agent of the owners, the sale is obviously made on the account of the contractor, and upon his credit. It is the ordinary case of a sale by one individual to another individual, who is the sole debtor. If the contractor for repairs upon a vessel is not authorized to employ men or buy materials upon the credit of the owners of the vessel, and the employes or the material men have knowledge of this state of facts, they can have no valid lien for services or materials furnished the contractor and used upon the vessel. In the absence of knowledge of the nonagency, the subcontractor may have been misled by the apparent power to bind the vessel which the acts or conduct of the owners permitted the contractor to have, and thus a valid lien will be placed upon the vessel. *Smith v. Railroad*, 1 Curt. 253, Fed. Cas. No. 13,039; *The*

Whitaker, 1 Spr. 229, Fed. Cas. No. 17,524. So, also, the person in actual command of the vessel as master, though by fraud, as against the owner, may create a valid lien in favor of a material man who has no notice of circumstances to create suspicion of the pretended master's authority. The *Sarah Harris*, 13 Blatchf. 503, Fed. Cas. No. 12,347. In this case the Morse Company, who, upon the face of their letters, declare that they are shipsmiths and machinists, ask for the per diem charge for pumps and men to be used in case of emergency upon a steamer which they propose to bring to New York, after having made temporary repairs upon her. It is hardly possible to think that the libelants had adequate reason to suppose that this firm of shipsmiths was the agent of the owner, which had done nothing to constitute the contractors as its agents, or to hold them out to the world as such. The *Eledona*, 10 Blatchf. 511, Fed. Cas. No. 4,341. When the agreement between the libelants and the contractors was made, the latter were not in the occupancy of the vessel, and so were not apparently in command. The great majority of cases upon the subject of liens in favor of material men arise when the goods or services are ordered by a master, or the agent of the owner, or some person in the manifest possession and control of a vessel in a foreign port, and who is seeking for necessary supplies; and in such cases presumptions of necessity and of power attend the acts of apparent agents which do not exist in this case. The circumstances which are shown in this record are very different, and, unless it can be said that a contract for necessities to be furnished in a foreign port binds the vessel, when made by the libelant with a mechanic, neither master, owner, agent, nor charterer, and not in an apparent position of agency, made without inquiry as to his authority, and without any manifested intent by either party to bind the vessel, this libel cannot be sustained. The facts disclosed in the shipsmiths' proposition called upon the libelants to make inquiry as to their relations to the vessel, and their power to bind it, if security upon her was desired. When a person, whose relation to the vessel is unknown, but who is not the apparent agent of the owners, who are unknown, but who can readily be ascertained, makes a contract for something to be done upon the vessel, in the line of his known business as a mechanic, the co-contracting party is put upon inquiry to ascertain the powers which the stranger possesses. If no such inquiry is made, and nothing is said about the credit of the vessel, the inference is that the material man was satisfied with the security of the sole debtor, and the mere subsequent declaration of the libelant that he furnished the materials upon the credit of the vessel will not vary the conclusion which is to be drawn from his conduct when the contract was made. The decree of the district court is affirmed, with costs.

## SMITH et al. v. ROBERTS.

(Circuit Court of Appeals, Third Circuit. April 26, 1895.)

## No. 7.

**DEMURRAGE—DISCHARGE “WITH ALL DISPATCH.”**

Delay arising from the fact that the charterers have a number of other vessels in port, whose cargoes of sugar they are unloading, and to which they chose, for their own convenience or business purposes, to furnish all the available weighers, constitutes a failure to give the vessel the dispatch to which she was entitled under a charter which required her discharge “according to the custom of the port of discharge, with all dispatch.”

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in personam by Griffith Roberts, master of the steamship *Stuart Prince*, against Pierre J. Smith and Charles Schipper, trading as *Smith & Schipper*, to recover demurrage for delay in the discharge of cargo. The district court rendered a decree for libellant, and the respondents appealed.

In the district court the following opinion was filed by BUTLER, District Judge:

It is admitted that this case is governed by *Smith v. Harrison* (recently decided by this court) 50 Fed. 565. I will not therefore enter on a statement of the facts, or a discussion of them. The vessel was not given the dispatch contracted for, and the respondents are answerable in damages. A commissioner will be appointed to decide the amount. In this case modern scales were used for weighing, but the cargo was not taken as rapidly as the contract required. I do not understand it to be denied that there was delay, but it is asserted in justification that this arose in part from failure of the government to furnish necessary weighers, and in part from wet weather. Without considering whether the cargo, or a part of it rather, should not have been taken on the wharf, in advance of weighing if such scarcity existed, or whether proper efforts were made as early as should have been done, or whether an unavoidable scarcity would excuse the respondents' failure to comply with the contract, it seems to be a sufficient answer that the respondents had an abundance of weighers, but unfortunately for the libellant found other use for them. Unmindful of their obligations to him, they assumed numerous similar obligations to other vessels arriving at the same time; and if they were unable to afford him more weighers it may be attributed to this cause. It was their duty to be prepared to take the cargo with the dispatch described—“all possible dispatch”—to leave no reasonable effort untried to be so prepared. To place obstacles in the way of carrying out the contract would be a plain disregard of their duty, and delay arising from such obstacles they would necessarily be responsible for. Of course they were not required to suspend their ordinary business by abstinence from entering into such contracts with others. But they were bound to remember the facilities for discharging such cargoes and their previous undertakings, and contract accordingly.

In addition to the authorities cited in the former case (*Smith v. Harrison*) section 614 of *Carver on Carriers* is referred to.

G. Heide Norris and Henry R. Edmunds, for appellants.

Horace L. Cheyney and John F. Lewis, for appellee.

Before *ACHESON*, Circuit Judge, and *GREEN* and *BUFFINGTON*, District Judges.

ACHESON, Circuit Judge. By the terms of the charter party, the cargo of the Stuart Prince was "to be discharged, according to the custom of the port of discharge, with all dispatch." The district court held that the vessel was not given the dispatch contracted for, and that the respondents were liable for demurrage at the stipulated rate for the undue detention; and it was decreed that the libellant recover demurrage for 3 days and 10½ hours. The appellants, we think, have no good reason to complain of this result. Under the proofs, the appellants were answerable for the demurrage allowed, upon any admissible construction of the above-quoted clause of the charter. In fixing the amount of the demurrage, the commissioner made allowance for the wet weather which interrupted the unloading of the vessel; and, upon a careful consideration of the evidence, we are entirely satisfied that the other delay in the discharge of the cargo was not owing to any custom of the port of Philadelphia, but was caused solely by the unjustifiable conduct of the consignees. There was no lack of weighers in any such sense as would excuse the respondents. The consignees at that time had in port a number of other vessels, whose cargoes of sugar they were unloading, and, for their own convenience or business purposes, they chose to furnish to those vessels weighers who might have been employed in discharging the Stuart Prince, and should have been so used, in order to give that vessel the dispatch to which she was entitled under her charter party.

The decree of the district court is affirmed.

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THE ARMONIA.

THE REDRUTH.

PENCO v. CORY et al.

(District Court, E. D. Pennsylvania. April 8, 1895.)

No. 64.

1. COLLISION—VESSEL ANCHORED AT NIGHT—BURDEN OF PROOF.

While it is true, in general, that a vessel under way, which collides with one at anchor, is presumably in fault, yet the burden of proof is not upon her when it appears that the anchored vessel was in a channel at night, and the pleadings raise the question whether she was in a proper place, exhibited a proper light, and maintained a watch.

2. SAME.

Where a vessel anchored in a channel at night was run into by a vessel under way, *held*, on the evidence, that the anchored vessel was in a proper place, had up a proper light, and maintained a watch; and *held*, therefore, that the moving vessel should be presumed to have been in fault, and that it was unnecessary to determine in what the fault consisted, more particularly than that she failed to keep away, as her duty required.

This was a libel by Domenico Penco, master of the bark Armonia, against John Cory & Sons, owners of the steamer Redruth, to recover damages resulting from a collision.

Edward F. Pugh and Henry Flanders, for libellant.  
Convers & Kirlin, for respondents.

BUTLER, District Judge. The ship collided with the bark while the latter was at anchor in Delaware Bay, about a mile eastward of the buoy on the lower end of Joe Flogger Shoal, April 21, 1893. The tide being ebb the bark swung head upward. The ship was passing down, and in an endeavor to cross the bark's bows, when very near, struck her forward, inflicting damage, severing the anchor chain, and setting her adrift.

The libel asserts that the bark was anchored where such vessels customarily lie; that the proper light was up; that a vigilant watch was maintained; and that the collision was the result of the ship's fault alone.

The answer denies these allegations, charging that the bark was anchored in mid-channel, that she had no light and no watch.

If the bark was anchored in a usual place for such vessels, had the required light, and maintained a proper watch, there is no room to doubt the respondents' liability.

It was her duty to keep off, and under such circumstances she can have no excuse for not doing so. There is no suggestion of inevitable accident, nor anything to warrant it.

The evidence respecting the light, and place of anchoring, is conflicting and irreconcilable. If the burden of proof in these respects, was on the respondents, I would have no hesitation in deciding against her. I incline to believe however, indeed I do believe, that it is not. It is common to say, where a vessel under way collides with one at anchor, that she is presumably in fault; and this is usually true. Where, however, the anchored vessel is in a channel, after night, and the question whether she was in a proper place, exhibited a light and maintained a watch, is raised by the pleadings, the burden is I think on her.

As respects the question of watch I have no difficulty. The evidence shows that a watch was maintained, with customary vigilance. The watch's duties are not those of a lookout. They are well described by the pilots of both vessels. If a light was up the watch had nothing to do but see that it was kept bright, and report any change in the situation of the vessel or surrounding circumstances which required attention. It was not his duty to exhibit a torch to approaching vessels, or in any other way attempt to supplement the warning which the light afforded. Such an attempt would be as likely to do mischief as good.

As respects the question whether the bark was anchored in a proper place, I have little difficulty. The channel at this point is two miles wide, for deep draught vessels; and the rules applicable to narrow waterways are therefore inapplicable. Whether she might anchor anywhere in the channel, and whether the statutes of Delaware apply to the locality I need not decide. She was not on the "range lights," for there are no such lights here. I am satisfied she was anchored to one side of mid-channel, and where such vessels customarily lie. Pilots Maule and Long, respondents'



witnesses, admit that vessels anchor about the fourth of a mile from the center. The witnesses most likely to know where she was are her pilot and officers. It was the duty of the pilot, who was familiar with the locality to select a proper place; his own safety and his duty, as well as the safety of the vessel and her crew, required this. He and others on board testify that he went over towards the western side about the fourth of a mile from the center, and there anchored, where such vessels usually lie. The testimony on the other side is unsatisfactory; the witnesses from the ship judge she was in mid-channel because they found her in their front. But it is fair to presume that they do not know whether they were in mid-channel or not. There was no necessity to run there, and they were as likely to run to the one side or the other as not. Their subsequent recollections respecting it are unreliable. The conclusion formed from finding the bark near mid-channel when the ship returned, after the accident, is unjustifiable. When the anchor chain was broken she drifted with the tide, and was as likely to go to mid-channel as elsewhere.

The question of light is much more serious. The witnesses on each side are numerous, and their statements are so contradictory that it is difficult to avoid the conclusion that some of them have intentionally falsified. The witnesses from the bark testify, some of them, that they prepared and hoisted the light when she anchored; others that they saw it up repeatedly during the night, and also directly after the accident and later in the morning. The several individuals who constituted the watch at different periods of the night, and whose duty it was to observe the light, all say it was up, burning brightly. Roland, a pilot, who passed down in charge of a vessel an hour or more before the collision, says he saw the bark at anchor with the usual light up. On the other hand witnesses from the ship say no light was up; that the bark was in total darkness, no light being exhibited anywhere. They say also that after passing they saw an anchor light put up; that it was carried from the stern forward and hoisted. There are several circumstances that tend to cast suspicion on this testimony. It seems incredible that no light whatever should have been up on the bark. The witnesses contradict each other respecting the time when a light was carried forward and hoisted. When the pilot and master, or mate, came aboard the bark, after the ship's return, they did not complain that no light was up, but that it was dim; and according to the statement of the original answer filed, this was their complaint subsequently. It is there said, and solemnly sworn to, that such was the bark's fault, in this respect; not that no light was up, but that it was smoked and dim. It is impossible to explain away such a fact, as the respondents now seek to do. Then again it seems incredible that the bark would thus hoist a light in the faces of these witnesses, upon whom she desired to impose a belief that the light was up before the accident. It would be the plainest admission of fault. The several witnesses from aboard the bark testify that no light was hoisted after the collision; but that a light was carried from the stern forward, to

examine the injury sustained; and that this is the whole foundation of the story that a light was put up after the accident. The witnesses from the ship are corroborated by the testimony of Pilot Maule, who says he passed down shortly before the collision, and saw a vessel at anchor in this vicinity without an anchor light, that he did not recognize her as the "Armonia" or know who she was, but that he saw no other vessel at anchor near; that he spoke of the fact on reaching his destination; and it is testified that he did so speak. This testimony is certainly important; but it is not more so than that of Pilot Roland who says he passed down a little earlier and saw the bark at anchor, recognized her, and that her light was up burning brightly. Of course, it is possible that Mr. Maule saw another vessel, but this is not probable. What is remarkable, however, is the fact that he too says the vessel had no light whatever—a statement that it is difficult to credit. The ship's forward lookout testifies that he saw three lights ahead when approaching the vicinity in which the bark lay, two large ones, apparently shore lights, and one small, apparently a vessel's light, which he reported to the pilot. When asked the direct question whether the latter was on the bark he said, "No." But how could he know? He did not see it elsewhere, and says he did not observe it after passing. The pilot recollects the report, but explains that the light was not on the bark. The explanation, however, is not very satisfactory.

I will not pursue the inquiry. It is sufficient to say that after careful examination and reflection I am convinced that there is a decided preponderance of evidence in favor of the libellant's allegation that the light was up; and I therefore, so find the fact. It results that the ship must be condemned—that she had no excuse for colliding with the bark. It is true that those on board testify to a full discharge of duty, as is common in such cases; but this testimony cannot be credited, in view of the collision, under the circumstances stated. While it is unnecessary to determine what the ship's fault consisted in, more particularly than that she failed to keep off, I incline to believe that it was in her failure to give proper attention to the report of her lookout.

I see nothing in the suggestion that the bark should have changed her position when the danger became apparent. She could not do so without raising her anchor and this required time—much more than the circumstances afforded.

A decree must be entered for the libellant.

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LONG ISLAND R. CO. et al. v. KILLIEN.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

**1. COLLISION IN EAST RIVER—TUG AND FERRYBOAT—OVERTAKING VESSEL—SUDDEN SHEER—INCOMPETENT WHEELSMAN.**

Where a tug coming down the East river, upon emerging from the eddy into the flood tide at Corlear's Hook, was swept by the current against an overtaking ferryboat, held, that the tug was in fault, being in charge of an incompetent wheelsman, either because he neglected to port his wheel in due season, or to do so sufficiently to neutralize the effect of the cross current. 63 Fed. 172, affirmed.

**2. SAME—OVERTAKING VESSEL—DUTY TO KEEP AWAY.**

The law does not impose upon an overtaking vessel the obligation of anticipating improper navigation on the part of the other vessel. *Held*, therefore, that a ferryboat, coming down the East river, which attempted to pass a tug on the port side, just as the latter was emerging from the eddy into the cross current created by the flood tide at Corlear's Hook, was not in fault in not allowing more than 100 feet between them. 63 Fed. 172, reversed.

**3. SAME—NAVIGATION OF EAST RIVER—VIOLATION OF STATUTORY RULES.**

A vessel which violates the state statute requiring vessels to keep as near as possible in the center of the East river is not, on that account, to be condemned for a collision which would not have occurred if the other vessel had exercised ordinary care. 63 Fed. 172, reversed.

**Appeal from the District Court of the United States for the Southern District of New York.**

This was a libel in personam by Mary Killien, as administratrix of Martin Killien, her husband, to recover damages under the New York statute for the death of the deceased, who was a fireman on the tugboat William H. Walker, on the afternoon of June 13, 1893, through an alleged negligent collision between the Walker, owned by the respondent Hyde, and the ferryboat Garden City, owned by the respondent the Long Island Railroad Company. The district court found that both vessels were in fault for the collision, and entered a decree against both for \$5,000, being the full amount allowed by the statute. 63 Fed. 172. The collision occurred on the East river, from 200 to 300 feet off the New York docks, about opposite the marble yard, just below the turn of Corlear's Hook. The weather was clear and pleasant; the tide, strong flood. Both boats were going down river,—the Garden City, on one of her regular trips from Hunter's Point to James' slip; the Walker, going down under one bell, near the docks, looking for a job. About 200 feet in front of them was the transfer tug No. 5, also going down. All three boats had come to a stop, just above the Grand Street ferry, for two ferryboats of that line on the New York side, one coming out of that ferry, and another going in. At that time the Garden City was a little outside of the Walker, and about 200 feet astern of her. As soon as the inward-bound ferryboat at the Grand Street ferry would permit them to pass, the three boats started ahead, the Garden City sheering at first somewhat outwards into the river, but soon putting her wheel to port, and turning her head down the river. When the tug reached Corlear's Hook, and emerged from the eddy into the flood tide, she lost control of her movements, and took a sheer of about 100 feet to port, striking the Garden City, and causing the death of libellant's husband.

William J. Kelly, for appellants.

E. H. Taft and T. M. Taft, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We agree substantially with the opinion of the district judge in regard to the facts of the collision out of which this suit arises. The appellant's ferryboat, the Garden City, had nearly overtaken the tug Walker, and was about to pass her on her port side, upon a course not more than one hundred feet away from her, when the tug, as she emerged from the eddy into the flood tide at Corlear's Hook, lost control of her movements, and was swept by the strong current against the starboard side of the Garden City. That the tug was improperly navigated is clear. In rounding the Hook on such a course as the tug took, when there is a flood tide, a strong cross current is encountered as soon as a vessel passes out of the eddy into the true tide, which

will sheer the vessel to port. The tendency to such a sheer is to be anticipated, and is usually neutralized by keeping the vessel sufficiently under a port wheel. The tug on the occasion in question was temporarily in charge of an incompetent wheelsman; and either because he neglected to port his wheel in due season, or to do so sufficiently, she took a rank sheer, and he lost command of her movements. We fully agree with the district judge that the tug was in fault for the collision. We are unable, however, to agree with his conclusion that the ferryboat was also in fault. The master of the Garden City was at the wheel of his vessel, as was also a wheelsman. They were watching the movements of the tug. There was ample room to enable the Garden City to pass the tug safely on her port side, no vessels were approaching to embarrass her in the effort to do so, and there was no conceivable reason why her master should attempt to direct the course of his vessel dangerously near to that of the tug. The sheer of the tug was observed, and, as soon as the master and wheelsman of the Garden City saw that there was danger of collision, they reversed her engines and starboarded her wheel. Doubtless the Garden City was not being navigated as near as possible in the center of the river, as the terms of the state statute, applicable to the East river, required; but this, as we have frequently had occasion to decide, should not condemn her for the consequences of a collision, which, notwithstanding her presence there, would not have occurred if the other vessel had exercised ordinary care to avoid it. Only such vessels can invoke the violation of the statute as an actionable fault as have been prejudiced by it, either because their own movements have been embarrassed by the presence of the offending vessel, or because they have omitted to take some precaution in ignorance of her presence, which they might otherwise have avoided danger by adopting. As an overtaking vessel, it was the duty of the Garden City to keep out of the way of the tug; and in this behalf it was incumbent upon her, when shaping her course to pass the tug, to allow a sufficient margin for safety, taking into consideration all the incidents of the situation; among them, the tendency of the cross current to deflect the course of the tug. The master of the Garden City was an experienced navigator. His vessel was on one of her regular trips, over a route which he had pursued for 27 years. He was perfectly familiar with the tides and currents around the Hook. Intrusted with the responsible command of a ferryboat, he had every incentive to be prudent. His vessel could gain no advantage by hugging the shore or crowding upon the course of the tug. He undoubtedly knew what reasonable allowance ought to be made for the influence of the cross current upon the course of the tug, and the dictates of ordinary prudence enjoined upon him the necessity of making such allowance. He deliberately chose a course which in his judgment at the time was sufficiently outside the tug's course to be a safe and prudent one. We think his judgment, formed under such circumstances, was not a rash one, or one which should be pronounced erroneous merely because subsequent events have shown

that there would not have been a collision if he had pursued a course further to port. The witnesses do not attribute the collision to an ordinary contingency of navigation. The master of the tug testifies that, just as the Garden City began to come abreast of the tug, her bow lapping the stern of the tug, she took a sheer of 100 feet to starboard. The wheelsman of the tug testifies that the Garden City took a rank sheer, and came right for the tug. The testimony of these witnesses, although generally discredited, is of some value, as showing the best theory they can invent in exculpation of their own vessel. The evidence amply supports the opinion of the district judge that the tug swung to port because of the faulty navigation of her wheelsman. In view of all the testimony in the record, we are satisfied that the course of the Garden City was shaped sufficiently far on the port hand of the tug to have enabled her to pass the tug safely, allowance being made for all the ordinary exigencies of navigation, if the tug had not been guilty of an unnecessary and culpable sheer to port, and that the collision would not have taken place if the tug had been handled with reasonable care and skill. The law does not impose upon an overtaking vessel the obligation of anticipating improper navigation on the part of the other vessel. By this we do not mean that the overtaking vessel may not be guilty of contributory fault, when the circumstances indicate that the other vessel is under incapable management, or is about to neglect in any respect the duty of reasonable care and prudence. There are circumstances under which one person ought to foresee and provide against the negligence of another; but ordinarily an act, though negligent, is not the proximate cause of an injury, when but for the intervening negligence of another the injury would not have been inflicted. *Lane v. Atlantic Works*, 111 Mass. 136; *Cuff v. Railroad Co.*, 35 N. J. Law, 32; *Vicars v. Wilcocks*, 8 East, 1; *Daniel v. Railway Co.*, L. R. 5 H. L. 45. "A finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, is not warranted unless it appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. Where there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it." *Railway Co. v. Kellogg*, 94 U. S. 469. In the present case there were no circumstances to indicate to the master of the Garden City that those in charge of the tug were not competent to navigate her properly, or that there was any reasonable likelihood that they would lose control of her movements. We conclude, therefore, that the owner of the Garden City was erroneously adjudged liable for the consequences of the collision. The decree of the district court is reversed, and the cause remitted to the district court, with instructions to dismiss the libel as to the Long Island Railroad Company, the appellant.

## LOOMIS et al. v. ROSENTHAL.

(Circuit Court, D. Oregon. March 28, 1895.)

No. 1,935.

## FEDERAL COURTS—JURISDICTION—CITIZENSHIP—CHANGE OF RESIDENCE.

L. and S., who alleged that they were citizens of the state of Washington, brought suit in the United States circuit court against R., a citizen of Oregon. It appeared that L., for six years before her husband's death, resided with him in Oregon; that before her husband's death she had contemplated bringing the suit; that in a few months after his death she removed with her children to her mother's home in Washington, taking some articles of personal property, but leaving the bulk of her furniture in Oregon, where she owned a house and lot; that she remained a few months in Washington, and then returned to Oregon, ostensibly to secure the benefit of better schools for her children. L. testified that she intended, some time, to return to Washington, and that she regarded her mother's farm, in that state, as her home, but her testimony, as to her purpose in returning to Oregon and her stay there, was ambiguous. *Held*, that L. was a citizen of Oregon, and the federal court had no jurisdiction of a suit between her and another citizen of that state.

This was a suit by Katie J. Loomis and Olive S. Swafford against Lewis Rosenthal to have the defendant declared trustee of certain real estate. The cause was heard on the pleadings and proofs as to the citizenship of one of the complainants.

Deady & Metcalf, Dell Stuart, and Mary A. Leonard, for complainants.

Joseph Simon, C. J. McDougall, and Wallace McCamant, for defendant.

GILBERT, Circuit Judge. The complainants, as the heirs at law of J. V. Clary, deceased, bring a suit against the defendant, and pray the court to have him declared the trustee of certain real estate, which was sold by him as administrator of the estate of said J. V. Clary, at which sale it is alleged the defendant was indirectly the purchaser, and to require him to reconvey the same to the complainants. The bill alleges that the said intestate left surviving him three children and his widow, and that the widow and the other heir have conveyed their interests in said land to the complainants. Upon the final hearing the defendant moved to dismiss the suit for want of jurisdiction, upon the ground that one of the complainants is a citizen of the same state with the defendant. The complainants alleged in their bill that they were citizens and residents of the state of Washington. The defendant made no formal plea to the jurisdiction, but in his answer traversed these averments of the bill. Upon the issue so made, the parties took testimony concerning the citizenship and residence of Katie J. Loomis, one of the complainants. The evidence, in substance, is that she and her husband had resided in Oregon for six years preceding the latter's death, which occurred upon the 13th day of February, 1892. Before that time she had contemplated bringing the present suit, and had engaged counsel for

that purpose. On the 2d of April, 1892, she testifies that she removed with her five children to her mother's farm in Clarke county, Wash., intending to make that place her home. The evidence is that she took with her some personal property,—bedding, clothing, chairs, and a sewing machine,—but the greater portion of her furniture was left at her former home in Portland. She remained with her mother in Clarke county, Wash., for some months,—the exact time is not stated,—when she returned with her children to Portland, where she resumed housekeeping, presumably with the furniture that she had left, and where she has since resided. Her explanation of her return is that she came back for the purpose of educating her children, since the schools which were accessible from her mother's farm were inferior to those at Portland. She testified that she might remain in Oregon until the education of her children should be complete, but that her home is with her mother, and that she intends ultimately to return there. During all the time referred to she has owned a house and lot in Portland, but in the state of Washington she has owned no real property, has had no rented house, nor a rented room, nor any place which she could of right call her home. The most that she can claim is that a home is and has been offered her with her mother and her stepfather, and that by their permission she considers their home hers, and that she has left at their house a few articles of personal property. This suit was begun upon the 19th day of May, 1892. Was Mrs. Loomis at that date a citizen and resident of the state of Washington? In determining this question, the court must be guided by her acts as well as by her declarations. If she removed her residence in good faith from Oregon to Washington, intending to reside there permanently, and still entertained that intention at the commencement of the suit, she was a citizen of Washington, no matter what may have been her purpose in so doing, and her status as a citizen of that state would not be affected by the fact that she subsequently returned temporarily to Oregon. But in dealing with the question of citizenship, as affecting one who for years had been a citizen of Oregon and removed therefrom for a few months, during which interval she commenced a suit in this court, which as a citizen of this state she could not have done, and thereafter returned to Oregon, and to her former possessions, where she has since resided, there must be other and more convincing proof than mere declarations of her relation to the state of which she claims to be a citizen. Her mother's farm in Clarke county, Wash., is but a short distance from Portland, and is easily accessible therefrom. The condition of the schools there was as readily ascertainable before the removal as after. Her retention of her property and household furniture in Portland, her short sojourn in Washington, together with the other circumstances in the case, all point to the conclusion that her removal from Oregon was accompanied with a present intention to return as soon as she could do so without defeating the jurisdiction of this court. There is much in the language of her testimony to indicate this. She says, for

instance, that in removing to Washington on April 2, 1892, it was her "idea to stay there permanently." This is far from saying that it was her definite intention to remain there, or that she still entertained that intention six weeks later, when she commenced the suit. A portion of her testimony was as follows:

"Q. Isn't it a fact that you intend to remain here until your children have completed their education? A. I can, if I see fit, or I can go there. Q. Isn't it your present purpose to remain here until your children complete their education? A. No; not altogether. Q. What is your present purpose about them? A. I do not seem to have any. Q. You haven't any well-defined idea about what you intend to do about going back there or staying here? A. O, I intend to go back there some time. Q. You don't know, then, when you will go? A. No."

This case is very similar to that of *Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, where it was held to be the duty of the trial court to dismiss a cause brought by a plaintiff who had invoked the jurisdiction of the court by virtue of his removal to another state, in which it appeared that he had no purpose to acquire a domicile or a settled home.

It is contended that the cause should also be dismissed as to the other complainant, for the reason that as to her the suit was commenced collusively, and without her consent or knowledge. The evidence does not sustain this contention. While the testimony is that she did not directly employ the counsel who represent her, there is evidence sufficient to prove that through communication with her co-complainant she was aware of the latter's action in instituting the suit, and consented thereto. But, since the suit must be dismissed as to one of the complainants, it necessarily follows that a like order must be made as to the other. In a suit such as this, brought to enforce a trust in real estate, upon the ground that the defendant has wrongfully purchased the same, all the heirs of the intestate, or at least all who represent their interests, are indispensable parties, and without their presence the court is powerless to render a decree affecting the merits of the controversy. *Hoe v. Wilson*, 9 Wall. 501. The bill will therefore be dismissed, without prejudice, at the cost of the complainants.

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THURBER v. MILLER et al.

(Circuit Court of Appeals, Eighth Circuit. April 18, 1895.)

No. 523.

**1. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.**

In an action against several defendants, where the plaintiff's complaint states but a single cause of action, the interposition of separate defenses by the different defendants does not make a separable controversy with each, which can be removed to a federal court without the removal of the whole cause.

**2. SAME—FORECLOSURE OF MORTGAGE.**

In a suit in a state court for the foreclosure of a mortgage, to which the heirs and executors of the mortgagor and certain creditors, claiming liens on the mortgaged premises, were made parties, one of said creditors filed a petition for the removal of the cause to the federal court,



alleging that a mortgage held by him was superior to plaintiff's mortgage and that he desired to litigate such claim of priority. *Held*, that there was no separable controversy between plaintiff and such creditor.

8. SAME—RESIDENCE OF DEFENDANT.

The same restriction as to the residence of the defendant which is expressed in the second and fourth clauses of section 2 of the act of August 13, 1888, relative to the removal of causes to the federal courts, is implied also in the third clause; and a defendant cannot remove from a state to a federal court a separable controversy between the plaintiff and himself, unless he is a nonresident of the state where the suit is brought. *Per* Caldwell and Thayer, Circuit Judges.

Appeal from the Circuit Court of the United States for the District of South Dakota.

This suit was commenced in the circuit court of Lawrence county, S. D., by Horace K. Thurber, appellant, against Mary C. Miller, Arthur James Miller, and Thurber Chumasero Miller, as heirs at law of James K. P. Miller, deceased, and Joseph Swift, E. B. Beecher, and William H. Swift, executors of the estate of James K. P. Miller, deceased, Addison W. Hastie, trustee, Fred T. Evans, the city of Deadwood, and Lawrence county, S. D., to foreclose a mortgage made by James K. P. Miller, in his lifetime, to the plaintiff, on certain real estate in Deadwood, S. D. The bill averred that default had been made in payment of the mortgage debt, which it was alleged amounted to \$61,900, and concluded with the usual prayer for a decree and sale of the mortgaged premises. Fred T. Evans, on his own motion, was made a party defendant to the suit. In his petition to be made a defendant he stated that the defendant Addison W. Hastie was a trustee in a mortgage executed by James K. P. Miller to him; that the mortgage was given to secure payment of a promissory note for the sum of \$7,850 made by the mortgagor Miller to Evans; that "Evans is the sole beneficiary of said mortgage, and that the same was taken in the name of Addison W. Hastie, trustee for said Evans, and for no other person; that the plaintiff herein, Horace K. Thurber, alleges in his complaint that the said mortgage is subject to, and inferior in right to, plaintiff's mortgage, and has made the said Addison W. Hastie, trustee, a party defendant for the purpose of determining the priority between the said two mortgages; that the claim of the plaintiff in this action is made adversely to the rights of said Fred T. Evans, and he therefore desires to litigate the question directly with him." An order was entered on the 29th of August, 1891, making Evans a defendant. An amended bill was afterwards filed, which made Evans a defendant. In this state of the record, Evans, on the 2d day of October, 1891, filed his petition to have the cause removed to the circuit court of the United States, alleging as the sole ground for the removal: "That there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that he was at the time of the bringing of this suit, and still is, a citizen of the state of South Dakota, and the said plaintiff, Horace K. Thurber, who, as your petitioner avers, was then, and still is, a citizen of the state of New York. That the said controversy is of the following nature, namely: Said action is brought by plaintiff against said defendants for the foreclosure of a certain mortgage alleged to have been executed by said James K. P. Miller in his lifetime to said plaintiff" on the lands described in the bill, to secure the payment of certain debts therein set forth, and that the plaintiff alleges that his mortgage is senior and superior "to a certain mortgage made, executed, and delivered to A. W. Hastie, as trustee for this petitioner, by said James K. P. Miller, and covering and including the same real estate, to secure the payment of a certain promissory note made and delivered to said Miller by this petitioner, dated November 26, 1888, for the sum of \$7,850, due two years after date. This defendant will insist and show to the court that the lien of his mortgage is prior and superior to that of the plaintiff." Upon the filing of this petition, the state court made an order for the removal of the cause into the circuit court of the United States, and upon filing a transcript of the record in

that court the cause progressed to a final decree of foreclosure, and also a final decree as to the disposition of certain rents and issues of the mortgaged property, from which last decree an appeal was taken to this court.

Norman T. Mason (Eben W. Martin, on the brief), for appellant.  
G. C. Moody (Edwin Van Cise and Granville G. Bennett, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Upon opening the record in this cause, it is apparent that the circuit court never acquired jurisdiction thereof. The petition for the removal shows no ground for the removal of the cause from the state court to the United States circuit court. The defect of jurisdiction was not brought to the attention of the circuit court by a motion to remand the cause to the state court, or otherwise, nor has it been called to the attention of this court by counsel; but it is our duty, under the law, to examine the record, and, if it appears that the circuit court never acquired jurisdiction of the cause, to remand it to the state court. *Barth v. Coler*, 9 C. C. A. 81, 60 Fed. 466; *Railway Co. v. Swan*, 111 U. S. 379, 383, 4 Sup. Ct. 510; *Burnham v. Bank*, 10 U. S. App. 485, 3 C. C. A. 486, 53 Fed. 163; *Railway Co. v. Twitchell*, 8 C. C. A. 237, 59 Fed. 727; *Mattingly v. Railroad Co.*, 15 Sup. Ct. 725; *Koenigsberger v. Mining Co.*, 15 Sup. Ct. 751. This is an ordinary suit in equity to foreclose a mortgage on real estate. The bill makes the heirs and executors of the mortgagor and the creditors of the mortgagor having, or claiming to have, liens on the mortgaged premises, defendants; alleges the amount of the mortgage debt, that default has been made in the payment thereof; and prays for a decree for the amount of the debt, and for the sale of the mortgaged premises to satisfy the same. The creditors of the mortgagor having liens on the mortgaged premises are made defendants for the purpose of barring their equity of redemption, and as to them the allegation of the bill is as follows:

"Plaintiff further states, on information and belief, that the defendants Addison W. Hastie, Fred T. Evans, Lawrence county, and the city of Deadwood, have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage."

A bill for the foreclosure of a mortgage which asks for a decree for the amount of the mortgage debt, and the sale of the mortgaged premises to satisfy the same, and alleges that the lien of the complainant's mortgage is prior and superior to the liens of some of the defendants named in the bill, presents but a single cause of action. The ascertainment of the relative rank of the liens is incidental to the main purpose of the suit. "The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." *Railroad Co. v. Ide*, 114 U. S. 52, 56, 5 Sup. Ct. 735; *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726. The state-

ment of the rule in *Dillon on Removals* is fully supported by the authorities. The learned author says:

"If there be but one cause of action, involving many defendants, the fact that each makes a separate defense does not make separable controversies, nor does the default or disclaimer of one of the defendants give a right of removal to the other. \* \* \* Thus, if the separate answers filed by the individual defendants in a suit for the foreclosure of a mortgage raised distinct issues in defending against the one cause of action, this will not create separate controversies, within the meaning of the act." *Dill. Rem. Causes*, §§ 40, 43.

It was open to the lien creditors of the mortgagor who were made defendants to the bill to set up such defenses to the plaintiff's claim of priority of lien as they might severally have. One might deny the validity of the plaintiff's mortgage, another might allege that it had been paid; and a third, as was done by the defendant *Evans* in this case, that it was junior to the lien of his mortgage. The effect of these different answers would be simply to put in issue the allegation of the bill that the complainant had a valid and paramount lien on the mortgaged premises. Defendants cannot divide or multiply a plaintiff's single cause of action. Separate defenses do not, therefore, constitute separate or different causes of action, or create separable controversies, but are merely separate defenses to the same cause of action, to the complete determination of which the mortgagor, or his proper representatives, are indispensable parties. *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90. In the case of *Rosenthal v. Coates*, 148 U. S. 142, 147, 13 Sup. Ct. 576, the supreme court, affirming decisions to the same effect, said:

"The suit was, in effect, one by the assignee to disincumber this fund in his possession of alleged liens, and the fact that each defendant had a separate defense to this claim did not create separable controversies."

The case made by the bill is one that cannot be finally determined, and the relief sought obtained, without the presence of the heirs and executors of the mortgagor; and it makes no difference whether they admit or deny the rights of the complainant,—their presence is nevertheless indispensable to the complete determination of the controversy. The issue raised by the answer of the defendant *Evans* is not, therefore, a controversy which can be fully determined between him and the plaintiff, and for this reason the cause was not removable. *Wilson v. Oswego Tp.*, 151 U. S. 56, 66, 14 Sup. Ct. 259. The principle applicable to the case at bar is clearly stated by the supreme court in the case of *Torrence v. Shedd*, *supra*, as follows:

"Accordingly, in a suit by a judgment creditor to have the property of his debtor sold and applied to the payment of his debt, after satisfying prior incumbrances thereon, the holders of which are made defendants, it has more than once been decided that there is no such separate controversy between the plaintiff and the holder of such an incumbrance as will justify a removal, and this for the following reasons: There is but a single cause of action,—the equitable execution of a judgment against the property of the judgment debtor,—and this cause of action is not divisible. The judgment sought against the incumbrancer is incidental to the main purpose of the suit, and the fact that this incident relates to him alone does not separate this part of the controversy from the rest of the action. What the plaintiff wants is not partial relief, settling his rights in the property as

against this defendant alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this defendant shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which the plaintiff seeks requires the presence of all the defendants, and the settlement, not of one only, but of all the branches of the case."

In the case last cited, Mr. Justice Gray formulated a general rule which has been accepted in all subsequent cases as expressing the law on this subject. He said:

"But, in order to justify such removal on the ground of a separate controversy between citizens of different states, there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them'; and, by the settled construction of this section, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

See, to the same effect, *Deposit Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Bellaire v. Railroad Co.*, 146 U. S. 117, 13 Sup. Ct. 16; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835; *Barth v. Coler*, 9 C. C. A. 81, 60 Fed. 466.

There is another fact disclosed by the record equally fatal to the jurisdiction of the circuit court. The plaintiff in the action is a citizen of New York, and the defendant Evans, on whose petition the suit was removed from the state to the circuit court, is a citizen of South Dakota,—the state in which the suit was brought. The removal of suits upon the ground that they involve separate controversies was first provided for by the act of July 27, 1866 (14 Stat. 306, c. 288). That act gave the right of removal to "the defendant who is a citizen of a state other than that in which the suit is brought." The provision of the act of 1866, that the defendant authorized to remove a suit upon the ground of a separable controversy must be a citizen of a state other than that in which the suit was pending, was in harmony with the rule that had always obtained with reference to the citizenship of a defendant in removing a cause from a state to a federal court. Under the judiciary act of 1789 (1 Stat. 73, c. 20, § 12), a defendant sued in a court of his own state by a citizen of another state could not remove the suit. It was only when the defendant was sued in the courts of a state of which he was not a citizen that he could remove the suit to the circuit court. Under the act of March 2, 1867 (14 Stat. 558, c. 196), which first gave the right of removal on the ground of prejudice or local influence, the right was confined to "such citizen of another state, whether he be plaintiff or defendant." The provisions of these acts restricting the right of removal to the party who is a citizen of a state other than that in which the suit is brought were re-enacted and carried into the Revised Statutes of 1873-74 (section 639, Rev. St. subsecs. 1-3). The first innovation upon this seemingly just and reasonable rule which had obtained from the organization of the federal courts occurred in the act of 1875. 18 Stat. c. 137. That act was designed to enlarge the jurisdiction of the circuit courts of the United States, whether original over suits brought

therein, or by removal from the state courts. It extended the jurisdiction of the federal courts to the very verge of the constitutional limit of the grant of judicial power. Among other provisions to carry out this object, it extended the right of removal to "either party or one or more of the plaintiffs or defendants," and did not restrict the right to the party or parties who were nonresidents of the state in which the suit was brought. But this act was, in turn, superseded and repealed by the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 434, c. 866). Section 2 of that act provides:

"Sec. 2. (1) That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein, to the circuit court of the United States for the proper district. (2) Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state. (3) And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. (4) And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause."

This act restores the rule of the judiciary act of 1789 as relates to the party who may remove the suit, by restricting the right of removal to "the defendant or defendants." Under this act, a plaintiff who commences a suit in a state court cannot afterwards remove it. He is bound to remain in the forum of his own selection. It will be observed that the second clause of the section relating to the removal of suits between citizens of different states restricts the right of removal to "nonresidents of that state," i. e. the state in which the suit is brought; and a like restriction is contained in the fourth clause, relating to removals on the ground of prejudice or local influence. While this restriction is not found, in express terms, in the third clause, relating to the removal of suits in which there shall be a controversy which is wholly between citizens of different states, it is plainly implied, and what is implied in a statute is as much a part of it as what is expressed. *U. S. v. Babbit*, 1 Black, 61; *Gelpcke v. Dubuque*, 1 Wall. 221; *Wilson Co. v. Third Nat. Bank*, 103 U. S. 770.

The case of *U. S. v. Babbit*, *supra*, was in principle like the case at bar, and the court said:

"It is insisted by the counsel for the defendants in error that this is a necessary result, because the proviso at the end of the third section of this act, which imposes the limitation, is confined, in its operation, to the cases mentioned in the previous part of the same section. If this were so, the result claimed would not necessarily follow. In that case, we should find no difficulty in holding it to be clearly implied that the same rule of compensation should apply to their successors as to the then incumbents and their predecessors. What is implied in a statute, pleading, contract, or will is as much a part of it as what is expressed. *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924; *Haight v. Holley*, 3 Wend. 258; *Rogers v. Kneeland*, 10 Wend. 218; *Fox v. Phelps*, 20 Wend. 447; Com. Dig. tit. 'Devise,' note 12. 'A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter.' *Stowel v. Zouch*, 1 Flow. 366; *U. S. v. Freeman*, 3 How. 565."

The fifty-ninth section of the act of February 25, 1863, concerning national banks, provided that all suits by or against such associations might be brought in the courts of the United States or of the state. The fifty-seventh section of the act of 1864, relating to the same subject, revised and repealed the fifty-ninth section of the preceding act, and in the latter act the word "by," in respect to such suits, was dropped. Construing this latter act, the supreme court said:

"The omission was doubtless accidental. It is not to be supposed that congress intended to exclude the associations from suing in the courts where they can be sued. \* \* \* Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship." *Kennedy v. Gibson*, 8 Wall. 498, 506, 507.

This rule was carried to great length, and much beyond the necessities of the case at bar, in *Ex parte Crow Dog*, 109 U. S. 556, 558, 3 Sup. Ct. 396. A clause of the act of congress regulating intercourse with the Indian tribes was omitted from, and thereby repealed by, the Revised Statutes of the United States, but was afterwards restored by act of congress. The supreme court held that the omitted clause was in force all the time, saying:

"It is assumed for the purposes of this opinion that the omission in the original revision was inadvertent, and that the restoration evinces no other intent on the part of congress than that the provision should be considered as in force, without interruption, and not a new enactment of it for any other purpose than to correct the error of the revision."

When a defendant is sued alone in a court of the state of which he is a citizen, by a citizen of another state, and the causes of action are such that the suit might properly have been brought against him and another if the plaintiff so elected, he confessedly cannot remove the suit. Now, when the suit is brought on these same causes of action against him and another by the same plaintiff, in which there is—as there must be to give the right of removal at all—a controversy wholly between him and the plaintiff, what possible reason can be suggested why he should have the right to remove that controversy for trial into the circuit court in the one case, and the right be denied to him in the other? It is the same suit and the same controversy, and between the same parties, whether he is sued alone or with another. If he must be content with the justice of the courts of his own state in the one case, why not in

the other? It would be difficult to conceive an intention in congress to make such a senseless and absurd distinction. It is a canon of construction that every interpretation of a statute that leads to such results ought to be rejected. The mischief to be remedied by the act of 1887 was the excessive jurisdiction conferred on the circuit courts by the act of 1875. The supreme court has said repeatedly that the act of March 3, 1887 (24 Stat. 552, c. 373), as corrected by the act of August 13, 1888 (25 Stat. 433, c. 866), "was intended to contract the jurisdiction of the circuit courts of the United States, whether original over suits brought therein, or by removal from the state courts." *Hanrick v. Hanrick*, 153 U. S. 192, 197, 14 Sup. Ct. 835. In the case of *In re Pennsylvania Co.*, 137 U. S. 451, 454, 11 Sup. Ct. 141, Mr. Justice Bradley, speaking for the supreme court, said: "The general object of the act is to contract the jurisdiction of the federal courts." In the case of *Smith v. Lyon*, 133 U. S. 315, 320, 10 Sup. Ct. 303, Mr. Justice Miller characterized it as "a statute mainly designed for the purpose of restricting the jurisdiction of the circuit courts of the United States." In *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. 207, Chief Justice Fuller, in delivering the opinion of the court, said: "The attempt was manifestly to restrain the volume of litigation pouring into the federal courts, and to return to the standard of the judiciary act. \* \* \*" By reference to the fourth clause of the second section, which we have quoted, it will be observed that it does not name any amount as requisite to give jurisdiction where the suit is removed on the ground of prejudice or local influence, and it was contended that removals upon this ground could be made without regard to the amount in controversy, and this contention was upheld by some of the circuit courts; but the supreme court of the United States, giving effect to the obvious purpose and intention of the act, held, in effect, that the requirement as to the amount necessary to give jurisdiction in other removal cases must be imported into this clause of the act, and that the suit could not be removed on the ground of prejudice or local influence unless the amount in controversy exceeded \$2,000. *In re Pennsylvania Co.*, supra. Again, as to the time when the application for removal must be filed, the same clause of the act, in express terms, declares it may be done "at any time before the trial thereof"; but the supreme court, taking into consideration all the provisions of the act, and the previous legislation on the subject, and the judicial expositions thereof, held that this language of the act ought not to receive a literal interpretation, but that it should be construed as requiring the petition "to be filed before or at the term at which the cause could first be tried, and before the trial thereof." *Fisk v. Henarie*, supra. The intention of the act of 1887 is to confine the right of removal in all cases to defendants who are nonresidents of the state in which they are sued. The plaintiff, when he sues in the state court, having selected that forum, must remain there, whether he be a citizen of that or some other state. The defendant who is sued can only remove the suit when it is brought in a state other than that in which he resides. This, in the language of Chief Justice Fuller in *Fisk v. Hen-*

arie, *supra*, is a "return to the standard of the judiciary act" of 1789, concerning which Mr. Rawle says: "But, if a \* \* \* citizen of another state has commenced the suit, he cannot afterwards remove it, for he is bound by his own selection; nor can the defendant remove, for he is not to be apprehensive of the injustice of the courts of his own state." Rawle, Const. c. 25, p. 223. It is obvious, therefore, that the act of 1887, so far at least as relates to the removal of suits on the ground of a separable controversy, intended to return to the rule of the act of 1866, which first gave the right, and limited it to "the defendant who is a citizen of a state other than that in which the suit is brought." Evans, having wrongfully removed the case into the circuit court, must pay the costs in that court, as well as the costs of the appeal to this court. *Hanrick v. Hanrick*, *supra*. The decree of the circuit court is reversed, and the cause remanded, with directions to that court to vacate all orders and decrees made therein, and remand the same to the state court from whence it was removed.

SANBORN, Circuit Judge. I concur in the result in this case on the ground first stated in the opinion.

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VANY v. RECEIVER OF TOLEDO, ST. L. & K. C. RY. CO.

POTTER v. SAME.

(Circuit Court, N. D. Ohio, W. D. April 9, 1895.)

RIGHT TO JURY TRIAL—ACTION AGAINST RECEIVERS—REMOVAL OF CAUSES.

Where a receiver appointed by a federal court is sued in a state court as authorized by act of congress, and removes the suit into the federal court, plaintiff is entitled to a trial by jury, if he would have been so entitled in the state court.

Actions by Isaac Vany and Cynthia Potter, administratrix, against the receiver of the Toledo, St. Louis & Kansas City Railway Company. The cases were removed into the federal court, and defendant moved that they be referred to a master.

Hurd, Brumback & Thatcher, for plaintiffs.  
Brown & Geddes, for defendant.

RICKS, District Judge. These are two cases removed from the court of common pleas of Lucas county, Ohio, by the receiver. They are suits instituted under the act of congress which authorizes parties having complaints against the receiver, based upon acts done by him or his agents or servants as receiver, to bring suit against him in the courts of the state without leave or permission first having been obtained from the court appointing such officer. Upon the removal of these cases into this court, the counsel for the receiver filed a motion asking for a reference to a master as to the issues of fact, made upon the petitions and the answers of the receiver. The receiver, by his counsel, contends that the cases, having been brought into this court, should be conducted as a part of the



equity proceedings of the main cause, and, as is customary in issues of fact in such proceedings, that a reference should be made to a master in chancery to report upon the facts involved. Counsel for the plaintiffs contend that, the act of congress having given them the right to sue the receiver in the state court, if such suit is removed into this court it ought to proceed as though it had been originally a law case instituted in this court, and according to the usages and practices of the state court into which they had elected to carry their controversy.

It is well settled by many adjudications of the supreme court that it is within the discretion of the chancellor, when an issue of fact arises in an equity case, to submit that issue to a jury or to a master, as may seem most expeditious, convenient, and just for all concerned. Under these decisions, the practice has obtained, in this circuit at least, to refer all such issues of fact to a master, because it is—First, more expeditious; second, more economical; and, third, more convenient and satisfactory to the court. When a party voluntarily intervenes in an equity proceeding, with such a practice well established, he is supposed to have intervened with knowledge of such practice, and thereby to have subordinated his claim to such mode of proceeding as is customary in such cases. But the act of congress having given a party the right to sue the receiver in a state court, where the right to a trial to jury is guaranteed him unless waived, if the receiver brings that controversy by removal into the federal court, I think the intent and purpose of the act of congress should be carried out, and that, if he demands it, he should have a trial to a jury in the court to which his case has been removed without his consent. It is not necessary to argue this matter further, as I believe that is pretty generally recognized as the practice in the different districts in this circuit.

The motion will therefore be overruled in both cases, and, at the proper time, the cases made by the petitioners and the receiver upon their pleadings will be submitted to a jury for trial.

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**RIKCORDS et al. v. CITY OF HAMMOND et al.**

(Circuit Court, D. Indiana. May 6, 1895.)

No. 9,202.

**1. INJUNCTION—ASSESSMENT FOR SEWER—REMEDY BY APPEAL.**

Burns' Rev. St. Ind. 1894, § 4298, authorizing a landowner to appeal from an assessment for a public improvement to the circuit court, but providing that no questions of fact shall be tried on such appeal which may arise prior to the making of a contract for such improvement under the order of the council, furnishes an adequate remedy at law, by appeal, for errors and irregularities occurring subsequent to the adoption of the ordinance and the making of the contract under which the improvement was constructed, and therefore injunction will not lie to restrain the collection of the assessment on the ground of such irregularities.

**2. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—INJUNCTION.**

Acts Ind. 1889, p. 239, § 2, provide that whenever cities deem it necessary to construct any sewer, etc., the council shall declare, by resolution, the necessity therefor, and shall state the kind, size, location, and designate the terminal points thereof, and give notice of the passage of such resolutions by publication in a newspaper. A city council passed a resolution declaring the necessity for the construction of a sewer, and gave notice thereof, but the resolution and notice failed to state the size of the proposed sewer. *Held*, that such failure did not deprive the council of jurisdiction to order the improvement, and that, therefore, the collection of an assessment therefor could not be enjoined.

In Equity. Bill by George E. Rickcords and Sarah C. Purdy against the city of Hammond and others for an injunction. Heard on motion for a preliminary restraining order.

Olds & Griffin, for complainants.

Peter Crumpacker, for defendants.

BAKER, District Judge. This is a suit to enjoin the collection of an assessment, amounting to \$3,527.93, made upon the real estate of the complainants, as their proportionate share of the cost of a sewer constructed in and along Calumet avenue, in the city of Hammond, under and pursuant to certain statutes of the state. Construing these statutes the supreme court of the state has repeatedly held that a suit would not lie to restrain the collection of an assessment after the completion of a public improvement, unless it was made to appear that the common council had proceeded without taking the statutory steps necessary to acquire jurisdiction of the parties. Jurisdiction of the subject-matter is conferred by the statute. *Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436, and cases there cited. In this case the sewer has been constructed, the assessment made, and a precept issued for its collection. Hence the only question open to inquiry is whether the common council acquired jurisdiction to make the improvement. This leads to the inquiry as to what acts are to be deemed jurisdictional, in such sense that their omission will render an assessment made after the completion of the work illegal and void. It has been said by this court in the case of *Railway Co. v. Huehn*, 59 Fed. 335, that it is thoroughly well settled in every tribunal administering justice according to the rules of the common law that the proceedings of a municipal corporation clothed with power to act, if it has proceeded within the scope of its statutory powers, cannot be collaterally assailed for mere errors or irregularities. And it is equally well settled that a court of equity will not, in a suit for an injunction, examine any errors or irregularities in a proceeding to construct a sewer or other public improvement, where the statute provides that such errors or irregularities may be reviewed on appeal. The statute (2 Burns' Rev. St. Ind. 1894, § 4298) provides for an appeal when, as in this case, a precept has been issued to collect the assessment. It is enacted:

"Any owner of land or his representatives aggrieved by such precept may appeal therefrom, within twenty days after such demand or publication, to the circuit court of the county wherein such city is situated upon filing suf-

ficient bond with the clerk of said city, conditioned for the payment of whatever judgment may be rendered against such appellant in said court, and such appeal shall stay all proceedings by such treasurer. And the trial of such appeal shall be conducted as other trials of civil causes are conducted in said courts; provided, that no questions of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council. The clerk shall, upon the filing of said bond, forthwith make out and certify, under his hand and official seal, a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds and other papers filed in said matter, which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule; and in case the court and jury shall find, upon trial, the proceedings of said officers subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold and conveyed by the sheriff thereof as the said treasurer is hereinafter directed to sell and convey property liable to street improvements."

The statute declares that on such appeal no question of fact shall be tried which arises prior to the making of the contract for the improvement under the order of the council. The statute further declares that in case the court and jury shall find, upon trial, the proceedings subsequent to the order (i. e. ordinance) directing the work to be done are regular, that a contract has been made, that the work has been done according to the contract, and that the estimate has been properly made thereon, then the court shall direct said property to be sold. The complainants, therefore, have a plain and adequate remedy at law, by appeal, for the redress of every error and irregularity complained of in their bill, which occurred subsequent to the adoption of the ordinance and the making of the contract under and pursuant to which the sewer was constructed. These alleged errors and irregularities must be disregarded in determining the sufficiency of the bill to authorize the granting of an injunction, upon the most familiar and firmly-settled principles of equity jurisprudence. This court cannot examine errors and irregularities which are, by the positive terms of the statute, made triable elsewhere by a court and jury, according to the rules of the common law. The only questions which may not be reviewed on appeal are those arising prior to the making of the contract. These questions relate to the resolution declaring the necessity of the improvement, the publication of the same, fixing a time and place when and where persons to be affected by the same may appear and be heard, and the passage and promulgation of the ordinance directing the work. The statute (Acts Ind. 1889, p. 239, § 2) provides that:

"Whenever cities or incorporated towns subject to the provisions of this act shall deem it necessary to construct any sewer, or make any of the alley or street improvements in this act mentioned, the council or board of trustees shall declare by resolution the necessity therefor, and shall state the kind, size, location and designate the terminal points thereof, and notice for ten days of the passage of such resolution shall be given for two weeks in some newspaper of general circulation published in such city or incorporated town, if any there be, and if there be not such paper, then in some such paper printed and published in the county in which such city or incorporated town

is located. Said notices shall state the time and place, when and where the property owners along the line of said proposed improvement can make objections to the necessity for the construction thereof."

On July 23, 1894, a resolution, duly adopted, declared:

"That it is deemed necessary to improve Calumet avenue, a street in said city, by building a two-ring brick sewer from Carrol street (formerly Cynthia avenue) in said city, south to the city limits of said city, being an extension of the sewer now constructed on said street southward to the city limits, in accordance with the profiles and specifications on file in the office of the city civil engineer of said city."

The common council directed the clerk to cause ten days' notice of the passage of the resolution to be given by publication for two weeks in the Hammond Weekly Tribune. The notice was published as directed on the 27th day of July, and on the 3d and 10th days of August, 1894, setting out the resolution adopted on July 23, 1894, and stating that objections to the improvement would be heard by the common council in their council chambers on August 20, 1894, at 7 o'clock p. m. The declaratory resolution and notice appear on their face to be in exact compliance with the law, except in failing to state the size of the sewer. The city claims that this apparent defect is cured by reference to the profiles and specifications of the sewer on file in the office of the city civil engineer; but complainants allege in their bill that no profiles or specifications were on file, and, for the purposes of the present motion, I must assume this to be the fact. The resolution and notice state the kind of sewer, the location, and designate the terminal points, but fail to state its size. Does this failure render the resolution and notice nugatory? Plainly, it does not. It has been repeatedly held by the supreme court of this state that where the statute required the filing of a petition as a condition precedent to the exercise of jurisdiction, or the giving of some particular notice, if a petition was filed, though defective, or some notice was given, though not a compliance with the statutory requirement, the proceeding was not void, and would be sufficient to withstand a collateral attack. *Ricketts v. Spraker*, 77 Ind. 371; *Argo v. Barthand*, 80 Ind. 63; *Pickering v. State*, 106 Ind. 228, 6 N. E. 611; *Strieb v. Cox*, 111 Ind. 299, 12 N. E. 481; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, and 19 N. E. 184; *Johnson v. State*, 116 Ind. 374, 19 N. E. 298; *Paving Co. v. Edgerton*, 125 Ind. 455, 463, 25 N. E. 436. The defect in the resolution and notice is of a character which brings them far within the principle of these cases, and it must be held unavailing to impair the jurisdiction of the common council. No other defect has been pointed out which is open to review in this proceeding. The motion for a preliminary restraining order must be denied, and, unless amended within 20 days, the bill shall stand dismissed for want of equity.

UNITED STATES *ex rel.* FISHER *v.* WILLIAMS, U. S. District Judge.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1895.)

## No. 4.

## 1. DECREES—VACATING AFTER END OF TERM.

A federal circuit court has power to set aside, on motion, after as well as before the end of the term, a final decree which the judge has been induced to enter, without examination, by false representations as to its character, and which he did not intend to enter.

## 2. CIRCUIT COURTS OF APPEALS—POWER TO ISSUE WRITS OF PROHIBITION.

Quaere, whether the power of the circuit courts of appeal to issue writs of prohibition, which power they derive from the twelfth section of the act of March 3, 1891, extends to any cases except those in which the exercise of the power becomes necessary for the efficient exercise of the particular jurisdiction with which those courts are vested.

This was a petition by William H. Fisher for a writ of prohibition against John A. Williams, United States district judge for the Eastern district of Arkansas.

George H. Sanders and G. S. Cunningham, for relator.

John McClure, for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. On a previous day of the present term the relator, William H. Fisher, obtained a rule on the respondent, the Honorable John A. Williams, United States district judge for the Eastern district of Arkansas, requiring him to show cause why a writ of prohibition should not issue to prohibit him from retrying a case said to be pending in the circuit court of the United States for the Western division of the Eastern district of Arkansas, wherein the relator, William H. Fisher, is complainant, and Charles M. Simon, the Arkansas Stables (a corporation), Max Markley, J. C. Herold, and R. B. Hornor are defendants. The information on which the rule was obtained alleged in substance, that in the aforesaid suit a final decree in favor of the relator, William H. Fisher, was entered at the April term of said court for the year 1893, and that at the succeeding October term of said court for the year 1893 said decree was vacated and set aside by said respondent, while acting as judge of said court; that, in vacating and setting aside said final decree at a subsequent term of said court, the respondent had exceeded his jurisdiction, and had acted wholly without authority of law, for which reason the relator averred that the order vacating said decree was and is utterly void, and of no effect. The return to the rule to show cause, which has since been filed by the respondent, discloses the following facts: That the final decree in favor of the complainant, Fisher, in the suit above described, was entered on Saturday, October 21, 1893, the same being the last day of the April term, 1893, of the circuit court of the United States for the Western division of the Eastern district of Arkansas; that said decree was handed to the respondent at his chambers on said day by the relator's then counsel, with the request that it be signed, counsel for the complainant stating to the respondent at the time that it was an interlocutory decree; that,

relying on such statement, and without reading the said decree, it was signed by the respondent, and subsequently entered of record by the clerk of said court; that, if the respondent had known that the document handed to him for signature was not an interlocutory decree, he would not have signed the same, or allowed it to be entered of record. The return further alleges that in the suit of Fisher v. Simon et al., above referred to, no process was ever issued or served on any of the defendants, and that none of said defendants ever entered an appearance to the action, or filed an answer therein. Counsel for the relator have filed what is termed a "reply to the return," which denies the averments of the return last above stated. Attached to the reply are two exhibits which purport to be copies of an appearance entered by the defendants on June 5th and July 1, 1893, in the suit of W. H. Fisher v. Charles M. Simon et al. No other evidence, however, has been offered to support the denials contained in the reply, or to overcome the statements contained in the respondent's return. The record being in this condition, we are asked to grant a writ of prohibition prohibiting a retrial of the case of Fisher v. Simon et al.

Such power as this court has to issue writs of prohibition is undoubtedly derived from section 12 of the act of March 3, 1891 (26 Stat. 826, c. 517; 11 C. C. A. xx.), which confers on the circuit court of appeals the powers specified in section 716 of the Revised Statutes of the United States; and that section grants to the supreme court and the circuit and district courts authority "to issue writs of scire facias," and "all writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law." It has been held on several occasions that a court of the United States which derives its power to issue writs of prohibition solely from section 716 of the Revised Statutes cannot issue the writ unless it becomes necessary for the efficient exercise of the particular jurisdiction with which it has been vested. In *re Bininger*, 7 Blatchf. 159, 3 Fed. Cas. No. 1,417; *Ex parte Christy*, 3 How. 296, 332; *Ex parte Gordon*, 1 Black. 503, 505. On the strength of these adjudications, it is strenuously urged by counsel for the respondent that the court is without power, in the present instance, to issue a writ of prohibition, because, as it is said, the act threatened to be done, to wit, the retrial of the case of Fisher v. Simon et al., is not an act which tends in any wise to obstruct, or to interfere with the proper exercise of, any jurisdiction now lodged in this court. We have not found it necessary, in the present case, to inquire as to the extent of our power to issue writs of prohibition, but it may be well to state, in explanation of the rule to show cause, heretofore entered, that when the rule was applied for an appeal was pending in this court from the order made by the circuit court of the United States for the Western division of the Eastern district of Arkansas vacating the final decree in the case of Fisher v. Simon et al. The application for the rule to show cause was doubtless based on the theory that the pendency of the appeal gave this court such jurisdiction over the case as would warrant it in granting a writ of prohibition to prevent a retrial of the case until

the pending appeal was heard and determined. Whether that view was right or wrong, we need not stop to determine, for, on the assumption that the power to issue the writ exists, we think we would not be warranted in exercising it, on the state of facts disclosed by the respondent's return. The judge certifies, in substance, that he had no intention of entering the final decree in question, that the paper handed to him for signature was represented to be an interlocutory decree, and that he signed it in that belief, without reading it, and allowed it to be entered of record under a misapprehension as to its true character. The relator has taken issue with this statement contained in the return, but he has offered no evidence to support his denial, and, in the absence of such evidence, the statement, as made, must be accepted as true. It may be conceded that if the decree had been expressed in terms which were known to the judge when he entered it, and he had merely misconceived the import or legal effect of the language employed, then the mistake would have been one of law,—an error of judgment,—such as no court can correct, on a mere motion, after the lapse of the term, by modifying the erroneous judgment, or by setting the same aside. But such was not the case. The respondent did not read the proposed decree. He relied on the statement of counsel who had prepared it that it was an interlocutory order, and, on that representation, it was allowed to be spread upon the records of the court. The judge acted under a mistake of fact; his judgment was not invoked, and was not exercised, with respect to any of the terms or provisions of the alleged decree, and for that reason it was not, in any proper sense, a judicial act. We think, therefore, that on the state of facts disclosed by the return the respondent did not exceed his powers in vacating the final decree at the October term, 1893, when his attention was called to the character of that decree. We are of the opinion that when, by a mistake of the judge, induced by erroneous statements of counsel, a decree has been entered of record, which the judge did not examine or approve, and did not intend to enter, such decree may be set aside, on motion, after as well as before the expiration of the term. We can conceive of no reason why the parties to a suit, or the court, for that matter, should be bound to any greater extent by a decree of that kind than by a judgment or decree erroneously entered in consequence of a mistake of the clerk as to the character of a judgment directed to be entered. In both cases the record is affected with the same vice, in that it is made to bear witness to judicial action that was never in fact taken. It is well settled that the record of a court may be corrected at any time, from memoranda made by the judge, or even by the personal recollection of the judge, when, through a misprision of the clerk, it fails to speak the truth, or to speak the whole truth. *Bank v. Perry* (decided by this court at the present term) 66 Fed. 887. And we are not aware of any substantial reason why the same rule should not be applied to the correction of errors in a record that were occasioned by a mistake of the court or judge, when they are of the character described in the case at bar. We are unwilling to concede that a litigant must resort to an original bill, or to a bill of review, for the purpose of

avoiding a decree which a court was induced to spread of record on the last day of the term, without reading it, by reason of an erroneous statement made by counsel as to the character of the decree. Entertaining these views, a writ of prohibition is denied, and the rule to show cause, heretofore entered, is discharged.

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FISHER v. SIMON et al.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1895.)

No. 464.

1. APPEALABLE DECREES—ORDER VACATING FINAL DECREE.

An order setting aside a final decree at the succeeding term *held* not a "final decision," from which an appeal would lie (Act March 3, 1891, § 6), where the appellant obtained leave to amend the bill, and inserted therein additional allegations as to the citizenship of the parties, after the circuit court had vacated its former decree.

2. DECREES—VACATING AFTER END OF TERM.

A federal circuit court has power to set aside, on motion, after as well as before the end of the term, a final decree which the judge has been induced to enter by false representations as to its character. *U. S. v. Williams*, 67 Fed. 384, followed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

G. S. Cunningham (J. W. Martin, on the brief), for appellant.  
John McClure, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal which was taken by the complainant in the case of William H. Fisher v. Charles M. Simon et al. after the circuit court had vacated the final decree which was rendered therein on October 21, 1893, under the circumstances fully stated in the case of *U. S. v. Williams*, 67 Fed. 384, which has just been decided. After the circuit court had set aside the decree, the record shows that the complainant, Fisher, asked and obtained leave to amend his complaint, and did amend the same, by inserting therein an allegation that the complainant was a resident of Texas, and that the defendants were residents of the state of Arkansas. Thereupon the defendants were allowed until the first Monday in December, 1893, within which to plead to the amended bill, and the complainant, on his part, prayed for an appeal to this court, which was allowed. The appeal so taken is the one now before us for consideration.

Whatever doubt we might otherwise have entertained as to whether the order setting aside the final decree of October 21, 1893, at the succeeding term, was a "final decision," from which an appeal would lie under section 6 of the act of March 3, 1891, must be resolved against the appellant by his action in taking leave to amend his bill, and by inserting therein, in pursuance of such leave, additional allegations as to the citizenship of the parties, after the circuit court had vacated its former decree. After the bill was so amended the defendants were entitled to file an answer thereto, as this court has recently



had occasion to decide in the case of *Nelson v. Eaton*, 66 Fed 376. Moreover, in disposing of the appellant's application for a writ of prohibition, we have already decided that on the state of facts disclosed by the respondent's return the circuit court had power to vacate the decree of October 21, 1893. In any aspect of the case, there does not seem to have been such a final decision as would authorize the present appeal. Wherefore the appeal must be dismissed, and it is so ordered.

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**MERCHANTS' BANK OF ST. JOSEPH (FIRST NATIONAL BANK OF HANNIBAL et al., Interveners) v. CRYSLER et al.**

(Circuit Court of Appeals, Eighth Circuit. April 3, 1895.)

No. 521.

**EQUITY PRACTICE—FIXING COMPENSATION OF COUNSEL—NOTICE.**

In the absence of any well-settled rule of practice or general order on the subject, motions to fix the compensation of receivers or their counsel should not be heard *ex parte*, but notice thereof should be given to all parties in interest.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This was an application by the Merchants' Bank of St. Joseph, Mo., First National Bank of Hannibal, Mo., and John Vaughn, interveners in the suit of Ezra V. Snively, against the Loomis Coal Company, to vacate an order, made by the circuit court, allowing \$5,000 to Charles S. Cryslar, the attorney for the receiver appointed in the cause. The circuit court denied the motion. The interveners appeal.

C. A. Mosman (J. D. Strong, on the brief), for appellants.

James H. Harkless and E. J. Sherlock, filed brief for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from a final order in an equity case allowing Charles S. Cryslar, one of the appellees, \$5,000 as an attorney's fee, in addition to amounts previously allowed, for services by him rendered to the receiver appointed in said case. The allowance was made under the following circumstances: In the month of June, 1893, a bill was filed by Ezra V. Snively against the Loomis Coal Company to establish and to enforce a vendor's lien against the property of the coal company, and at the instance of the complainant, James A. Bovard, who has since died, was appointed receiver of all its property and effects, consisting of coal lands and mines, a store, and the usual tools and appliances for operating coal mines. By an order made in the case on June 30, 1893, the receiver was authorized to employ said Charles S. Cryslar, the appellee, as his attorney, to represent the interests of the trust estate in the receiver's charge. Subsequently, on March 3, 1894, the present appellants, the Merchants' Bank of St. Joseph and the First National Bank of Hannibal, Mo., who held mortgages on the coal lands in question to the amount of about \$40,000, includ-

ing interest, were allowed to intervene in the cause for the protection of their interests. On April 16, 1894, a decree was entered by consent of all parties in interest, which provided, in substance, that the property in the hands of the receiver should be sold at public sale by a commissioner appointed for that purpose, and that the proceeds of the sale should be distributed in the manner following: First, to the payment of all costs and expenses in the case, including compensation to the receiver and his attorney, and such indebtedness as the receiver had lawfully contracted while in control of the property; second, to the payment of the interveners' mortgages; third, to the payment of a judgment lien on a portion of the lands held by the appellant herein, John Vaughn; fourth, to the payment of the vendor's lien held by the complainant, Snively; the residue of the fund, if any, to be paid to the Loomis Coal Company. On the last day of the same term, to wit, on June 2, 1894, on an oral motion made by the receiver's attorney, without notice to the appellants, the circuit court allowed the receiver and his attorney each \$5,000 as compensation, in addition to the compensation theretofore allowed to them, and at the same time it approved certain lengthy reports that had been filed by the receiver. Previous to making this order, and on December 5, 1893, the court had made an order allowing the receiver to pay to himself, out of the funds in his hands, \$250 per month, as compensation, from the date of his appointment, and to pay to his attorney, said Charles S. Cryslar, \$100 per month from the date of his appointment, and to continue such payments to himself and his attorney until further order. The appellants herein made a motion on June 11, 1894, which was duly served on the appellees, to have the court vacate the final allowance in the sum of \$5,000 that was made to said Cryslar on June 2, 1894, alleging as a ground for said motion that the allowance was irregularly made without notice; that the interveners were interested in the amount of said allowance; and that they desired to be heard in relation thereto. This motion was denied by the circuit court on July 2, 1894, and the interveners prayed for an appeal, which was allowed.

The question does not arise upon this appeal as to whether the allowance made to the appellee Cryslar was reasonable in amount or otherwise. No testimony was offered on that point. When the motion to vacate the allowance and to grant a rehearing was heard, the interveners insisted that the allowance was irregularly made; that their interests were vitally affected by the amount of the allowance; and that they were entitled to notice of the motion for additional compensation, and to an opportunity to be heard before a motion of that nature could be regularly tried and determined. The circuit court apparently took a different view, holding that it was a motion which could be heard by the court *ex parte* without notice. It accordingly denied a rehearing, and ordered the allowance to stand on such evidence as may have been offered when the allowance was made, which evidence, however, is not contained in the record. If the circuit court was right in the above view, then the order must be affirmed; otherwise it must be reversed. It is familiar learning

that all motions which may be made during the progress of an equity case are classified as "motions of course" or "special motions." To the former class belong all of those which are granted "without the court being called upon to investigate the truth of any allegation or suggestion upon which they are founded", to the latter class belong all of those applications addressed to the chancellor, which he may or may not grant in his discretion, and which usually involve an investigation of the facts or circumstances on which the application is predicated. Daniell, Ch. Pl. & Prac. (5th Ed.) 1592, 1593. Special motions are subdivided into two kinds: Those which may be granted *ex parte*, and those which require notice of their presentation and hearing. It is obvious that the motion with which we are concerned in the case in hand was not a motion grantable of course because it involved the production of evidence and a judicial inquiry into the nature and extent of the services that had been rendered by the appellees and the value thereof. The only point that admits of any controversy is whether it was a special motion of the kind that can regularly be heard *ex parte*. Mr. Daniels says that it is impossible to lay down any clear rule defining such special motions as may properly be heard *ex parte*, but that any application addressed to a chancellor concerning proceedings to be taken in a pending case, that is not regulated by some general order or by any clearly-defined rule of practice, must be made on notice. Daniel, Ch. Pl. & Prac. 1593. Also in *Isnard v. Cazeaux*, 1 Paige, 39, it was held that notice of every application for an order must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in court, or where a final order is sought, orders for time and those of a like nature alone excepted; otherwise the applicant or petitioner will only be entitled to an order *nisi*. See, also, *Marshall v. Mellersh*, 5 Beav. 496, and *Hart v. Small*, 4 Paige, 551.

It cannot be said, we think, that there is now in force in this circuit any general order or clearly-defined rule or practice which regulates the mode of procedure with reference to such motions as are now under consideration. Equity rule No. 6 declares that "all motions for rules or orders, and other proceedings which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion was made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion." This rule clearly was not observed in the present case. But it may be conceded that the rule in question leaves it undetermined whether a motion by an attorney for an allowance against funds in the hands of a receiver or receivers, for services rendered in behalf of the estate in their hands, is an *ex parte* motion, which can properly be heard without notice. The general practice throughout this circuit has been, we believe (though it may have been departed from on some occasions) to make an order either

contemporaneously with the appointment of a receiver, or shortly thereafter, permitting him to retain out of the funds in his hands a certain sum monthly, on account of services, reserving the question of a further final allowance on account of services until the conclusion of the case, when the amount of such final or full compensation is usually fixed by the court after notice given, unless the amount of the allowance is agreed upon by all parties in interest. There is no usual method of procedure, so far as we have observed, with reference to making allowances in favor of attorneys who have been employed by the receiver with the sanction of the court. In the absence of any well-settled rule of practice or general order governing the subject, we entertain no doubt that applications for such orders ought to be accompanied with notice to all parties in interest, or to their solicitors of record, and that such applications ought not to be heard *ex parte*, unless the parties, when notified of the application, fail to appear. It is a well-known fact that large claims are often preferred against funds in the custody of receivers on account of legal services rendered in their behalf. The allowance of such claims depletes the trust fund, and frequently lessens the amount which the parties to the suit would otherwise be entitled to receive and would receive. The parties to the suit, therefore, have an interest in the amount of such allowances, and, according to well-established principles, they should have notice of applications for such allowances, and should be given an opportunity to defend. Any other practice might, and probably would, lead to great abuses.

Entertaining these views, we conclude that the application in question was one which could not properly be heard *ex parte*, and that the order appealed from was irregularly and erroneously entered. The order made by the circuit court on June 2, 1894, allowing the appellee \$5,000 on account of services as aforesaid, is therefore vacated and annulled, and the case is remanded to the circuit court for further proceedings therein not inconsistent with this opinion.

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ROBINSON v. CALDWELL.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1895.)

No. 188.

**1. INDIAN LANDS—INTERCOURSE ACT OF 1834—OREGON TERRITORY.**

The provisions of the intercourse act of June 30, 1834, regulating trade and intercourse with the Indian tribes, did not apply to the Oregon territory, which did not become a part of the United States until the treaty of June 15, 1846; and the act of June 5, 1850, extending the provisions of the intercourse act over the Oregon territory so far as applicable, did not, through the prohibition in the intercourse act of settlement upon Indian lands, affect the rights of settlers who had taken actual possession of lands within that territory before the passage of the act of 1850.

**2. SAME—NEZ PERCE TREATY—DONATION ACT.**

The treaty of the United States with the Nez Perce Indians of June 11, 1855, relinquished to the United States the right, title, and interest of the Indians to the country occupied by them, reserving for their own use a specified part. It also contained a clause providing that certain land occupied

by one C., though within the boundaries of the reserved portion, should not form part of the reservation. *Held*, that by this treaty the title to the land so occupied by C. was fully vested in the United States, and such land came within the terms of the donation act of September 27, 1850, granting titles to settlers upon lands in the Oregon territory.

3. PUBLIC LANDS—DONATION ACT—PROOF OF TITLE.

The donation act of September 27, 1850, granting lands to settlers in the Oregon territory, required that the settler, within a certain time after survey should be made, or, if already made, within the same time after settlement, file a notice of the land claimed and certain proof of settlement with the surveyor general, who should then issue a certificate showing the lands to which the settler was entitled. In 1853 an act was passed requiring persons entitled to the benefit of the donation act to file, in advance of the making of public surveys, a notice setting forth their claims to the benefit of the donation act, with proof of settlement. *Held*, that one who had settled on unsurveyed land, and who, within the time limited by the act of 1853, filed his notice and proofs under that act, and was only prevented from complying with the terms of the donation act by the failure of the government to extend its survey over the lands claimed by him, was entitled, though he had never received a patent, to be quieted and protected in his possession of the land, and could convey the same right to his grantee.

Appeal from the Circuit Court of the United States for the District of Idaho.

This was a suit by William A. Caldwell against Joseph Robinson to quiet complainant's title to certain lands in the state of Idaho. The circuit court rendered a decree for the complainant. 59 Fed. 653. Defendant appeals. Affirmed.

James H. Forney, for appellant.

Rothchild & Ach, for respondent.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. William Craig, a native-born citizen of the United States, was on the 6th day of July, 1838, married to Isabel Craig, an Indian woman, belonging to the Nez Perce tribe of Indians. On the 15th day of September, 1846, Craig and his wife located and settled upon the land in controversy in this suit. The land was then a part of the lands occupied by the Nez Perce Indians in what is now the state of Idaho, and it is included within the boundaries of the present Nez Perce Indian reservation. Craig and his wife continued to reside upon the land and cultivate the same from the 15th day of September, 1846, until the 4th day of June, 1855, upon which latter date Craig filed his notification with the register and receiver of the land office of the then territory of Washington, at Olympia, in said territory, for the settlement of said land, which notification was as follows:

"Pursuant to the act of congress approved on the 14th day of February, 1853, entitled 'An act to amend an act entitled "An act to create the office of surveyor-general of public lands in Oregon, and to provide for the survey, and make donations to settlers of the public lands," and amendments thereto,' I, William Craig, of Walla Walla county, in the territory of Washington, hereby give notice of my claim to donation of 640 acres of land, particularly bounded and described as follows: 'Beginning at a stake 30 yards north of Lapwai creek; thence two miles to a pile of rocks; thence south half a mile to a stake; thence

east two miles to a cottonwood tree; thence north half a mile to the place of beginning.'"

On June 19, 1855, said Craig filed in said land office his own affidavit and the affidavits of Henry M. Chase, William C. McKay, and Louis Raboin. These affidavits are to the effect that the affiants are disinterested parties; that they are personally acquainted with William Craig, and know that he has personally resided upon and cultivated said tract of land continuously from the 15th day of October, 1849; and Raboin's affidavit contains the further statement that Craig and his wife have lived together as man and wife from the 6th day of July, 1838, and that they are and were reputed by their neighbors to be man and wife during said period. After making the said proofs, Craig and wife received a letter from the officers of the land office, where the same were filed, notifying Craig that his filing and proof were complete, and that he had as complete a title to said land as could be acquired prior to issuing a patent, and that patent could not issue until the government survey had been extended over the country. In the year 1870, one D. P. Thompson, while engaged in making and extending the first surveys of the government from township 35 N., range 3 W., P. M., in which is included the land in controversy, made a survey of the Craig claim at the request of one Joseph K. Vincent, tenant thereof under the heirs of William Craig, and was paid for said survey by said Vincent. A plat of this survey was made, and kept on file in the office of the Indian agent at Lapwai, Idaho. In the month of October, 1887, in reply to a letter written by R. J. Monroe, attorney for the heirs of William Craig, and for one Samuel Phinney, who had acquired an interest from the Craig heirs in said land, the commissioner of the general land office notified said Monroe that the proof of said William Craig was deficient, for the reason that it was not accompanied by the affidavit required by section 12 of the donation act, approved September 27, 1850, and that no certificate of the surveyor general or the register and receiver of the local land office appears to have been made, setting forth the facts in the case, and specifying the land to which the party is entitled, as is prescribed by the seventh section of said act. On the receipt of this letter, said Phinney, through his attorney, on December 20, 1890, made application to the surveyor general of Idaho for an order of survey of said land. On March 14, 1891, said surveyor general replied that he had no authority to issue said order, for the reason that said lands were included in the lands of the Nez Perce Indian reservation. On receipt of this letter, the attorney for Phinney and the Craig heirs applied to the commissioner of the general land office for patent, inclosing the plat and notes of the survey made by said D. P. Thompson in 1870, together with the affidavit of said Vincent, in which the facts concerning the settlement by Craig and the survey of said claim by said Thompson are set forth. The commissioner of the land office refused to issue a patent, on the ground that the treaty provisions of the 11th of June, 1855, conferred no title or authority to issue title to Wil-

liam Craig and wife, but simply granted a right to occupancy so long as the Indian title to the reservation remains unextinguished; and the further ground that congress, in preamble approved March 3, 1873 (17 Stat. 627), construed the right of Craig as a personal right to occupy the land, that his right ceased with his death; and upon the further ground that no affidavit seems to have been made by said Craig, as required by the twelfth section of the donation act, and that no certificate of the surveyor general or receiver and register appears to have been made, setting forth the facts in the case, as required by the seventh section of said act; and upon the further ground that the said land was not subject to donation entry when Craig made his settlement, for the reason that the Indian title had not then been extinguished.

The defendant, Joseph Robinson, is the United States Indian agent of the Nez Perce Indians in Idaho. As such Indian agent, and acting under the direction of the commissioner of Indian affairs and the secretary of the interior, he has ordered the plaintiff to remove from said land. The said William Craig and wife, on February 13, 1869, conveyed all their right, title, and interest to said Phinney and one Moses H. Rice. Subsequently, the said Rice conveyed his interest to Phinney, and Phinney, under the said conveyance, went into the possession of and continued to occupy and cultivate the said land until the 9th day of March, 1891, when he conveyed an undivided one-half interest in the tract to said W. A. Caldwell, the complainant, who thereupon went into possession of said land, together with said Phinney.

On the 29th day of January, 1894, upon the facts stated above, the circuit court granted a decree adjudging the respondent to be the true and lawful owner of an undivided one-half interest in said land, and quieting his title thereto, and enjoining the defendant from interfering with his possession of said premises.

The assignments of error upon the appeal bring to our consideration two principal questions: First. Was the land in controversy subject to location and settlement by William Craig and wife under the provisions of the donation act? And, second, were the necessary steps taken by them, under the provisions of that act, to entitle them to a patent to the land, or to the relief awarded by the decree? It is contended that the land in controversy was Indian country at the time William Craig entered into the possession of the same, and that its character as Indian country has remained unchanged from that time to the present day, and that by virtue of the act of June 30, 1834, commonly known as the "Intercourse Act," no valid settlement could be made upon the land so long as the right of the Indians remained unextinguished. The act of June 30, 1834, is entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." It defines the Indian country to be all that part of the United States west of the Missouri river not included in the states of Missouri and Louisiana or the territory of Arkansas, and all lands east of that river not within any state "to which the Indian title

has not been extinguished." It contains many provisions for the regulation of trade and intercourse with the Indians in the Indian country. In section 11 is found the reference to settlement by whites upon the Indian lands. A penalty is therein denounced against any person who shall make a settlement upon or survey "any lands belonging, secured, or granted by treaty with the United States to any Indian tribe." At the time this act was adopted, there had been no treaty with the Nez Percés; no lands had, by statute, contract, or treaty, been recognized as belonging to them. In its dealings with the Indians the United States has uniformly denied their title to any of the lands within its domain. In *Johnson v. McIntosh*, 8 Wheat. 574, the nature of the right of the United States in the Indian country was considered at length, and the conclusion was there reached that the absolute title to all such lands is vested in the United States, subject only to the Indian right of possession, and that the government possesses the absolute right to extinguish that. In view of this well-known attitude of the United States towards the Indian title, and taking into consideration the fact that the intercourse act contemplates the residence of whites within the Indian country as the same is therein defined, the true interpretation of section 11 would seem to be that the lands upon which settlement is therein prohibited are such only as have been confirmed to the Indians by treaty with the United States. The other lands in the Indian country, although they are described in the act as lands to which the Indian title has not been extinguished, were never in fact recognized by the United States as "belonging" to the Indians.

But it is not deemed necessary in this case to determine the true construction to be given to that provision of the act of June 30, 1834. That act refers only to lands that were "a part of the United States" at the time of its enactment. It cannot be extended in its application to territory that was subsequently acquired, or over which the United States subsequently asserted jurisdiction. Although the northern boundary of the United States westward as far as the Rocky Mountains was established by treaty with Great Britain as early as October 20, 1818, the land to the westward thereof, including the territory in which the land in controversy is situated, was, by the express agreement of the contracting powers in that treaty, left free and open to the citizens and subjects of the United States and Great Britain, without prejudice to the claims of either to the said country, and without affecting the claims of any other power or state to any part thereof. In 1827 the provisions of that treaty were further extended; and it was not until June 15, 1846, that the territory of Oregon became a part of the United States, and subject to the exclusive jurisdiction thereof. This was the decision of the Oregon courts at an early date. *U. S. v. Tom*, 1 Or. 27; *U. S. v. Seveloff*, 2 Sawy. 312, Fed. Cas. No. 16,252. In the interval between the two treaties last mentioned, many emigrants from the states had settled in



the Oregon territory. By the year 1843, a sufficient number of settlers had taken up claims to justify the formation of an independent provisional government by adopting the organic law, which two years later was re-enacted. In the law so adopted, the right of each male settler to a claim not to exceed 640 acres was expressly protected. The people governed themselves under the organic law until congress, by the act of August 14, 1848, organized the territory of Oregon, and declared the laws of the United States extended over and "in force in said territory so far as the same or any provision thereof may be applicable."

On June 5, 1850, congress, recognizing the fact that the law of 1834 was not in force in the Oregon territory, enacted (9 Stat. 437):

"That the law regulating trade and intercourse with the Indian tribes east of the Rocky Mountains, or such provisions of the same as may be applicable, be extended over the Indian tribes in the territory of Oregon."

At the time this law went into effect, Craig had been in the possession of his claim for nearly four years, and many other settlers had taken like claims in lands similarly situated throughout the territory. In extending to the Oregon territory such of the provisions of the law of 1834 as were applicable, it is clear that congress had no intention to extend the provisions of section 11 to lands such as that held by William Craig. Up to that date, congress had made no treaty with any Indian tribe in the Oregon territory. On the 27th of September of the same year, congress enacted the donation act, providing for granting titles to settlers upon lands in that territory, and expressly recognizing certain rights of the settlers under the laws of the provisional government, but making no reservation whatever of Indian lands. Both these enactments were made with reference to conditions then known to exist.

By the terms of the donation act, the public lands within the territory were granted to every white settler who was then, or who, on or before December 1, 1851, should become, a resident thereon, provided he were a citizen of the United States or had declared his intention to become such. The provisions of this act applied as well to the settlement of William Craig as to that of any other settler in the territory. Craig and his wife were still in possession of the land as donation claimants when, on June 11, 1855, the first treaty between the United States and the Nez Perce Indians was made. 12 Stat. 957. By the terms of that treaty, the Indians relinquish and convey to the United States their right, title, and interest in and to the country occupied by them, which is therein described by metes and bounds; but they reserve to themselves out of the lands so described a certain portion, also described by metes and bounds, for the use and occupation of the tribe, and as a general reservation for other friendly tribes, "all which tract" it is stipulated "shall be set apart, and so far as necessary surveyed and marked out, for the exclusive use and benefit of said tribe, as an Indian reservation." Thereafter follows article 10, providing as follows:

"The Nez Perce Indians having expressed in council a desire that William Craig should continue to live with them, he having uniformly shown himself

their friend, it is further agreed that the tract of land now occupied by William Craig, and described in his notice to the register and receiver of the land office of the territory of Washington on the 14th day of June last, shall not be considered part of the reservation provided for in this treaty, except that it shall be subject, in common with the lands of the reservation, to the operation of the intercourse act."

By the language of this article, both the contracting parties expressly recognize the right of William Craig and the validity of his entry under the donation act. The mention of his notice to the register and receiver serves the double purpose to identify his land and to acknowledge the character of his settlement to be that of a donation claimant. There is further the express stipulation that this land shall not be a part of the reservation. What was the reservation? It was that part of the lands reserved to the use of the Indians out of the larger tract which they first relinquished to the United States. William Craig's claim was included in the lands which they had so relinquished, but it was not included in the lands reserved. The Indian right of occupancy in his land was fully extinguished, and the complete title was vested in the United States. The force of the express exclusion of Craig's land claim from the reservation is not abated by the further stipulation that it shall be subject to the provisions of the intercourse act. This imposes no limitation upon Craig's tenure, or upon the ultimate title which he is to acquire. It was essential to the integrity of the reservation that the donation land claim wholly surrounded by Indian lands should, so long as the reservation and the intercourse act should remain in existence, be made subject to the same regulation of trade and intercourse with the whites that attached to the reservation. When Craig's notice was filed, therefore, with the register and receiver, the settlement of himself and his wife upon their claim was clearly within the terms of the donation act, and the land was subject to settlement under that law from the date of its enactment.

It remains to be considered whether such steps were taken by Craig and his wife as to entitle them to the benefits of the act. Section 4 contains the words of the grant as follows:

"That there shall be and is hereby granted to every white settler, etc., now residing in said territory, or who shall become a resident thereof on or before the first day of December, eighteen hundred and fifty, and who shall have resided upon and cultivated the same for four consecutive years and shall otherwise conform to the provisions of this act," etc.

Sections 6 and 7 contain the provisions that must be conformed to. In substance, they are that the settler must within 3 months after survey is made, or, if the survey has been previously made, within 3 months after settlement, notify the surveyor general of the precise tract claimed by him, and must within 12 months after the survey has been made, or within 12 months after settlement where the survey has been previously made, prove to the satisfaction of the surveyor general that the settlement and cultivation required by the act have been commenced, specifying the time of the commencement; and he must also, at any time after the expiration of 4 years from the date of settlement, prove

in like manner, by two disinterested witnesses, the fact of continued residence and cultivation. And, upon such proof being made, the surveyor general, etc., shall issue a certificate "setting forth the facts in the case, and specifying the lands to which the parties are entitled."

It is urged that Craig failed to conform to these provisions, and that, by reason thereof, he has not placed himself within the description of the persons to whom the grant is made. The steps which the donation land claimant is by the act required to take are for the purpose of producing the proper proof that he is, as he claims to be, a resident and cultivator upon the land, and has been such for the requisite period of time, and that he belongs to the class of persons to whom the land is given. All these steps refer to and are dependent upon a public survey of the land. If the survey is not made, the settler is powerless to produce the requisite proofs. The failure of Craig to conform to the donation act resulted solely from the fact that no survey was made of his land. But on February 14, 1853, for the protection of the rights of settlers residing upon unsurveyed lands, congress amended the donation law, by requiring all persons who were entitled to the benefit of the fourth section of the act to file with the surveyor general, in advance of the time when public surveys shall be extended over the particular land, a notice in writing setting forth their claims to the benefits of the act, and the required particulars in reference to settlement and cultivation. By the act of July 17, 1854 (10 Stat. 306), the settlers were given until December 1, 1855, to comply with the amendment. Craig filed the required notice on June 4, 1855, and 15 days later he filed affidavits containing the particular facts of his settlement and residence upon the claim. No objection was made to the form of his papers, and nothing further was required of him. He received notice from the officers of the land office at Olympia to the effect that his filing and proof were complete, and that he had as complete a title to said land as could be acquired prior to issuing a patent, and that patent could not be issued until the government survey had been extended over the country.

At the date the donation act took effect, William Craig was a settler who had already resided upon and cultivated his claim for four years, and was in other respects qualified to take as a grantee. But for the requirements of the law as to notification and proof, which are contained in sections 6 and 7, the grant to him would have been in praesenti. The title was to pass to him upon his placing himself in the status of a grantee by complying with certain formalities. Therein was he to "otherwise conform to the provisions of the act." These steps he has taken, so far as it was possible, before a survey. He has done all that the law demanded of him. That he did not obtain a patent was owing to no default of his. Even if it should be held that he never became qualified to receive the title, and that he never became the grantee of the soil, he was, nevertheless, entitled to all the re-

relief that was accorded the appellee in the court below in any view of the case, for he had, as was said in *Hall v. Russell*, 101 U. S. 510, "a present right to occupy and maintain possession, so as to acquire a complete title to the soil," and that right has been lawfully conveyed to the appellee. Craig's grantees have endeavored to obtain a government survey, and to perfect their title. In 1870 they paid the expense of a survey that was made by the surveyor then engaged in surveying government lands in the township in which the claim is situated. In 1887 they were informed by the commissioner of the general land office that William Craig's proofs were deficient, because unaccompanied by the affidavit required by section 12 of the donation act, and because no certificate had been made by the surveyor general or the register and receiver, as provided in section 7. These were not valid reasons. The affidavit made necessary by section 12 applied only to settlements made subsequent to December 1, 1850, and the provisions of section 4, making void all sales and contracts of sale of lands before patent is issued, were repealed by the act of 1854 (10 Stat. 306, § 2); and, if the provisions of section 7 were not complied with, it was due solely to the nonaction of the officers of the government.

It is our judgment that the appellee has such right in the land in controversy as to entitle him to the relief afforded in the decree which is appealed from, and that decree is accordingly affirmed.

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GERMAN SAVINGS & LOAN SOC. v. DE LASHMUTT et al.

(Circuit Court, D. Oregon. April 22, 1895.)

No. 2,147.

1. **VENDOR AND PURCHASER—BONA FIDE PURCHASERS—INSANE GRANTOR.**

A deed of an insane grantor is absolutely void, and therefore a bona fide purchaser from the grantee takes no title.

2. **SUBROGATION—BONA FIDE PURCHASERS—INSANE GRANTOR.**

The deed of an insane grantor being absolutely void, the fact that she received and used the consideration for her support and maintenance creates no equity to which a bona fide purchaser from the grantee can be subrogated.

**In Equity.** Bill by the German Savings & Loan Society against De Lashmutt and others to foreclose a mortgage. The bill was amended, and defendant Starr excepts to the amendments for impertinence.

Milton W. Smith, for plaintiff.

M. L. Pipes, for defendant William Starr.

**BELLINGER, District Judge.** This is a suit to foreclose a mortgage executed by the defendant De Lashmutt in 1890 to secure the latter's note for \$25,000, upon which there is now due, principal and interest, about \$26,000. The title of De Lashmutt to a part of the mortgaged premises, consisting of the south two-thirds of lot 3 in block 22

in the city of Portland, is by deed from Bridget Lavin, now deceased, of date about June 7, 1887. The bill of complaint alleges that the defendant Starr claims some interest in the south two-thirds of said lot, which interest arises under a certain deed of De Lashmutt and wife to said Starr, dated April 7, 1893. The defendant Starr answers to the bill that he claims to be the owner in fee simple of the property in question, as heir at law and devisee of Bridget Lavin; and he further answers that at the time of the execution of the deed to De Lashmutt by Bridget Lavin, and for a long time prior and subsequent thereto, she was non compos mentis and insane, and was incapable of executing or acknowledging such deed. The complainant meets this defense by amendments to his bill, alleging, in effect, that at the time it made its loan to De Lashmutt, and took the mortgage in suit, it did so in good faith, without notice or knowledge of the alleged insanity of De Lashmutt's grantor; that De Lashmutt paid Bridget Lavin \$10,000, which was a fair price, for the property in controversy, and that the money was used by her for necessary expenses of maintenance and support, and that at the time of such purchase De Lashmutt acted in good faith, and without notice of her alleged insanity; that about April 7, 1893, De Lashmutt and the defendant Starr, "by a good and valid accord and satisfaction, had a full and complete settlement between themselves of all the matters and things then or theretofore in controversy between said De Lashmutt and said Starr, as heir, devisee, and personal representative of said Bridget Lavin, or theretofore in controversy between said De Lashmutt and said Lavin with respect to the ownership and possession of said mortgaged premises; and that then, and in pursuance and consideration therefor, said De Lashmutt executed and delivered to said Starr the deed referred to in the original bill, bearing date April 7, 1893; and that said Starr, in pursuance and consideration thereof, accepted said deed, and went into possession thereunder." The defendant Starr excepts to all these matters so alleged for impertinence.

It is settled that the deed of a person non compos mentis is void. A person incapable of understanding is incapable of executing a contract or deed. Whatever differences of opinion once existed as to whether the deed of an insane person was void or voidable, the question is authoritatively settled that such deed is absolutely void. Formerly the rule in England was that "the deed, feoffment, or grant which any person non compos mentis makes is avoidable"; but even under this rule, which is now no longer accepted, the doctrine was steadily maintained that, as against the heirs of a lunatic, his deed was invalid. Whatever reasons existed for enforcing a contract against the lunatic himself, they were never allowed in any case to apply to his heir. *Dexter v. Hall*, 15 Wall. 20; *Edwards v. Davenport*, 20 Fed. 756; *Farley v. Parker*, 6 Or. 105. The doctrine of bona fide purchase, which the plaintiff invokes, is not a rule of property. It does not determine the question of title between parties. It is only available by way of defense. It is a shield in the hands of a defendant, to

protect him against the claim of his adversary. It means that equity will refuse to interfere to aid the plaintiff in his suit, because, under the circumstances of the case, it would be unconscionable that the plaintiff should have what he seeks to obtain. It enforces no right, but simply refuses to interfere in the plaintiff's behalf. "The very few instances in which affirmative relief is granted to the bona fide purchaser are exceptional. They rest upon their special facts, and arise from the fraud of the defendant against whom the relief is awarded." 2 Pom. Eq. Jur. § 738. Moreover, the doctrine of bona fide purchaser is not applied to protect an equity as against a legal estate, but to "protect the legal title against a prior equity, by uniting with such legal title an equity arising from the payment of money, and securing the conveyance without notice and a clear conscience." *Boone v. Chiles*, 10 Pet. 211; *Mortgage Co. v. Hopper*, 56 Fed. 75. "If the defendant has a legal estate, the court does not deprive him, even as against a plaintiff clothed with an equitable interest, of the advantage which the law confers upon the holder of such estate." 2 Pom. Eq. Jur. § 743.

In the present case the plaintiff is without title or lien. It seeks in effect to acquire a lien upon the property of the defendant Starr by invoking the doctrine of bona fide purchaser. It is not claimed that either this defendant or his ancestor committed any fraud or wrong in the premises. The right to relief, as to this defense, rests solely on the ground that complainant and its grantor innocently dealt with the property of another. Such a case is not one for relief upon any principle of equity. When the legal owner is innocent, the claim of a subsequent and bona fide purchaser cannot be sustained. The good faith of a purchaser cannot create a title where none exists. *Dodge v. Briggs*, 27 Fed. 160. Nor is it material that Bridget Lavin used the \$10,000 paid her by De Lashmutt for her maintenance and support. The mere payment of the consideration, without a deed or agreement to convey and such actual performance as would justify a court to decree specific performance, is not enough in any case, and in the case of an insane person the reasons for refusing relief are still more imperative. The complainant relies upon the case of *Edwards v. Davenport*, 20 Fed. 756. In that case money was advanced to an insane person to pay off certain liens upon his property. It was held that the party advancing such money was entitled to be subrogated to all the remedies which the original lien holder had against the property, but only so far as such were valid pre-existing liens, and were to secure the debt of the insane owner. The liens in question were a lien for taxes and a mortgage to secure the debt of another person. To the extent that the money advanced was used to pay taxes the creditor was subrogated to the rights of a lien holder, but no further. The court said, as to the other lien, that the insane person received no benefit from it. Upon this statement in the opinion the complainant in this case bases its contention that the fact of the receipt of benefits was the decisive point in the case. But such was not the case. The question was simply one of

subrogation under a valid pre-existing lien. There was no contract because of the mental incapacity of the owner to enter into a contract. There was, therefore, as to the mortgage, no lien and no subrogation. But as to the tax lien the case was different. That was a valid pre-existing lien, the discharge of which necessarily inured to the benefit of the owner, whose interests could not be injuriously affected by subrogating the party who paid the money to discharge it to all the remedies of the lien.

It follows from what has already been said that the accounting between De Lashmutt and Starr, relied upon by complainant, cannot be set up against the latter's title. The case admits of but a single question, and that is the question of the mental soundness of the defendant De Lashmutt's grantor. The exceptions are allowed.

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BARR v. MAYOR, ETC., OF CITY OF NEW BRUNSWICK et al.

(Circuit Court, D. New Jersey. April 15, 1895.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EMINENT DOMAIN.

The exercise of the right and power of eminent domain is due process of law, if the conditions of its exercise are observed.

2. SAME—BENEFIT TO INDIVIDUAL.

The city of N., through its common council, in the exercise of its discretion, determined to close a certain street, and lay out a new street in lieu thereof. The proposed change was greatly to the advantage of the P. Ry. Co., which had agreed to pay all the expenses attending it. The steps required to close the one street and lay out the other were all regularly taken. *Held*, that the property of one whose land was required for the new street would not thereby be taken without due process of law.

This was a suit by Henry J. Barr against the city of New Brunswick and the Pennsylvania Railroad Company to enjoin the taking of complainant's property under the power of eminent domain. Complainant moved for a preliminary injunction. Denied.

Alan H. Strong, for complainant.

James B. Vredenburg, Charles E. Gummere, and Frederick Weigel, for defendants.

GREEN, District Judge. There is but a single question presented by the moving papers in this case, and that is whether the defendant is threatening to deprive the complainant of certain of his lands, situate in the city of New Brunswick, without due process of law, contrary to the provisions of the fourteenth amendment to the constitution of the United States, which, in terms, forbids such action. The facts are that the city of New Brunswick, through its legislative department, is about to vacate a certain street within its corporate limits, and to lay out, in lieu thereof, another street for public use. To do this latter, it will be necessary to take, by the exercise of the power of eminent domain, a part of certain lands belonging to the complainant. And it is to prevent this that the interference of this court has been asked. It is alleged by the complainant, and not

denied, that the proposed vacation of the existing street will be greatly to the benefit of the Pennsylvania Railroad Company, and that the railroad company has agreed to pay all the expenses which may arise on account of the vacation of the one street and the laying out of the other, and that these facts are conclusive as to the use to which the lands of the complainant are to be put; that the whole transaction is intended to benefit the railroad company and not the public, and therefore should be prevented. Even if this were so, it is extremely doubtful whether this court has any jurisdiction of the subject-matter. It is not denied that every step which has been taken by the common council is strictly in accordance with the requirements of the charter concerning and regulating the vacation and laying out of streets by the municipality. From the first "notice of intention," to the "approval" of the ordinance by the mayor, which accomplishes the design, every act is strictly in harmony with existing law. The policy, the necessity, of the proposed action, is a matter solely within the judicial discretion of the common council,—the legislative department of the municipality. With that there can be no interference. Having determined those questions, it only remains that the necessary proceedings taken should be in entire and full accord with law, that is, should be in fact "due process of law." The moving papers show such to be the fact. The fourteenth amendment was intended to secure the individual from the arbitrary exercise of the power of the government, unrestrained by established principles of private rights. The right of private property is unassailable under the constitution, except by due process of law. The exercise of the right and power of eminent domain is "due process of law" if the established conditions of its exercise are observed. In this case they seem to have been literally complied with. It follows, then, that the complainant's property will be taken, if at all, only by "due process of law," and to that it is liable, and of that he cannot complain. That the railroad company will be benefited by the proposed action of the common council, and that it has agreed to pay all necessary expenses arising from the vacation and laying out of the streets in question cannot affect the matter. The affidavits submitted by defendant clearly show that the public interest will be promoted by the proposed action; and, if that be so, it is perfectly proper to invoke the right of eminent domain, although private interests may also gain largely.

The promise of the railroad company to pay such expenses as the proposed action of the common council may cause does not invalidate such action, nor militate in any degree against the contention that the lands of the complainant are to be taken "by due process of law." The supreme court of New Jersey, in the case of *North Baptist Church v. City of Orange*, 54 N. J. Law, 111, 22 Atl. 1004, distinctly held that "a promise made by a citizen to pay for the expenses of opening a street is not opposed to public policy, and an ordinance passed by the common council to open such street will not upon that ground be set aside."

It appearing from the record that all the requirements of law touching the exercise of the right of eminent domain by the defend-



ant have been complied with in this case, and that the lands of the complainant are to be taken only by "due process of law," there is no reason for any action by this court in the premises, further than to dissolve the enjoining order heretofore granted, to discharge the rule to show cause, and to dismiss the bill of complaint, with costs.

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**FARMERS' LOAN & TRUST CO. v. OREGON & W. T. R. CO. (HUNT, Intervener.)**

(Circuit Court, D. Oregon. April 22, 1895.)

No. 1,896.

**1. PAYMENT—WHAT CONSTITUTES—PURCHASE OR DISCHARGE OF COUPONS.**

Bonds of a railroad were issued to a construction company, and by it turned over to intervener under a contract with him for the construction of the road. Intervener was the president and manager of the railroad company, and held practically all its stock. He sold the bonds from time to time to obtain money for construction, part of the price being retained in each instance by the purchaser to pay matured and maturing coupons. Coupons on bonds held by intervener were carried by him. Subsequently, under a contract which was practically a sale of the road free from all indebtedness, all remaining bonds were sold to the purchaser of the former bonds. *Held*, that the coupons so "carried" or to pay which money was retained out of the price were discharged, not purchased, and intervener was not entitled to share, as the holder of them, in the proceeds of a foreclosure.

**2. ESTOPPEL—BY PLEADINGS—INCONSISTENT POSITIONS.**

On intervention in a railroad bond foreclosure suit, the principal bondholder is not estopped to claim that the contract under which the bonds were acquired was in effect a purchase of the road, by a sworn answer filed by him in an intervention by another party, where the same question became material, denying that he ever became owner of the franchises and properties involved, or interested therein otherwise than by purchase of bonds and stocks.

In Equity. Bill by the Farmers' Loan & Trust Company against the Oregon & Washington Territory Railroad Company to foreclose a mortgage. George W. Hunt intervenes. Petition denied.

C. E. S. Wood, for intervener.

L. L. McArthur, for respondent Wright.

BELLINGER, District Judge. The petition of George W. Hunt prays that he may be allowed to share in the proceeds of the sale which has been had, on foreclosure, of the Oregon & Washington Territory Railroad. He claims as the owner of coupons of the value or amount of \$233,340, originally belonging to the bonds secured by the mortgage for the foreclosure of which this suit was brought. The Oregon & Washington Territory Railroad originated with the people of Pendleton, Or., who organized a company, and procured money by subscription, to inaugurate the building of a line from Pendleton to Wallula Junction. Hunt became the contractor to build the road. Soon thereafter the enterprise was, in

effect, turned over to him. He became the owner of four-fifths of the stock of the company, and also its vice president and general manager. C. B. Wright was a large stockholder in the Northern Pacific Railroad, and was interested in the construction of the proposed road, since it was to connect with the Northern Pacific road. In 1889 Hunt applied to Wright for money to carry forward the enterprise which he had assumed, with the result that the latter purchased at different times, during the early part of 1888, 942 bonds, of the par value of \$1,000 each, being all of an issue on what is known as the "Pendleton Division Issue," excepting 400, which were sold in equal amounts to W. S. Ladd and to one Tower, the total of such issue being 1,142. At the time Wright made the second purchase of bonds, 400 in number, he deducted and retained from the purchase price to be paid \$60,000, to pay the July interest on a prior purchase of 400 bonds, and the installment of coupons of the 800 bonds to mature on the first days of the succeeding January and July. Wright allowed Hunt interest upon the amount retained by him to pay coupons not then due. The same course, as to retaining money to pay coupons not yet due, was adopted with reference to the bonds purchased by Ladd and Tower. Subsequently there was a further issue of bonds upon an extension of the road, of which Wright purchased 142. There was a third issue, of what is known as the "Consolidated Mortgage Bonds," intended to be exchanged for the bonds already issued. At the time of the last two issues, Hunt was president and manager of the company and the holder of four-fifths or nineteen-twentieths of its stock. All these several issues of bonds were received by Hunt, in the first instance, as the representative of the railroad company, and were by him, as he claims, delivered to the construction company, in compliance with the railroad company's contract with such company; and thereupon the construction company turned them over to Hunt, to pay for construction by him under his contract with the latter company. He contends that the deductions made by Wright and Ladd from the purchase price of bonds bought by them from him to pay interest upon coupons not yet matured was, in effect, a payment by him of such interest, and that he is thereby in the position of a lienholder against the property mortgaged to secure the bonds to which the coupons belonged. These coupons were passed through the Farmers' Loan & Trust Company, and were canceled. A part of the coupons for which Hunt makes claim in this proceeding belonged to bonds held by Hunt, who says that he paid these coupons thus belonging to him; that he paid them by "carrying" them, by the fact that as fast as they matured they became enforceable liens in his hands against the road. All bonds not already owned by Wright at the time were subsequently, on February 27, 1891, sold by Hunt to Wright, the matured coupons having been in the meantime detached and punched. Hunt testifies that he was compelled to pay these coupons by allowing future interest to be deducted from the purchase price of the bonds sold, and by detaching and canceling the matured coupons upon the bonds held by him, in order to protect his interest in the company's property. On Febru-

ary 27, 1891, Hunt and Wright entered into the following agreement:

"Philadelphia, Pa., Feb. 27, 1891.

"It is hereby agreed between C. B. Wright, of Philadelphia, Pa., and G. W. Hunt, of Walla Walla, Wash., as follows: The said Hunt agrees to deliver, and the said Wright to take, all of the issue of bonds of the Oregon & Washington Territory R. R. Co. (except 1,142 bonds of the first issue on the Pendleton Division, already sold), at 90 per cent. of their par value, at \$20,000 per mile, or at a purchase price of \$18,000 per mile. There are said to be 111 miles of said road, but the exact mileage shall be determined by actual measurement, by two competent parties, one to be selected by each of the parties to this contract. If said road is not in a fair and reasonable good condition, according to the standard of western railroads, the said Hunt agrees to put it in such a condition, to the reasonable satisfaction of the president and chief engineer of the Northern Pacific, at his own expense. This provision applies only to roadbed, not to stations or other improvements. The said Hunt further agrees to deliver to said Wright, without additional compensation, 51 per cent. of the capital stock of said corporation. It is further agreed that said Hunt shall be paid for all the rolling stock of said corporation, or of said Hunt, and used by said corporation, an additional sum, to be determined by T. F. Oakes, president of the N. P. R. R., and G. W. Hunt; also that the said Hunt shall be allowed to build and complete, ready for the rolling stock, about 42 miles of extension of said road, as follows:

"About 18 miles to the Snake river.

" 12 " to the near Conalle.

" 12 " to the near Milton.

—All in Washington and Oregon, whenever the same shall be built, and at such price as may be agreed on with the said T. F. Oakes. The terms of payment to be as follows: \$75,000 cash, which immediate payment shall be further secured by said Hunt pledging with said Wright, as collateral security, until the second payment is made, all the capital stock of said corporation remaining and belonging to said Hunt, over and above the 51 per cent. aforesaid.

"\$800,000 to be paid on Friday, April 17th, 1891.

"\$300,000 " " " " July 1st, 1891.

"\$400,000 " " " " September 1st, 1891.

—And the balance on December 1st 1891. Deferred payments to draw interest at 6 per cent. It is further agreed that said road shall be delivered clear and free of floating (or unsecured) indebtedness, and that the said Hunt, as president of said corporation, shall lend his best efforts and his time to the reorganization of said corporation, as the said Wright or his successors shall direct.

C. B. Wright. [Seal.]

"G. W. Hunt. [Seal.]

"C. B. Wright.

"In the presence of

"C. E. S. Wood,

"C. B. Wright, Jr."

Wright has made all the payments provided for in this agreement, and has paid in addition thereto above \$230,000 in settlement of floating debts of the road. The foreclosure sale that has taken place has been in his interest. He purchased the property at such sale in extinguishment of his liens, so that any payment decreed to Hunt on this petition will be, in effect, at Wright's expense. If what Hunt did amounts to payment of coupons of outstanding bonds of the company, he is not entitled to be subrogated to the rights of the original holder of the coupons so paid. What he did was intended to have the appearance and effect of payments made by the debtor company, and was for the purpose of advancing or sustaining its credit in the market. He was the absolute manager

of the company, and was practically the only person beneficially interested in it. It had become his enterprise, and a default in the payment of interest would have brought on a foreclosure of the mortgage, and would have been ruinous to him. It was to the interest of the bondholders that the coupons should be paid, not purchased and held for future payment. To sustain the intervenor's claim, it must appear that the payment of coupons by him was upon a distinct understanding with the holders of the bonds to which the coupons belonged that such coupons were purchased, not discharged. Otherwise the accumulation of interest would impair the security of such bondholders, and work a fraud upon them. Hunt's relations to the property were such that its earnings came into his hands. Prior to the agreement of February 27, 1891, he caused a statement of its earnings to be made and placed in the hands of an official of the Northern Pacific Railroad, from which it appeared that such earnings were enough to pay operating expenses, and interest on its indebtedness. This statement, or its substance, would naturally come to Wright's knowledge, from his relation with the Northern Pacific Railroad. Its intent and effect are obvious. Moreover, it is suggestive of the fact that the earnings were enough to meet the requirements of the road, as represented. In any event, Hunt ought, in good conscience, to have shown what the fact is as to this,—what he received as president, manager, and stockholder of the company, and the application made of such receipts.

On the intervention of Congdon in this case (58 Fed. 640), I considered the effect of the agreement between Wright and Hunt, of February 27, 1891, and concluded that this agreement was, in effect, a purchase by Wright from Hunt of the road in question, free from all indebtedness. I am still of that opinion. Wright testifies that the agreement was the result of a conference between the parties at his home, in Philadelphia, where he was visited by Hunt and Mr. Wood, Hunt's attorney; that the latter introduced the subject of the agreement with the statement:

"Now, Mr. Wright, we have come here to sell you this road. We have got to the end of our string, and we have got a large amount of money to raise on Monday. Mr. Hunt has been called upon for a large amount of money payable on Monday,—the first of March, he said,—and we want to sell you this road."

He testifies that in pursuance of this offer the contract in question was entered into, and the road taken possession of by him. This testimony is not contradicted. But, without this testimony, the written agreement of the parties clearly shows that the contract was, in effect, one of sale and purchase. Wright bought all the bonds and 51 per cent. of the stock of the company; provided for all the floating indebtedness, for the purchase of the rolling stock, and for the construction of 42 miles of extension of the road, to be paid for at such price as should be agreed upon between Hunt and T. F. Oakes, president of the Northern Pacific Railroad Company. The provisions in the agreement as to such construction, that "Hunt shall be allowed to build and complete forty-two miles"

of extensions to specified points, "at such price as may be agreed upon with the said T. F. Oakes"; the language of the bond-purchase provision, that Wright is to take all of the issue of bonds, etc., "at 90 per cent. of the par value, at \$20,000 per mile, or at a purchase price of \$18,000 per mile"; and the provision for ascertaining the exact mileage of the road by a disinterested measurement; and the further provision that Hunt is to put the road in a good condition, to the reasonable satisfaction of said Oakes or the chief engineer of the Northern Pacific Railroad Company,—are all conditions of purchase, rather than conditions of security. Hunt's agreement "to put the road in a good condition" can only refer to a change of ownership in fact, whatever the form of ownership might be; otherwise it must be supposed that Hunt would be required, not only to put the road in a good condition, but to keep it in such condition. Nor is this all. The agreement provides that Hunt shall deliver the road, free and clear of floating or unsecured indebtedness (Wright had taken up, by the agreement, the bonded debt), and shall aid in such reorganization of the company as Wright or his successors shall direct. Under this agreement, Wright took actual, formal possession of the road, sending his son and an accountant to this country for that purpose.

It is in evidence (for the admission of which the case was reopened after it had been submitted) that Wright, in an answer filed in this court to the petition of W. M. Ladd and others, in a proceeding where the question became a material one, denied that he ever became, in fact or at all, the owner of the franchises or properties of the Oregon & Washington Territory Railroad Company, or interested in them in any other way than by the purchase of bonds and stocks. This answer was sworn to by Wright, and filed after the adjudication in the Congdon intervention, where it was decided in favor of Wright's contention that he did, in effect, become the purchaser of the road free from all indebtedness, and that the purchase by him of bonds and stocks on February 27, 1891, was merely a means to that end, and after this cause had been submitted here upon his like contention, supported by his own oath and the argument of his lawyers. It was to his interest, in the Ladd petition, that his relation to the road should be held to be merely that of stockholder and creditor, and his oath therein is according to that interest. His interest in the Congdon intervention and in this intervention is the other way. In this case, as in the Congdon Case, he makes it clear that Hunt came to him with a proposition to sell the road, and that it was upon that basis that the contract was made, and he testifies that he took possession of the road. I am not authorized to punish Wright for his oath on the Ladd petition by a judgment in this case that is contrary to the judgment rendered by me in the Congdon intervention, and to my present convictions of the truth of the matter to be determined. There is no room for an estoppel. The question for decision rests upon a written contract of the parties, and upon what was done under that contract, and is not open to doubt. The prayer of the petition is denied.

## CUTLER v. CLEMENTSON et al.

(Circuit Court, D. Minnesota, Fourth Division. May 6, 1895.)

## 1 MORTGAGES—ASSIGNMENT AND FORECLOSURE.

A mortgagee, who has sold, assigned, and conveyed "all his right, title, and interest in and to" the mortgage, guarantying the notes secured thereby, cannot foreclose without the consent of the assignee, though the assignment is not recorded; and such a foreclosure is a nullity.

## 2. SAME—RIGHTS OF JUDGMENT CREDITORS.

Where a mortgagee, after assigning the mortgage with guaranty of payment, foreclosed the same without notice to the assignee, for which reason the foreclosure was void, *held*, that certain third persons, who obtained judgment against the mortgagors, while the mortgage stood of record, and docketed the same before the assignment was recorded, but filed notice of intention to redeem and did redeem, after the assignment had been placed on record, acquired thereby no right superior to that of the assignee; and that the Minnesota statute, protecting judgment creditors and bona fide purchasers (Gen. St. 1878, c. 40, § 21; Gen. St. 1894, § 4180), did not apply in their favor.

This was a bill by I. M. Cutler against Peter J. E. Clementson and others to foreclose a mortgage, and for other relief.

Roberts & Sweet, for complainant.

Selden Bacon, for defendants Curtis & Wheeler.

NELSON, District Judge. This suit is brought to set aside a prior foreclosure and sale, and to foreclose the complainant's mortgage upon the property in question. The facts I find to be as follows:

In December, 1889, defendants Clementson and wife executed to the Lombard Investment Company, a corporation of the state of Missouri, a mortgage upon certain real estate in Hennepin county, Minn., which was duly recorded in that county on the 4th day of January, 1890, to secure two notes, one for \$400, due January 1, 1891, the other for \$8,000, due January 1, 1895, with interest coupons attached payable semi-annually. About January 20, 1890, the mortgage was assigned in writing, and the notes sold and delivered by the Investment Company, with its guaranty of payment to complainant. This assignment was not filed for record in Hennepin county, Minn., until December 24, 1892. The Investment Company had offices in Kansas City and Boston, and when the complainant presented at the latter office his coupons, and the \$400 note when it became due, they were paid, but the defendants Clementson and wife made no payments of either principal or interest. July 9, 1892, the Investment Company foreclosed the mortgage in its own name by advertisement, for the sum of \$1,548.29, the amount claimed to have been advanced by it to complainant, and in September of the same year bid in the property for \$1,732.03. These proceedings were without the knowledge or consent of complainant, and it does not appear that he ever ratified them. Subsequent to the execution of the mortgage, and prior to the foreclosure thereof, Eugene P. Curtis and Artemas H. Wheeler, who alone answer herein, obtained judgment, and docketed the same against the defendants Clementson. On the 7th day of September, 1893, there being due upon it the sum of \$1,921.15, they filed in the office of the register of deeds for Hennepin county, Minn., notice of their intention to redeem from the foreclosure sale; and on the 11th of that month, by the payment of \$1,868.55, did redeem the property, and received the sheriff's certificate therefor, which was duly recorded on the same day. This amount, less his fees, was paid by the sheriff to the Lombard Investment Company, and is still retained by it. In January, 1893, by direction of the Investment Company, this suit was commenced to set aside the prior sale, and

to foreclose the mortgage in the name of the complainant. The latter was not notified of that proceeding until June following, when he received a letter from the company, stating that probably it would be compelled to foreclose the mortgage, and that the property could be sold, and gotten into better hands, if complainant would accept from the purchaser a mortgage for 90 per cent. of the present one, and \$800 in cash. In answer to this letter, complainant wrote immediately as follows: "I have received your letter of 1st inst., informing me that it would be advisable to foreclose loan 039679, Clementson, \$8,000, as the borrower has defaulted in the payment of interest. In compliance with your request, I hereby authorize you to collect this mortgage loan by foreclosure or otherwise." He then discusses the proposition made to him by the company, and virtually agrees to the terms proposed by it. At that time he knew nothing of the prior foreclosure, and not until January, 1894, did he become aware that his interests were in jeopardy. In order to protect the same, he immediately employed counsel, and filed the amended bill in this suit.

Upon this state of facts, as a conclusion of law, I find that the complainant is entitled to a decree as prayed for in the bill.

Mem. Defendants Curtis and Wheeler base their claims on several grounds, which may be summed up thus: (1) They deny that the assignment was completed and delivered before the foreclosure. (2) They set up their recorded judgment as a prior lien to the assignment. (3) They urge that complainant consented to or ratified the foreclosure by the Investment Company, or that he is estopped, either by his own laches, or equitably, from denying such consent or ratification.

The evidence does not support the first claim of the defendants.

Again, the Investment Company, having sold, assigned, and conveyed "all its right, title, and interest in and to" the mortgage, could not foreclose it without the consent of the assignee; for, though it held the record title, it had no interest in the mortgage, or the debt secured by it, and the foreclosure was a nullity. The recording statute of Minnesota (Gen. St. 1878, c. 40, § 21; Gen. St. 1894, § 4180) has no application to the facts disclosed in this suit. It protects judgment creditors as bona fide purchasers for a valuable consideration, whose liens arise while the record title appears in the judgment debtor, although he may in fact have conveyed the property. In this case there was a conveyance (a mortgage) to the Lombard Investment Company on record at the time these defendants obtained their judgments against the mortgagor, and the prior lien of this mortgage was not destroyed by anything that occurred afterwards. It is true that at the time Curtis & Wheeler docketed their judgments the assignment of the mortgage was not on record, but their answer discloses that they had notice of it February 11, 1893, and when they filed their notice of intention to redeem they had constructive notice from the records that an assignment of the mortgage had been filed some eight months previous. They cannot by an appeal to this statute defeat the relief sought, for they parted with nothing upon the strength of the record. I do not think the evidence warrants the conclusion that complainant authorized or ratified the foreclosure by the Investment Company upon which the sale in question was made, or that the complainant was guilty of such negligence or laches as would bar him from the relief sought herein. As to the claim of equitable estoppel, the payment of money by

these defendants for the redemption was their own act, brought about and consummated by themselves after notice of the assignment to complainant. Let a decree be entered as prayed for in the bill of complaint.

**CHICAGO, B. & Q. R. CO. v. BOARD OF COM'RS OF REPUBLIC  
COUNTY et al.**

(Circuit Court of Appeals, Eighth Circuit. April 22, 1895.)

No. 485.

**TAXATION—EQUALITY—KANSAS CONSTITUTION AND STATUTE.**

The constitution of Kansas provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation." Article 11, § 1. The statutes provide that railroad property shall be assessed by a state board of assessors, and other property by city and county assessors. In 1893 the state board assessed railroad property at its full value, but the assessors of R. county, pursuant to an agreement among themselves, assessed the other property in the county at one-third of its value. The C. Ry. Co. paid its state taxes in full, and tendered to the county of R. the amount that would have been due it for taxes if the property of the railway company had been assessed upon the same basis as other property. *Held*, following the decisions of the supreme court of Kansas, that the railway company was entitled to an injunction to restrain the county from collecting the remainder of the tax.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a suit by the Chicago, Burlington & Quincy Railroad Company against the board of county commissioners of the county of Republic and the county treasurer of the county to enjoin the collection of a tax. The circuit court dismissed the bill. Complainant appealed.

W. F. Guthrie, for appellant.

John T. Little, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The appellant, the Chicago, Burlington & Quincy Railroad Company, filed its bill in the circuit court of the United States for the district of Kansas against the board of county commissioners of the county of Republic and the county treasurer of the county, the appellees, praying to enjoin the collection of a part of the county taxes assessed and levied on the property of the railroad company in the county of Republic. Under the laws of Kansas, railroad property is valued for taxation by a state board of railroad assessors; other property is valued for taxation by city and county assessors. The constitution of the state declares that "the legislature shall provide for a uniform and equal rate of assessment and taxation" (section 1, art. 11), and the statute provides that all property shall be assessed at its true value. For the year 1893 the state board of assessors assessed the appellant's property at its true and actual value; but, in pursuance of an agreement entered into between the trustees, sitting and acting



as a body of assessors for Republic county, the city and township assessors of that county agreed to value, and did value and assess, all other property in that county, for the purpose of taxation for that year, at 33 $\frac{1}{3}$  per cent. of its true value. The appellant paid the state taxes in full, and tendered unconditionally to the proper collector of the revenue for the county, which tender was accepted without prejudice, the full amount of county and local taxes that would have been due and collectible upon its property in the county if it had been valued and assessed for purposes of taxation by the rule adopted and carried out by the city and township assessors in valuing and assessing for taxation all other kinds of property in the county.

The bill raises no federal question, and the rights of the parties must be determined by the laws of the state applicable to the case. The circuit court, in deference, probably, to what was said by the supreme court of Kansas in *Adams v. Beman*, 10 Kan. 37, and *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190, dismissed the bill. After this case was decided below, and since its submission in this court, the opinions of the supreme court of Kansas in the cases referred to have come under the review of that court in the case of *Chicago, B. & Q. R. Co. v. Board of County Com'rs*, 39 Pac. 1039. We have been furnished with a manuscript copy of the opinion of the court, from which it appears that, in a case on all fours with the case at bar, that court held that the railroad company was entitled to the relief sought by the appellant in this case. The opinion of the court was delivered by Chief Justice Horton, and the headnote, which by a law of that state is required to be prepared by the judge delivering the opinion, and to express the exact ruling of the court, reads as follows:

"By the Court, Horton, C. J.: (1) \* \* \* *Adams v. Beman*, 10 Kan. 37, and *Challiss v. Rigg*, 49 Kan. 119, 30 Pac. 190, distinguished. (2) In 1893 the property of the Chicago, Burlington & Quincy Railroad Company in Atchison county was assessed by the state board of railroad assessors at its true and actual value. The city and township assessors of that county, upon an agreement entered into between themselves, assessed in 1893 all of the other property of the county at twenty-five per cent of its true value, and the property of the county, except the railroad property, was taxed in 1893 upon such twenty-five per cent. assessment. Subsequently the railroad company tendered to the county treasurer of Atchison county the full amount of all of the state taxes which were levied on its property, and also an amount for the county and other taxes equal to that assessed on other property of the county, and then brought its action to enjoin the county authorities from collecting the remainder. Held, that the railroad company is entitled to an injunction to restrain the collection of the illegal excess."

Inasmuch as the state law, as construed and expounded by its supreme court, furnishes the rule of decision in this case, the decree of the circuit court is reversed, and the cause remanded, with directions to enter a decree as prayed for in the bill.

CHICAGO, B. & Q. R. CO. v. BOARD OF COM'RS OF NORTON COUNTY  
et al.

(Circuit Court of Appeals, Eighth Circuit. April 22, 1895.)

No. 486.

1 TAXES—SUIT TO ENJOIN COLLECTION—TENDER.

In the federal courts, the collection of a tax cannot be enjoined unless the party seeking the injunction has paid or tendered, unconditionally, so much of the tax as it is certain he should pay. An averment of readiness to pay, or a tender made in the bill, is not sufficient.

2. SAME—PRACTICE.

Where, in a suit to enjoin collection of a part of a tax, it appears that a tender has been made in good faith of the amount supposed to be due, but that the sum so tendered was in fact less than was due, the bill should not be dismissed absolutely, but an opportunity should be given to the complainant to pay the excess, together with costs and penalties. *Chicago, B. & Q. R. Co. v. Board of Com'rs of Republic Co.*, 67 Fed. 411, followed.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a suit by the Chicago, Burlington & Quincy Railroad Company against the board of county commissioners of the county of Norton, Kan., and the county treasurer of the county, to enjoin the collection of a tax. The circuit court dismissed the bill. Complainant appealed.

W. F. Guthrie, for appellant.

John T. Little, C. D. Jones, and David Overmyer, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This case is similar in all respects to that of *Same Appellant v. Board of Com'rs of Republic Co.* (No. 485; just decided) 67 Fed. 411, except in these particulars: The county assessors, by an agreement between themselves, assessed all property in the county, except the railroad, at 50 per cent, of its true value; but the appellant, believing it had been assessed at only 40 per cent. of its true value, tendered unconditionally, which tender was accepted without prejudice, the amount of taxes that would have been due upon its property in the county if it had been assessed at 40 per cent, of its true value. When it was ascertained that all other property in the county had been assessed at 50 per cent. of its true value, the appellant amended its bill by adding thereto: "Your orator here offering to do such further equity, in addition to such payment and tender, as your honors may deem just and equitable, your orator having heretofore done equity as your orator understood the same;" but made no further actual tender or payment.

In the federal courts no one can enjoin the collection of a tax until he has paid or made an unconditional tender of so much of the tax assessed against him as can be plainly seen he ought to pay. *State Railroad Tax Cases*, 92 U. S. 575, 616, 617; *Bank v. Kimball*, 103 U. S. 732. The tender made by the appellant in this case was not sufficient, and, when advised of the insufficiency of the tender by record evidence of the valuation by the county assessors of all

other property in the county for taxation, it merely amended its bill, offering to do equity. This was not a compliance with the rule. It should have paid or tendered unconditionally an amount of tax equal to that assessed on other property in the county. An averment of readiness to pay or a tender made in the bill is not sufficient in this class of cases. The tender must be made to the officer authorized to collect the taxes. It must be actual and unconditional, and made in money or in evidence of indebtedness of the county which by law of the state is made a legal tender in the payment of the taxes. We think it sufficiently appears from the record that the appellant supposed at the time the tender was made and the bill filed that the amount tendered equaled the tax assessed on other property in the county, and that the tender was made in good faith under that belief. In view of this fact, we do not think the mistake in the amount tendered should operate to deprive the appellant of all relief on final hearing. The decree of the circuit court is reversed, but at the costs of the appellant, and the cause remanded with direction to dismiss the bill unless, within 60 days after the filing of the mandate of this court in the court below, the appellant shall, by competent evidence, satisfy the circuit court that it has paid or tendered to the proper officer of the county the taxes on the 10 per cent. of valuation not heretofore paid or tendered, with all penalties and interest accrued thereon, and the costs of this suit in the circuit court, in which case the court will enter a decree enjoining the collection of the remainder of the taxes as prayed for in the bill.

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MERZ CAPSULE CO. v. UNITED STATES CAPSULE CO. et al.

(Circuit Court, W. D. Michigan. March 19, 1895.)

1. CORPORATIONS—RIGHT TO SUBSCRIBE FOR STOCK OF OTHER CORPORATIONS—ULTRA VIRES.

A corporation has, in general, no authority to subscribe for stock of another corporation, when the law governing the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and obligations imposed by the law of the subscribing corporation. *Held*, therefore, that a subscription made by a private business corporation organized under the laws of Michigan, for stock of a similar corporation organized under the laws of New Jersey, which subscription was to be paid for by a transfer of the entire property and business of the Michigan corporation, was ultra vires and void.

2. MONOPOLIES AND COMBINATIONS—ILLEGAL CONTRACTS.

A contract by which a Michigan corporation agrees with other corporations and persons doing business in a particular article of commerce that each of said parties shall convey its entire property and business to a new corporation for the purpose of controlling the price of said article, and each of the parties becomes practically a mere employé of the new corporation, and subject to its dominion and control, is unlawful, under the provisions of the Michigan statute of 1889, which declares certain contracts and combinations unlawful, and provides a punishment for parties entering into the same. 3 How. Ann. St. § 9354j.

3. SAME—CONSTITUTIONAL LAW.

The above statute, though perhaps of doubtful constitutionality, is not so clearly invalid as that a court of first instance would be justified in declaring it void.

**4. SAME—RIGHTS OF PARTIES TO ILLEGAL CONTRACT.**

A corporation entering into a contract which is illegal as against public policy, and also as contrary to the express provisions of a statute forbidding monopolies and combinations, is not entitled to any relief upon such contract against the other parties thereto; but where, after making such agreement, it decides to withdraw therefrom, it is entitled to preventive relief, such as an injunction to prevent the combination from taking possession of its property pursuant to the terms of the contract.

This was a bill by the Merz Capsule Company, a corporation organized under the laws of Michigan, and doing business at Detroit, against Robert H. McCutcheon, J. Ernest Warren, James Wilkie, John A. Grogan, William H. Warren, the National Capsule Company, and the United States Capsule Company, praying that a certain contract between complainant and defendants should be declared null and void, and that defendants be enjoined from carrying out the same as against the rights of complainant. Complainant was engaged in the business of manufacturing and selling gelatine shells or capsules, and on November 29, 1893, it entered into a contract with the other defendants (excepting the United States Capsule Company), who were engaged in the same business, to pool their interests in such business, and form a corporation under the laws of New Jersey, under the name of the United States Capsule Company. After the preliminary papers had been signed, and the necessary steps taken for the organization of such New Jersey corporation, the stockholders of the complainant company reconsidered their action, and resolved to remain an independent corporation. The other parties to the combination, however, endeavored to hold the complainant company to its agreement, and took steps to obtain possession of its plant. Complainant thereupon filed this bill. The agreement was as follows:

This agreement, made the 29th day of November, 1893, between the National Capsule Company, a corporation organized under the laws of the state of New Jersey, and doing business at Indianapolis, Indiana; the Merz Capsule Company, a corporation organized under the laws of the state of Michigan, and doing business at Detroit, Michigan; J. E. Warren and James Wilkie, copartners doing business at Detroit, Michigan, as the Warren Capsule Company; and John A. Grogan and W. H. Warren, copartners doing business at Detroit, Michigan, as the Michigan Capsule Company,—witnesseth:

(1) That said parties agree to organize a corporation for the manufacture and sale of hard, empty, gelatine capsules; the main office and point of shipment of the goods manufactured by said company to be at Detroit, Michigan. The capital stock to be (\$70,000.00) seventy thousand dollars, allotted among the parties hereto as follows: Twenty thousand dollars (\$20,000.00) each to be allotted to the National Capsule Company, the Merz Capsule Company, and jointly to the parties doing business as the Warren Capsule Company, and ten thousand (\$10,000) dollars to be allotted jointly to the parties doing business as the Michigan Capsule Company. Three-quarters of the stock allotted to each of said parties shall be issued at the time of the organization of the company. The remaining one-quarter of each allotment shall be held as treasury stock of the new company until the several parties shall demonstrate that the present capacity of their respective plants is as follows: The National Capsule Company at least twenty gross of completed capsules per day; the Warren Capsule Company at least twenty gross of completed capsules per day; the Michigan Capsule Company at least ten gross of completed capsules per day. The capacity of each plant to be determined by the average amount produced during a

test of five consecutive days of ten hours each, to be had in the presence of the representatives of each party, and under ordinary conditions of manufacture. Such test to be had within three months from the date of the organization of said corporation, unless said test shall be prevented by reason of injury or destruction of the plant by the elements, or for other good and valid reasons, in which case a reasonable time in addition shall be allowed to restore the plant to a proper working condition. In case any of the parties above named shall fail to demonstrate that the capacity of their plant is as above stated, the twenty-five per cent. of the stock retained by said corporation shall be forfeited by said party, and remain the property of the corporation.

(2) The parties hereto hereby agree to sell and convey to said corporation, upon its organization, free and clear from all incumbrances, their respective plants operated by them in the manufacture of hard, empty, gelatine capsules, including all real estate owned and used by them for such purpose, together with all machinery and appliances of every kind pertaining thereto, stock in trade, good will, and patentable devices, labels, trade-marks, trade secrets (except processes for treating gelatine), now owned by said parties, and used in connection with the business of manufacturing hard, empty, gelatine capsules, and in payment therefor (except for manufactured stock, or boxes or raw materials) to receive from said corporation mortgage bonds to the amount of the appraised value of the property thus conveyed to said corporation. Said bonds to bear interest at eight per cent. per annum, payable five years from the date of issue, and only sufficient amount of bonds to be issued to cover the value of the property conveyed to said corporation by all of the parties hereto. Said bonds to be secured by mortgages covering all of the property of every kind belonging to said corporation. The value of the property conveyed to said corporation by the respective parties shall be determined in the following manner: If all of the parties hereto are unable to agree upon the value of the property conveyed by each, the value of the real estate now owned by each party in Detroit shall be appraised by three disinterested and competent parties; one to be chosen by the National Capsule Company, and one by the other three parties, and the two so chosen to select a third. The decision of said appraisers, or the majority of them, to be final. The value of the real estate now owned by the National Capsule Company in Indianapolis to be appraised by three appraisers to be chosen in a similar manner, whose decision, or that of a majority of them, is to be final. The machinery and appliances of every kind, including box-making machinery, to be appraised by three disinterested and competent appraisers at the price at which it can be duplicated in open market; and, in estimating the value thereof, only such machinery and appliances shall be considered as are practical in the manufacture of empty capsules, and now used by the parties hereto in the conduct of their business. The appraisers to be chosen as follows: The National Capsule Company to select an appraiser in Indianapolis, the other parties to select an appraiser from Detroit, and the two so chosen to select a competent expert machinist from a city outside of the two cities above named; the decision of such appraisers, or that of a majority of them, to be final.

(3) The parties hereto agree that each shall receive in payment for the manufactured stock, boxes, and raw material conveyed to said corporation, notes of said corporation payable six months from the date of delivery of the property, and all marketable manufactured and unmanufactured stock of complete empty capsules to be paid for at thirty (30) cents per thousand, partially manufactured goods and all other material as can be readily utilized at appraised value, and raw material to be appraised at market value.

(4) All expenses of appraisal and of organization of the new company shall be borne by the new company.

(5) Each of the parties hereto agree, from the date hereof, not to make, sign, or accept any contract whatsoever for the future sale or delivery of any hard, empty capsules, or any other contract whatsoever, except ordinary contracts for immediate sale and delivery. All old, existing contracts with drug jobbers are to be completed by the new company, provided such are not for over fifty gross of capsules.

(6) It is also agreed that none of the parties hereto shall hereafter engage in the manufacture or sale of empty gelatine capsules in any manner whatsoever.

In witness whereof, the parties hereto have set their hands and seals, and have affixed the seals of the various corporations, by the hands of their respective officers thereunto duly authorized, the day and year first above written.

Attest:

Lincoln B. Palmer, Secty.

National Capsule Company,

By Charles M. Stephens, President.

Attest:

Sol. E. Heineman, Secretary.

The Merz Capsule Company,

By S. E. Heineman, Pres.

Warren Capsule Company,

By J. Ernest Warren, Jas. Wilkie.

Michigan Capsule Company,

By John A. Grogan, W. H. Warren.

All patents, procured or pending, owned by parties hereto, shall be assigned to the new company, with the sole provision that there shall be a reversion to the present owner thereof in case of dissolution, or failure or sale of the assets under the mortgage, or retirement from active business of the new corporation. The word "dissolution" shall, however, not be construed to apply to a nominal or formal reorganization or merger of the new company with any other corporation, person, or persons.

David E. Heineman and Edwin F. Conely, for complainant.

H. E. Spaulding, F. A. Brooke, and Russell & Campbell, for defendants.

SEVERENS, District Judge. In my opinion, the complainant in this case is entitled to the relief prayed. The case is one of much importance, and will doubtless undergo a review in the appellate court. I shall therefore merely summarize the grounds upon which my conclusion is founded.

One of the grounds upon which the invalidity of the agreement between the parties of November 29, 1893, is asserted, viz. that the combination was a conspiracy in restraint of trade or commerce among the several states, and was illegal under the act of July 2, 1890, has, since the argument of this case and while it has been under consideration, been declared to be untenable by the supreme court of the United States in the case of U. S. v. E. C. Knight Co., 15 Sup. Ct. 249, and may be laid out of further consideration. I am of opinion, however, that that agreement was in contravention of the laws and public policy of the state of Michigan, in that it was a disposal of substantially the entire business plant of the Michigan corporation, as the consideration for its purchase of the shares of stock in the United States Capsule Company, a new Jersey corporation. The general rule may be stated to be that it is incompetent for a corporation to subscribe for stock in another corporation. It must be acknowledged that there are exceptions to this rule, founded upon a variety of peculiar circumstances, which it is not necessary here to enumerate. I am unable to discover any ground upon which this case can be held within any of such exceptions. But, however this may be, if the corporation in which the stock is taken is a domestic one, and subject to the same laws and dominion as the one taking such stock, or where, if the corporations are organized in different states, they are subject to regulations of a substantially identical

character, my opinion is that where, as in this case, the law of the corporation in which the stock is taken is of a substantially different character, and fails to impose the liabilities and create the obligations imposed by the law of the corporation subscribing for the stock, such subscription is ultra vires of the latter corporation, and is illegal and void. The laws of Michigan, under which the complainant is incorporated, impose restrictions, duties, and obligations upon it of a character which indicate the purpose and policy of the laws of the state of Michigan in providing for its incorporation. I shall not go into details in respect to those provisions. They are sufficiently obvious upon an inspection of the statute. The general fact is sufficient for the present purpose. They are safeguards erected by the state, and constitute the bounds and conditions of corporate action. It is quite clear that the laws of New Jersey fail to make many of those conditions effectual or obligatory upon corporations organized thereunder, either in the original incorporation, or in corporate action; and it is clear that the statutory regulations, in that regard, of the state of New Jersey, do not respond to what, by the laws of Michigan, is deemed essential. By the agreement in question the Michigan corporation conveys substantially its entire assets to the New Jersey corporation, abandons its business as a proprietor thereof, and becomes practically a mere employé of the New Jersey corporation, and subject to its dominion and control.

My opinion is, also, that the above-mentioned agreement is obnoxious to the provisions of Act 225 of the Laws of Michigan (1889), entitled "An act declaring certain contracts, agreements, undertakings and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof." 3 How. Ann. St. 9354j. It was strenuously argued before me by counsel for defendants that this statute is unconstitutional and void, in that it is class legislation. Whether or not this contention is well founded, I do not now undertake to decide. It may be admitted that there is fair ground for doubt of the validity of this statute; but its invalidity is not so clear and free from doubt as that a court of first instance would, in my opinion, be justified in declaring it void. For the reasons thus briefly stated, my conclusion is that the agreement upon which the defendants found their supposed rights was not authorized by the laws of Michigan, and is therefore void. It is unnecessary, therefore, to pass upon other grounds upon which the agreement is alleged to be invalid.

It remains to be considered what relief should be administered upon this state of things. The proof sufficiently shows—and, indeed, the nature of the transaction demonstrated this—that the complainant, on its own account, is not entitled to claim any relief founded upon the contract; but the contract itself being contrary to law furnishes no support for the aggressive attitude and conduct of the defendants. The complainant's conduct has been disingenuous, but I think it has the law of the case. The result is, as it seems to me, that the parties stand, in respect of their property rights, upon the same footing as if the contract had never been made;

and upon the restoration by the complainant of what it has received, upon the footing of the contract, it would seem that the complainant is entitled to preventive relief, and that the defendants, or such of them as threaten to invade the property of the complainant, should be restrained from interfering therewith. Counsel may prepare a decree in consonance with these views, and the same will be entered of record.

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HUBBARD et al. v. URTON et al.

(Circuit Court, D. Nevada. March 18, 1895.)

No. 581.

1. BILL FOR ACCOUNTING—ALLEGATION OF TITLE—DEMURRER.

On general demurrer to a bill for an accounting by an administrator for assets converted by him, and unadministered upon, an allegation that complainants "comprise all the heirs and next of kin" of deceased, though stating a legal conclusion, is a sufficient averment of complainants' title, where the decree of distribution in the probate proceedings, reciting the pedigree and relationship of each of the complainants, is set out in the bill.

2. DESCENT AND DISTRIBUTION—ACTION BY DISTRIBUTEES—NECESSITY FOR ADMINISTRATION.

After final settlement of an estate, and discharge of the administrator, the heirs and distributees may sue in equity to recover personal property unadministered upon, of which their ancestor was defrauded; the act "regulating the settlement of the estates of deceased persons" (Gen. St. Nev. 1885, c. 19) not providing that heirs and distributees shall acquire title only through administration.

3. EQUITY PLEADING—PRAYER IN THE ALTERNATIVE.

In a suit to recover property procured by fraud, the prayer of the bill may be in the alternative that complainant recover the specific property or its value.

Bill in equity by B. P. Hubbard and others against W. J. Urton and others to recover mining stock, and for further relief. The case was heard on demurrer to the bill.

Booth, Lee & Gray and A. C. Ellis, for complainants.

J. W. Dorsey, for defendants.

HAWLEY, District Judge. This is a suit in equity, brought by the heirs and next of kin of John Hubbard, deceased, to recover certain shares of mining stock, or its value, and to compel an accounting of the proceeds of a certain mine, and for other relief. The bill is quite lengthy. A brief reference to some of its essential features will be sufficient to give an understanding of the points raised by the demurrer. It is alleged that there had been an administration of the estate of John Hubbard, deceased; that defendant Urton was the appointed administrator thereof; that there had been a settlement and distribution of the property of the estate that had been brought to the attention of the probate court; that the administrator had been discharged; that the debts of the estate had been paid; that by the fraud of said Urton, and his conspiracy with the other defendants, certain



personal property, described in the bill, including mining stock and money, dividends upon the mining stock, and money derived from the sale of ores, etc., had not been administered upon, but, on the contrary, had been fraudulently appropriated by the defendants, and converted to their own use. Complainants allege facts to establish the relation of trustees upon the defendants, and to compel them to account for all the property which had not been accounted for in the probate proceedings. They do not seek to disturb any of the proceedings had in the probate court. To this bill the defendants have interposed a demurrer, upon the ground that complainants have not stated such a case as entitles them to any discovery or relief touching the matters alleged in the bill; that the bill does not state facts sufficient to constitute any cause of action against defendants, or either of them, "nor does it set forth any matter or thing entitling said complainants, or any one of them, to any relief, equitable or otherwise, against these defendants, or any one of them"; that the bill "does not show that said complainants or any one of them have or has any interest in, or are entitled to complain of, or are the proper parties to maintain, this suit because of any of the matters or grievances alleged therein."

Is this demurrer well taken? It is first sought to be maintained upon the ground that the averment in the bill that "your orators comprise all of the heirs and next of kin of the said John Hubbard, deceased," states a mere conclusion of law, and is wholly insufficient to establish the right of complainants to bring this suit. This objection, if deemed to be valid, could be easily remedied by an amendment. It is undoubtedly true that suits of this character, as well as others, must be brought by the real parties in interest, and should be based upon the rights of the complainants as they existed at the time of the commencement of the suit. As a general rule, where a suit is brought by a party claiming title to property by reason of his heirship, he ought specifically to allege his particular kinship to the person through whom he claims. He ought to set out his relationship in full, and aver that there are no others nearer of kin than himself, so that the court, from the facts stated, might be able to say whether he is, under the law, entitled to the property as such heir. But in the present case there are certain other averments in the bill which ought to be considered in this connection with the one complained of. For instance, the decree of distribution of the property of the estate in the probate proceedings is set forth in full in complainants' bill, and the pedigree and relationship of each of the complainants herein to the deceased is therein minutely set forth, and the question of their kinship was therein adjudicated. This should be considered sufficient as against a general demurrer. It would accomplish no good end to require a repetition on this point. The ultimate fact is admitted that complainants comprise "all of the heirs and next of kin," and it is wholly immaterial to defendants whether they are sisters or brothers or cousins or aunts of the deceased. The particular relationship is matter of proof, and

the final decree in the probate court sufficiently advises defendants in regard thereto. Considering all the averments in the bill I am of opinion that it substantially complies with the requirements of the general rule that every bill in equity must clearly show, upon its face, that the complainant is entitled to the relief demanded, and that he has such an interest in the subject-matter as clothes him with the right to initiate and maintain a suit concerning it. 1 Daniell, Ch. Pl. & Prac. 314; Story, Eq. Pl. § 23.

The next proposition relied upon in support of the demurrer is far-reaching. It goes to the merits of the bill. If tenable, the bill must be dismissed. The contention is that the complainants, as heirs of the estate of John Hubbard, deceased, have no such title to the personal property set forth in the bill as will enable them to maintain this suit; that the only authority which they can legally invoke against the wrongs and grievances complained of must come through the channel of probate proceedings in the regular course of administration by the appointment of a new administrator. The argument in behalf of this contention was directed principally to the point that, under the statutes of the state of Nevada, no title vests in the next of kin until the estate has been regularly administered upon; that then they only take the surplus remaining after payment of debts and expenses of administration under the statute of descents and distribution; that until then the heirs or next of kin, although entitled to a distributive share, have no right to the possession of either the whole or any specific portion of the personal property; that, when a man dies intestate, the title of his personal property remains in abeyance until administration is granted upon his estate, and then vests in the administrator as of the time of his death. These general principles have been repeatedly announced under a great variety of circumstances in many of the state courts. A vast number of authorities have been cited by defendants' counsel. The following, among others, have been examined: *Bush v. Lindsey*, 44 Cal. 125; *McCrea v. Haraszthy*, 51 Cal. 147; *Auguisola v. Arnaz*, Id. 435; *Chaquette v. Ortet*, 60 Cal. 598; *Dean v. Superior Court*, 63 Cal. 474; *Estate of Radovich*, 74 Cal. 536, 16 Pac. 321; *Cullen v. O'Hara*, 4 Mich. 132, 138; *Morton v. Preston*, 18 Mich. 61, 71; *Miller v. Clark*, 56 Mich. 337, 23 N. W. 35; *Jenkins v. Freyer*, 4 Paige, 47; *Woodin v. Bayley*, 13 Wend. 453; *Beecher v. Crouse*, 19 Wend. 306; *Palmer v. Green*, 63 Hun, 6, 17 N. Y. Supp. 441; *Weeks v. Jewett*, 45 N. H. 541; *Hagthorp v. Hook*, 1 Gill & J. 271, 277; *People v. Brooks*, 123 Ill. 249, 14 N. E. 39; *Collamer v. Langdon*, 29 Vt. 39; *Taft v. Stevens*, 3 Gray, 504; *Boylston v. Carver*, 4 Mass. 608; *Smith v. Dyer*, 16 Mass. 18; *Weld v. McClure*, 9 Watts, 495; *Little v. Walton*, 23 Pa. St. 166; *Bufford v. Holliman*, 10 Tex. 560; *State v. Britton*, 11 Ired. 110; *Lansdell v. Winstead*, 76 N. C. 366; *Sneed v. Hooper*, 5 Am. Dec. 691; *Bungard v. Miller* (Pa. Sup.) 8 Atl. 209; *Hayes v. Hayes' Ex'x* (N. J. Ch.) 17 Atl. 634; *Varner v. Johnston* (N. C.) 17 S. E. 483; *Crane v. Warfield* (Ark.) 15 S. W. 609; *Richardson v. Vaughn* (Tex. Civ. App.) 22 S. W. 1112; *Hall v. Cowles' Estate* (Colo. Sup.) 25 Pac.

705; *Weyer v. Watt* (Ohio Sup.) 28 N. E. 670; *Pritchard v. Norwood* (Mass.) 30 N. E. 80; *Allen v. Simons*, 1 Fed. Cas. 514. It would serve no useful purpose to specifically review these authorities. In several of them suits were brought by the heirs to recover property belonging to the estate pending the regular course of administration. Others were instituted before there had been any administration at all. In some of them the principles announced are based upon special provisions of the statute and the particular practice of the courts wherein the actions were brought. It may be conceded, for the purposes of this opinion, that the principles announced therein are correct as applied to the particular facts of each case. But the question here is whether the general principles therein stated, by analogy or otherwise, have any controlling application to the facts of this case, which are in many material respects essentially different from the cases cited.

Can the heirs of the deceased bring and maintain a suit in equity to compel the individual who was the administrator, and other persons who fraudulently conspired with him, to account for the personal property belonging to the estate which they have fraudulently converted to their own use, after due administration of the estate, the payment of the debts of the deceased and the expenses of administration, the discharge of the administrator, and distribution of the property brought before the court, without having another administration of the estate? Admitting that another administrator might be appointed, and that he could maintain a suit in his name to obtain the relief here asked for, have complainants no other remedy? There is no substantial reason why complainants should be required to go through the circumlocution of another administration, and contest for their rights through an administrator, and this court ought not to require it to be done, unless the provisions of the statute of Nevada imperatively demand it. Why should complainants be compelled to travel over such a circuitous route if the law permits them to take a more direct road? There is no pretense that the defendants will be subjected to any peculiar hardship or injustice if the heirs are allowed to maintain this suit in their own name, instead of by an administrator. Do the provisions of the statute of Nevada require that an administrator should be appointed, under facts similar to the case at bar?

Section 2783, Gen. St. Nev., provides that:

"The executor or administrator shall have a right to the possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by order of the probate court, to the heirs or devisees."

Section 2949 provides that:

"The final settlement of an estate shall not prevent a subsequent issuance of letters testamentary, or of administration with the will annexed, should other property of the estate be discovered, or should it become necessary or proper, from any cause, that letters should be again issued."

If confined to a strict interpretation of the phraseology of these sections, it must be admitted that it gives some support to the con-

clusions contended for by defendants. But it is the duty of the court to look at all the provisions of the act "to regulate the settlement of the estates of deceased persons," and determine therefrom its object, scope, and intent. The object of the act is primarily for the benefit and protection of the creditors of the estate, and it provides the methods by which an administration shall be had, and defines the steps that shall be taken to carry out and complete the administration of the estate. It regulates and defines the powers and duties of the executors and administrators, provides how and in what cases they may be cited to appear and account before the court, provides for their discharge and for the final settlement and distribution, etc. The object of the sections heretofore quoted was to enable the administrator or executor to comply with the other provisions of the statute as to the payment of the debts and expenses of the administration. After these and other provisions are complied with, the statute (section 2981) declares that all the real and personal estate of an intestate descends to his heirs. The duty of an administrator is to take charge of the estate for the purpose of settling the claims, and, when they have been satisfied, it is his duty to pass it over to the heir, whose absolute property it then becomes. The act, in its entirety, "regulates the proceeding of executors and administrators as such, and, acting in that capacity alone, the validity of their acts depends upon a compliance with its provisions." *Hunt v. Hunt*, 11 Nev. 442. In *Gossage v. Mining Co.*, 14 Nev. 153, the scope, intent, and purpose of the act is illustrated and explained on lines similar to those here suggested, and several cases are there cited where the heirs and next of kin were permitted to institute actions of law independent of the statutory proceedings relating to the administration of estates.

Admitting it to be true as a general proposition that the probate courts have jurisdiction of the estates of deceased persons and of matters pertaining thereto, such as the settlement of the accounts of executors and administrators, and the distribution of the property among the heirs and legatees, and that in these respects such courts can only proceed in the manner prescribed by the statute, yet there are many proceedings which relate to the estates of deceased persons—even during the course of administration—of which the probate courts have no jurisdiction. Judicial determinations as to the right of possession to real estate between administrators and the heirs or other persons and the title to personal property furnish an example. Many other instances might readily be mentioned. None are more imperative than in cases of an alleged trust in real estate or personal property. Such cases are within the well-established jurisdiction of courts of equity. In *Haverstick v. Trudel*, 51 Cal. 433, the heirs at law of the deceased were permitted to maintain a suit in equity against the administrator of the estate to establish a trust as to certain real property which the administrator was attempting to convert to his own use, and to compel him to render an account of all the property received by him, both real and personal. Complainants cite

the following among other cases which shed more or less light in favor of their right to maintain this suit: *Moseley v. Lane*, 27 Ala. 62; *Green's Adm'x v. Creighton*, 23 How. 90, 104; *Beall v. New Mexico*, 16 Wall. 535, 541; *U. S. v. Walker*, 109 U. S. 258, 261 et seq., 3 Sup. Ct. 277.

There is nothing in any of the provisions of the statute of Nevada which forbids the heirs, in a case like this, from bringing a suit in their own names. The present case presents many strong reasons in support of the right of the heirs to maintain this suit. It is alleged that John Hubbard, in his lifetime, was of feeble mind and body, brought about by the excessive use of alcoholic stimulants, and that for some time previous to his death he was incapable of transacting any business; that he was possessed of mining property of great value; that the defendants, well knowing his condition, took advantage thereof, and caused him to execute deeds for said property, without any consideration, and fraudulently deprived him of his estate, etc. In the light of all the averments, too lengthy to recite, it is manifest that it would work a great hardship and injustice to compel the heirs to go to the expense and delay of another administration of the estate. They are the real and only parties in interest. They alone will be benefited or injured, as the case may be, by the result of the suit. There are no debts to be paid; no creditors whose rights will be affected. No provision of the statute will be violated; no rule of the state court disturbed. The defendants will not be injured. They are not in a position to complain of the manner in which they are brought into court. They cannot take advantage of their own wrong. The appointment of another administrator would not accomplish any useful end. Moreover, the right of the heirs to bring a suit of this character has been recognized in the United States circuit courts, and the right to have relief in a court of equity is sanctioned and approved by the supreme court of the United States.

In *Stanley v. Mather*, 31 Fed. 860, a suit was brought by the heirs to foreclose certain mortgages belonging to the estate. Letters of administration had previously been granted, and the administrators proceeded to administer upon the personal estate of the decedent under the direction of the court. The claims against the estate had been paid. An order of distribution of the personal property had been made, but the administrator had not been finally discharged. The notes and mortgage sought to be foreclosed were never brought to the attention of the probate court, for the reason that they were deemed to be of but little value; and, after the decree of the court for the distribution of the property reported by the administrators, the administrators delivered these notes and mortgages to the heirs, without any direction or order of the court. It was there, as here, claimed, upon demurrer to the bill, that the notes and mortgages were part of the personal estate of the deceased; that they were never delivered to the claimants by the administrators under the direction of the probate court, and that no person except the personal representatives of the estate could sue to foreclose the mortgage. The sole question presented

was whether the complainants (who were the heirs) could maintain the suit. With reference to this question, Gresham, J., in overruling the demurrer, said:

"An administrator takes the personal estate of the decedent in trust—First, for the creditors; and, next, for the heirs. He is a mere trustee, with no beneficial interest in the property upon which he is appointed to administer. After all debts and expenses of administration are paid, any surplus remaining in his hands goes to the heirs. It is admitted in this case that all creditors and all expenses of administration have been paid, and that the complainants are the sole heirs and distributees. In fact, it was judicially determined by the probate court \* \* \* that the three complainants were the sole children and heirs of the decedent. The only thing that a personal representative could now do would be to obtain an order from the probate court to deliver the notes and mortgages to the complainants, or collect the notes and pay over the money. The law will not require the heirs, who are the equitable owners of the notes and mortgage, to deliver them to Hoyt, the remaining administrator, if he is such, and, if he is not, to go to the trouble and expense of having another personal representative appointed in order that a suit of foreclosure may be maintained. It does not follow, because the administrator is the proper party to collect the debts due a decedent, and pay creditors, and for that purpose bring suits, that under no circumstances can the heirs at law maintain a suit to collect a debt which has not been collected by the personal representative. Having paid all creditors and all expenses of administration, the administrators delivered the notes and mortgages to the complainants, the only persons entitled to them in equity; and there is no reason why their possession should now be disturbed."

Defendants insist that there is a distinction between that case and this, because in that case the heirs had obtained possession of the personal property from the administrators. But possession was not obtained by virtue of the probate proceedings in due course of administration by an order of the probate court. This was the point urged and relied upon in that case in support of the demurrer. The opinion of the court is not based upon the ground of the possession of the property. That is only incidentally referred to as a fact in the case. The entire reasoning of the court is based upon the broad ground of the right of the heirs to maintain the suit, without having the title to the property come to them under a decree of the probate court.

In *Griffith v. Godey*, 113 U. S. 89, 93, 5 Sup. Ct. 383, Mr. Justice Field, in delivering the opinion of the court, said:

"It is well established that a settlement of an administrator's account by the decree of a probate court does not conclude as to property accidentally or fraudulently withheld from the account. If the property be omitted by mistake, or be subsequently discovered, a court of equity may exercise its jurisdiction in the premises, and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might in such case open its decree, and administer upon the omitted property. And a fraudulent concealment of property or a fraudulent disposition of it is a general and always existing ground for the interposition of equity."

Some suggestions were made in the oral argument about this suit having been brought in the alternative to recover the specific property or its value. This cannot be relied upon as an objection to the bill. In *Hardin v. Boyd*, 113 U. S. 756, 763, 5 Sup. Ct. 771, the court said:

"It is a well-settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that, if one kind of relief is denied, another may be granted; the relief of each kind being consistent with the case made by the bill."

The demurrer is overruled.

### HENRY v. CLEVELAND, C., C. & ST. L. R. CO.

(Circuit Court, S. D. Illinois. February 23, 1895.)

#### 1. NEGLIGENCE—WHAT CONSTITUTES.

A railroad company, on whose tracks a collision has occurred between a train and a number of tank cars containing petroleum, some of which have been broken, and the oil set on fire by the collision, and which neglects for two hours to remove the other cars of oil, in consequence of which some of them are set on fire by the burning oil, and explode, is liable to one who is injured by such explosion.

#### 2. CONTRIBUTORY NEGLIGENCE—SAME.

It is not contributory negligence per se for a stranger to go upon premises where a fire is raging, which endangers life or safety, if he does so in good faith, for the purpose of saving life or property.

#### 3. CARRIERS—DEGREE OF CARE REQUIRED.

The same degree of care is required of carriers, in handling and transporting explosives and combustible oils, as is exercised by merchants and insurers in dealing with such articles.

This was an action by John J. Henry, Jr., against the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company to recover damages for personal injuries. On the trial the court (ALLEN, District Judge) charged the jury as follows.

John G. Irwin and William P. Early, for plaintiff.

John T. Pye, George F. McNulty, James A. Connolly, and H. J. Hamlin, for defendant.

ALLEN, District Judge (charging jury). Under the pleadings in this case the burden is thrown upon the plaintiff to prove all the material facts of his case, as stated in the declaration. But by this you are not to understand that he must prove all that he alleges in all the counts of his declaration, but all the material facts contained in any one of said counts essential to his right to recover. The court upon demurrer to the declaration has held each and every count thereof good, and that the plaintiff will be entitled to recover, if you believe from the evidence that any one or more of them is true as to all material allegations contained in such count or counts, as explained further on in this charge; but where two or more acts of negligence are alleged to have produced one and the same injury, the law is that it is not necessary to prove all of such alleged acts, and that the plaintiff may recover upon proof of one only, if it is shown by the evidence to have caused injury, and to have been the proximate cause of such injury. What these counts, severally considered, are, and wherein they differ from one another, you will find out by reading the declaration, which, together with the other pleadings in the case, you may take with you when you retire to delib-

erate. And, when I say what I have already stated, you are to understand by it that the allegation contained in each and all of the counts of the declaration to the effect that the plaintiff was exercising due care and caution for his own safety, at the time he says he was injured, is a material and essential element of his case, which it devolves upon him to prove, as well as to prove all other material allegations made by him in any count of his declaration. The rule of law which requires this only goes to the extent of requiring proof of the facts and circumstances attending the alleged injury. If these show negligence on the part of the defendant from which the injury is a proximate consequence, and do not show contributory negligence on the part of the plaintiff, the prima facie case is made out in favor of the plaintiff, and puts upon the defendant the burden of refuting the negligence or injury charged, or the allegation of due care and caution for his own safety on the part of the plaintiff. You are therefore instructed that if you believe from all evidence before you that the defendant is guilty of negligence as charged in all or any of the five counts of the declaration, and that such negligence was the proximate cause of injury to the plaintiff, and that the plaintiff is not guilty of contributory negligence, you will find the issues in favor of the plaintiff. But if, on the other hand, you believe that the evidence does not show negligence on the part of the defendant, or does not show that the plaintiff was injured, or does not show that the plaintiff's injuries were the proximate consequence of the defendant's negligence, or does show that the plaintiff was guilty of contributory negligence, or failed to exercise due care and caution for his own safety, you will find for the defendant.

When I speak of "negligence," you are to understand that term to mean either failure to do what a reasonable and prudent person would ordinarily have done, or doing what such a person would not have done, under all the circumstances shown by the evidence. In other words, negligence is the failure to observe, for the protection or safety of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, and is actionable if it is the proximate cause of injury to another. And what is due care and diligence must be determined according to the facts and circumstances of the particular case. The law requires more care and caution on the part of persons handling, carrying, or using articles commonly known to be dangerous than it does in handling, carrying, or using articles not dangerous, and considers all explosives dangerous. Common carriers and all other persons owe this duty to their fellow men. I do not yield full assent to the contention that a common carrier or other person who handles or carries explosives, or keeps them on private premises, does so at his peril, and must be answerable for all injurious consequences, regardless of the degree of care and vigilance exercised in doing so, but I do hold that due care and prudence are required in this respect,—such care and prudence as prudent and careful persons ordinarily exercise whose business it is to deal in these articles. It is a matter of common knowledge that insurers and merchants exercise greater care and caution as to the storage and use of explosives, combustible



oils among them, than they do as to articles which are not commonly considered dangerous, and I shall hold it to be the law that the same degree of care and caution is required of carriers as between them and the general public. This is merely requiring of them ordinary care,—the same degree of care and caution that ordinarily prudent men exercise in delivering and handling dangerous articles.

It has been held by the circuit court of appeals of this circuit that petroleum is not a dangerous agency of itself, but becomes such by subjection to a high degree of heat, or from actual contact with fire, and that, therefore, the shipment of such an article of commerce casts upon the shipper a certain duty to the public,—that of providing a suitable vehicle for the petroleum in all respects adapted to the purposes of carriage, and able to encounter the usual risks of transportation, so that the petroleum in its transit shall not be exposed to the danger of taking fire from causes incident to its transportation reasonably to be anticipated. This is a rule which applies to carriers as well as to shippers, imposing upon them the degree and kind of diligence already stated, as to petroleum in their charge while in transit, and when detained on their premises by delays ordinarily incident to the transportation of articles of commerce. It requires the exercise of due care and caution on the part of railroads to prevent exposure of petroleum to great heat or contact with fire while standing on a side track in their yards, and such care on the part of their servants as may be reasonably necessary to protect the public from danger in this respect.

I yield my assent to the contention that a defendant who owes no duty to the plaintiff cannot be guilty of actionable negligence as to such plaintiff. For this reason, in actions like the one now being tried, the plaintiff must show what duty the defendant owed him, and a breach of it. But you are not to infer from this statement that the law imposes no duties upon railroads or common carriers except as to persons and property carried by them, and as between them and their employés, and other persons and corporations with whom they make contracts.

Besides obligations of this kind, the law imposes upon them, as it does upon natural persons, the duty to so exercise their rights as not to interfere with the equal rights of others. They must so use their own as not to negligently injure another. This is a duty which they owe to all mankind, and the nature of the duty they are charged with not having performed towards the plaintiff. The law is that anything done by the owner of premises which is in the nature of a nuisance or of a wanton injury, and which is the proximate cause of injury to another, gives the person so injured a right of action for injuries thus caused; and this rule applies, even as between the wrongdoer and a trespasser or licensee, who, after the wrong has been done, has not recklessly or rashly exposed himself to its consequence. This rule has always been held to apply to a person who negligently or intentionally sets fire to anything on his own land, if the fire extended to the property of another, and became the proximate cause of injury to such person. It is true they do not owe the same degree of care and caution to strangers that they do to

passengers and persons for whom they carry property, but they are under obligations to exercise reasonable and ordinary care, prudence, and diligence for the safety of the persons and property of the general public, and are held to an action for any breach of duty in this respect which causes injury to another person who has not been guilty of contributory negligence. By "contributory negligence" I mean the want of ordinary care on the part of the plaintiff, and a proximate connection between that and the alleged injury. As to what is and what is not "proximate cause," as applied to the charges of negligence made against the defendant, and of contributory negligence made against the plaintiff, you are to understand this: Although you may believe from the evidence that the defendant was guilty of negligence as charged in the declaration, or any count thereof, yet if you further believe from the evidence that the plaintiff was also negligent, and that his negligence co-operated with that of the defendant in causing his injuries, and that the consequences of the plaintiff's negligence could not have been counteracted or avoided by ordinary care on the part of the defendant, then you will find that the plaintiff's own negligence was the proximate cause of his injuries. But, as applied to the negligence with which the defendant is charged, proximate cause means such cause as would probably lead to injury, and which has been shown to have led to it. It need not appear from the evidence that the injuries complained of resulted instantly and immediately from the negligence charged. The law regards the one as the proximate cause of the other, without regard to lapse of time, where no other cause intervenes or comes between the negligence charged and the injuries received to contribute to it. There must be nothing to break the causal connection between the alleged negligence of the defendant and the alleged injuries of the plaintiff; but by this you are not to understand me as saying that the act of the plaintiff may not be an intervening cause.

Having now stated, in a general way, the law of the case, as I understand it to be, I instruct you that if you believe from the evidence that on the 21st day of January, 1893, a collision occurred between a locomotive and train of cars which were running over the defendant's railroad, in charge of its servants and employes, and a train of cars standing on its side track at Wann, Madison county, Ill.; that the train upon said side track was laden with tanks containing petroleum or gasoline, or both; that the oil in said tanks was of an inflammable and explosive nature when exposed to heat or fire; that the cause of said collision was either the negligence and carelessness of the defendant's servants in leaving open a switch or switches leading from its main track to the side track upon which said cars and oil tanks were standing, or the careless management by the defendant's servants of the train which ran into said tanks, or both; that the consequence of said collision was the bursting of one or more of said tanks, and the escape of the oil from them, and setting it on fire by the escape of sparks or fire from said locomotive; that such oil ran along said side track, and under the train of cars on which said tanks were, and communicated fire to tanks which had not been burst open by the collision, or exposed them

to the heat of a conflagration caused by said collision, and thereby caused the explosion of one or more of said tanks; that more than two hours elapsed after said collision occurred and before the explosion which caused the plaintiff's alleged injuries; that by the exercise of proper care and diligence during that time the defendant might have put out the fire and stopped the conflagration, or might have removed the cars upon which said oil tanks were to such a distance from the fire that they would not have exploded, or might have warned people away from dangerous proximity to said fire, and failed to do so, or did so in an insufficient or negligent way; that the plaintiff was injured by said explosion, and at the time of receiving his injuries was exercising due care and caution for his own safety; and that his injuries were the proximate consequences of the negligence or carelessness of the defendant as charged in the declaration, and were not the result of his own imprudence or negligence or want of ordinary care and caution for his own safety,—then you will find the issues in favor of the plaintiff.

In determining whether the defendant is or is not guilty of negligence as charged in the declaration, you will take into consideration all the facts and circumstances shown by the evidence and by the law as given to you in this charge: The defendant's duties as a common carrier; the nature of the articles it was handling; the obligation it is under by law to so exercise its rights as not to negligently or carelessly endanger human life or safety, or destroy property.

In considering the charges of negligence made by the plaintiff, you are to direct your inquiries to these points: Does the evidence show there was a collision? If it does, you will next consider whether, according to the evidence, such collision was or was not the result of carelessness or negligence on the part of the defendant's servants or employes. In this last point is involved the question whether, according to the evidence, if negligence appears, such negligence was in leaving a switch or switches open, if you believe from the evidence a switch or switches was left open, or that there was a failure to put out the fire or remove the oil tanks to a safe distance from it, if you believe from the evidence that the fire might have been put out, and that no sufficient effort was made to do so, or that the oil tanks might have been removed to a place of safety, and that no sufficient effort was made to remove them, or in failing to give warning of danger, and that no such warning as the circumstances required was given. If you believe from the evidence that the defendant is guilty of negligence in all or any of these respects, and that an explosion occurred and was the proximate consequence of such negligence, then, before finding the issues in favor of the plaintiff, you will further inquire whether the evidence shows that the plaintiff was injured by such explosion, and, if you find that he was, whether his injuries are or are not the proximate consequences of such explosion. In this inquiry two questions are involved: First. Were these injuries caused by negligence of the defendant? Second. Are they the proximate consequence of it?

If from the evidence, you find that they cannot be attributed to the act or acts of any person except the defendant, and were caused

by its negligence, and that nothing intervened to break the causal connection between the defendant's negligence and the plaintiff's injuries, then you may find from the evidence that the plaintiff's injuries are the proximate consequence of the defendant's negligence. But if you so find from the evidence, before finding the issues in favor of the plaintiff you will still further inquire whether the plaintiff, at the time he received his injuries, was or was not exercising due care and caution for his own safety.

Touching this inquiry, the law is that it is not per se, or in and of itself, negligence to be in a place of danger when a conflagration is raging, and the life or safety of human beings thereby endangered. Under such circumstances, one person may lawfully go upon the premises of another, if he does so in good faith, to save others from personal injury, loss of life, or destruction of property. The law does not regard them as trespassers under such circumstances, nor will it lightly impute negligence to an effort made in good faith to save life, or secure the safety of persons or property. And the law also is that persons called upon to act in sudden emergencies, or under unusual or peculiar circumstances, are not held to the exercise of the same degree of care and caution as in other cases, and under ordinary circumstances. Therefore, in considering whether, under the evidence before you, the plaintiff was or was not exercising due care and caution for his own safety when he received his injuries, if you believe from the evidence he was injured, your inquiries will be, does the evidence show that a conflagration was then raging? If you find it does, you will further inquire whether it shows, or fails to show, that the safety of persons and property was thereby endangered, and whether the plaintiff was or was not, when injured, in good faith trying to prevent the conflagration from spreading, and protect the life and property of others. If you find from the evidence that a conflagration was raging, and that the safety of persons and property was thereby endangered, and that the plaintiff was in good faith trying to prevent the fire from spreading and protect the persons and property of others, you will further inquire what reason he had to suppose, according to the evidence, that it was dangerous to go where he was injured. Does the evidence show that he knew it was dangerous to be there? Does it show that he had been warned before going that it was dangerous to go there? Or, after going where he did, it was dangerous to remain there? Does it show that he recklessly and rashly exposed himself to danger? According to the evidence, would an ordinarily careful and prudent man, under all the circumstances, have gone where he was, and have done what he was doing when he was injured? If you believe from all the evidence that he acted as an ordinarily careful and prudent man would have acted under the circumstances, then you will find that he was exercising due care and caution for his own safety when he received his injuries, and is not precluded on this ground from maintaining this action. But if you believe, from all the evidence, that an ordinarily prudent man would not have acted as he did, under the same circumstances, you will find for the defendant.

Having now given you what I understand to be the law of this case, touching the points of contention involved in it, I will add that it is the province of the court to decide all questions of law, and your province and duty to decide all questions of fact. In what I have said I have not assumed, or at least have not intended to assume, that the defendant is or is not guilty of all or any of the acts of negligence with which it is charged; that the plaintiff has or has not sustained injuries caused by the negligence of the defendant; that, if injured, his injuries are or are not the proximate consequence of the negligence charged in the declaration; or that the plaintiff is or is not guilty of contributory negligence, was or was not exercising due care and caution for his own safety when he received his alleged injuries. All these questions, so far as the facts are concerned, and all questions of fact in the case, are for your determination. But in deciding them you are to be governed by the law as given in this charge, and your verdict should be based upon that alone.

If you find the issues in favor of the plaintiff, it will be your duty to assess his damages, in doing which you may take into consideration any sum or sums of money the evidence shows he has expended or become liable to pay for medical and surgical treatment, nursing, care, and attention made necessary by reason of his injuries; to which you may add the value of any time which the evidence shows he may have lost by reason of disabilities resulting from his injuries, in fixing which you will take into consideration his age, occupation, or vocation, business capabilities, and what the evidence shows his time and services to have been worth to him during the year, or other shorter or longer period of time just prior to the time he was injured. And, in addition to the elements of damages above stated, you may make reasonable allowance for bodily pain, anguish, and suffering, and permanent disabilities, resulting from the injuries sustained, if you believe from the evidence that he suffered bodily pain and anguish, and has been permanently disabled by reason of injuries resulting from the negligence charged in the declaration. In considering and deciding the question of permanent disabilities, you will be governed by the plaintiff's age, occupation, and his station in life, and reasonable business and financial prospects in life, before he was injured. Any reasonable sum you may fix as compensation for the plaintiff's injuries, not exceeding \$25,000, upon the basis of the elements of his damages I have just stated, will be the amount of your verdict, if you find in his favor; and, if you do, the form of your verdict will be: "We, the jury, find the defendant guilty, and assess the plaintiff's damages at (whatever sum you may determine upon under the evidence not exceeding twenty-five thousand dollars)." If you find for the defendant, the form of your verdict will be: "We, the jury, find the defendant not guilty."

## HAGAR v. TOWNSEND et al.

(Circuit Court, E. D. New York. April 4, 1895.)

**PLEADING — MONEY HAD AND RECEIVED — NEW YORK CODE OF CIVIL PROCEDURE.**

Plaintiff's complaint alleged that he let one E., a partner of one of the defendants, and since deceased, have certain bonds with which to raise \$3,000; that E. and his partner, T., one of the defendants, afterwards increased the loan on the bonds to \$4,000, and used the additional \$1,000 in the firm business; that D., the other defendant, afterwards became a partner; that the bonds were sold for \$1,460 more than the loan, and that this balance was received and used by the defendants. Upon these facts, plaintiff demanded judgment for the return of the bonds, or, on inability or failure, for payment of damages for their loss. *Held*, under the New York Code of Civil Procedure, that the allegations of the complaint were sufficient to support a recovery for money had and received to the amount of the plaintiff's remaining interest in the bonds, and that the demand of judgment for a return of the property would not control the right to damages, where there was no judgment for a return.

This was an action by James M. Hagar against James A. Townsend and Wallace Downey to recover the value of certain bonds. The jury gave a verdict for the plaintiff. Defendants moved for a new trial.

E. N. Taft and T. M. Taft, for plaintiff.  
Peter S. Carter, for defendants.

**WHEELER, District Judge.** The defendant Townsend and one Edgett, now dead, were partners. The plaintiff let Edgett have some railroad bonds to raise \$3,000 upon, which he did by pledging them on a firm note of that amount to a bank. Without the plaintiff's knowledge, a note of \$4,000 was substituted. The defendant Downey became a member of the firm. The bonds were sold by the bank for more than the note, and the excess, \$1,460.88, by direction of the firm, was placed to its credit. These latter two sums were credited to Edgett on a balance against him in his firm account. The complaint set forth the facts, with conclusion that the defendants had converted the bonds to their own use to the damage of the plaintiff, and demand of judgment for the return of the bonds, or, on inability or failure, for the payment of damages suffered from the loss of them. The evidence tended to show that Townsend knew the bonds were the plaintiff's before the note was enlarged, and that the additional \$1,000 went to the use of the firm. The court refused to direct a verdict for the defendants requested because of the form of action; and, against exception, a verdict for the \$1,460.88 excess was directed, and one for the \$1,000 was found, under directions that the plaintiff was entitled to recover it if it went to the use of the firm. On this motion for a new trial the counsel for the defendants insists that a verdict for the defendants should have been directed; and that, if not, as damages were demanded only upon inability or failure to return, none but those for not returning them at the time of trial were recoverable. If one of these causes of action was intended

for a replevin, as argued, it was not used as such, and could apparently be joined with the other without affecting it. Code N. Y. § 1689. The allegation of conversion is like that in trover, which perhaps could not be maintained because the plaintiff had not the right to immediate possession. As either of these could be joined with other causes of action (Id. § 484), the defendants would not be entitled to a verdict because not supported by proof, if what would constitute any other was alleged. The complaint well alleged, and the evidence showed, an interest remaining to the plaintiff in the bonds which the firms of which the defendants are the survivors converted into money, to the damage of the plaintiff. This is a good cause of action in assumpsit for money had and received, which always concludes in the same way, and the damages recoverable is the amount received. The demand of judgment for damages upon failure on a judgment return would not control the right to damages when there was no judgment of return. And a tortfeasor may be held liable for the avails as a measure of damages. This is well shown in patent cases, where an infringer may always, as is elementary, be held liable for the profits, at least, as damages. So here the defendants would be liable, at least, for the avails received from the wrongful conversion of the plaintiff's interest in the bonds. Although Edgett was given apparent control of the bonds by the plaintiff, they were not left to stand upon that, but further control was assumed by the defendants, which, as the jury has found, resulted in the appropriation of \$1,000 of these avails by the firm of which Townsend was a member, after notice to him, and of \$1,460.88 by the firm of which both were members. The credit of the avails to Edgett on the balance of firm accounts against him would not deprive the defendants of their benefit, nor affect the plaintiff's right to them. On this review no reason for disturbing the verdict becomes apparent. Motion denied.

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#### ROOD v. WHORTON.

(Circuit Court, E. D. Wisconsin. April 29, 1895.)

**1. CORPORATIONS—LIABILITY OF STOCKHOLDERS—PONA FIDE PURCHASER.**

One who purchases in good faith, in the open market, stock of a corporation which purports, on the face of the certificates, to be full paid and nonassessable, is not liable for assessments on such stock, though in fact it had not been fully paid.

**2. SAME—MICHIGAN STATUTE.**

The A. Co. was organized, under the Michigan statutes, with a capital of \$1,000,000, in shares of \$25 each, all of which was subscribed, and on which \$220,000 was paid in. In order to raise money for the purposes of the corporation, the original subscribers contributed two-fifths of their stock to a pool, to be sold at \$3 per share, as full paid, non-assessable stock, the proceeds to be divided between the corporation and the contributors. Defendant, through one W., an agent of the corporation, not a stockholder, bought 800 shares, which were represented by W. to be full paid and unassessable. Defendant had no knowledge of the real facts. The corporation failed, and a receiver, under the

direction of the court, sued defendant for the unpaid balance on his stock. *Held*, that defendant was not liable, either at common law or under the statute of Michigan.

8. SAME—STOCKHOLDERS—EFFECT OF JUDGMENT AGAINST CORPORATION.

A stockholder of a corporation who is not made a party to proceedings in insolvency against it is not bound by a decree in such proceeding in respect to any question of his individual liability, involving his special holding of stock.

This was an action by William H. Rood, as receiver of the American Iron Company, against John H. Whorton, to recover an assessment upon stock held by him. The case was submitted to the court, jury trial being waived.

This is an action at law in which the plaintiff appears as receiver of the American Iron Company, an insolvent Michigan corporation, and seeks to recover of the defendant \$12,000 and interest, assessed for the alleged unpaid portion of the capital stock held by him. The proceedings under which the plaintiff was appointed receiver arose and are pending in the circuit court for Marquette county, in the state of Michigan; and a decree has been there entered directing the assessment of \$15 per share against the stockholders, and that the receiver proceed in its collection, by suit or otherwise. The defendant is a citizen of Wisconsin, and is not a party to the action in Michigan aside from his privity as stockholder. The insolvency of the corporation and the existence of a large indebtedness, which would require the assessment of stockholders to the extent claimed for liquidation, are shown by the decree. The corporation was organized March 7, 1887, with a capital stock of \$1,000,000, all subscribed for and taken by eight corporators. The statute of Michigan (How. Ann. St. § 4077) requires that the articles of association state the amount of cash actually paid in and the cash value of any property "conveyed to the corporation coterminously with its organization"; and accordingly the articles in this case state that no cash was paid in, and that mining property was conveyed and accepted, and its value fixed at \$220,000, which would leave \$780,000 unpaid by the original subscribers and incorporators. The shares were \$25 each, making the amount of pro rata actual credit about \$5.50 per share, and the unpaid portion \$19.50. Subsequently it became necessary to raise money for the enterprise, and these original shareholders, at a meeting on April 15, 1887, resolved that each should contribute to a common pool two-fifths of his holdings of stock, denominated "treasury stock," to be sold at not less than \$3 per share, "as fully paid and nonassessable stock," and of the proceeds three-fifths was to go into the treasury, and two-fifths to be paid to the contributors. This stock was to be issued to trustees named, and the resolution declared that it should "not be construed as mandatory so far as it authorizes the sale of said stock as fully paid, but that such trustees shall be at liberty" to sell any part as fully paid. On April 25, 1877, a scheme was proposed to have all stock made "nonassessable," but it was abandoned on advice of counsel, and the plan of April 15th was so far carried out that the contributions of stock were made (1,600 shares) by all the holders, and were placed on sale. It appears that the firm of Hoskins & Wambold, who were not stockholders, became agents of the corporation for selling this stock, under some arrangement by which their services were to be paid in shares of the treasury stock; that they sold some, purchased some, and received 6,000 shares for their services. In February, 1888, Wambold, of that firm, negotiated with the defendant, at Appleton, Wis., for the sale of 800 shares, at \$3 per share, and the sale was agreed upon, 500 shares being then delivered and paid for, and the remaining 300 shares were taken in July. The transaction was entirely with Wambold, who represented that the shares were fully paid, and the defendant supposed that Wambold was the owner. The shares, when received by the defendant, were issued in his name, were duly signed and sealed by the proper officers, and had written upon their face, in red ink, the words "Stock full paid and unassessable." No distinction was preserved in reference to any of the shares of this stock.



which came through the hands of Hoskins & Wambold, and it does not appear whether the defendant's shares were, in fact, of direct sales for the corporation, or of stock which Hoskins & Wambold had purchased, or stock received for their compensation. The defendant had no information or knowledge of any of the arrangements prior to his purchase, except that the mining property was considered valuable when it could be developed; that his shares were full paid, and therefore no liability or risk was incurred beyond the investment in the shares. He was a nonresident, had no active part in the business, was only present at one meeting, but appears to have been elected a director for a time, without participation or knowledge of the affairs otherwise than by a formal presence. Until after the proceedings in the Michigan court, and immediately prior to this action, he had no information of any claim upon him of liability, and he never received any dividends or benefits from the corporation. If liable, the amount assessed is \$12,000 and interest from February 15, 1894.

John Bottensek and E. E. Osborn, for plaintiff.

Humphrey Pierce and Quarles, Spence & Quarles, for defendant.

SEAMAN, District Judge (after stating the facts). I have reached a conclusion upon the merits of this case by which I am relieved from a consideration of the objection raised in behalf of the defendant that the plaintiff, as a receiver appointed by the court in the state of Michigan, cannot maintain his action in this forum, but is barred by the ruling in *Booth v. Clark*, 17 How. 322. See, also, *High*, Rec. § 239; *Beach*, Rec. § 680. Whether a distinction must be made in reference to the enforcement of liability against a stockholder under proceedings authorized by the statute of the state creating the corporation, and entering into the obligation which was assumed by the taking of stock, will not be passed upon in this opinion. See, for a distinction, *Relfe v. Rundle*, 103 U. S. 222; *Railway Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363; *Parsons v. Insurance Co.*, 31 Fed. 305; *Fry v. Insurance Co.*, Id. 197.

The defendant was not an original subscriber or stockholder of the corporation, and is not a direct purchaser or transferee under any original subscriber or stockholder. He was not a member at the time the arrangement was made out of which came the issue of stock in question. He had no actual knowledge of the facts which govern the issue of this stock, or any of the stock of the corporation; and there was nothing upon the face of the certificates from which notice could be inferred that the stock was not paid up, or of any infirmity in the issue. The question of his liability is not therefore within the ruling of the *Upton Cases*, 91 U. S. 45-72, and is not directly ruled by any decision of the supreme court cited on the argument or found in my research. The doctrine is well settled and strictly enforced that "the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who do not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation that the stock shall be treated as fully paid and nonassessable, or otherwise limiting their liability therefor, is void as against creditors." *Handley v. Stutz*, 139 U. S. 417, and cases cited page 427, 11 Sup. Ct. 530. If the original stockholder transfers his unpaid stock, this

trust and subsequent liability follow it into the hands of any assignee who has notice or against whom notice can be implied. *Webster v. Upton*, 91 U. S. 65. But the decisions exempt the holder of such stock who purchases or takes as creditor bona fide, and clearly so in the absence of recitals or circumstances to give notice. *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530; *Sanger v. Upton*, 91 U. S. 56; *Steady v. Railroad Co.*, 5 Dill. 348, Fed. Cas. No. 13,329; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Young v. Iron Co.*, 65 Mich. 125, 31 N. W. 814; *Brant v. Ehlen*, 59 Md. 1; 1 Cook, Stock, Stockh. & Corp. Law, §§ 50, 257. The certificates of stock are not, strictly speaking, negotiable paper, but "they approximate to it as nearly as practicable" (*Bank v. Lanier*, 11 Wall. 377); and the cases above cited recognize that they possess so much of the attributes of negotiability that purchasers in the open market may accept as true the clear representation on their face that they are full paid. In *Steady v. Railroad Co.*, supra, Judge Dillon clearly points out this right of a bona fide purchaser to rely upon corporate representations thus made in the certificate, and that the creditors of a corporation have no equities superior to "the obvious equities which exist in favor of such a purchaser." Answering the claim that a purchaser of stock was bound to ascertain aliunde the truth of the representations, and must look to the records, the opinions say: "What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters *infra vires*?" The decision in that case, in which Judge Caldwell concurred, exempts the bona fide transferee from liability under circumstances which do not raise equities in his favor of equal strength with those which are presented in favor of this defendant, but they are at least so far analogous that the rule and the reasons for its adoption there are clearly applicable here, and would discharge this defendant from liability unless the Michigan statute and the proceedings thereunder in the chancery court of that state (which will be presently considered) create a special liability.

The case at bar presents a feature in aid of the defendant which impresses me as entitled to great weight, in the conceded fact that this "treasury stock," out of which the defendant's purchase came, was produced by the deliberate surrender and contribution to the company by all the original subscribers of a portion of the original shares, which were taken by each to fill his subscription, and with direction that it be issued by the company, and placed on sale for its benefit, certified as full-paid stock. In view of that action, it is not necessary to carry the rule in favor of a bona fide transferee to the extent of relieving him from examination or from implied knowledge of the corporate records or proceedings. The stockholders have by this transaction applied upon these surrendered shares the general credit to which they were entitled on account of the property which they conveyed to the corporation as the only payment on their subscription, so far as it would be required to pay up the shares which

were thus segregated and sold; and an inspection of the record would justify the purchaser in the understanding that his shares were therefore cleared from liability. There is no proof here of the actual number of shares thus passed to bona fide purchasers, and clearly no proof of any deficiency in the payment of the defendant's shares after such application. The shares must therefore be regarded as full paid, according to their purport, and there is no common-law liability upon the holder for the corporate indebtedness.

The statutes of Michigan, which must govern in respect to this corporation, created under them, do not impose any additional liability. The supreme court of Michigan is clear and controlling authority for this construction of the statute. *Young v. Iron Co.*, 65 Mich. 125, 31 N. W. 814, and the cases cited are directly in point. The rule held in *Steacy v. Railroad Co.* is there broadly adopted, and the opinion in *Young v. Iron Co.* expressly states that the defendants there sought to be charged as stockholders "must be treated as good-faith purchasers, for value, of stock, from the original holders of the same"; that, being bona fide transferees of shares of this stock, which purported upon its face, in clear and unmistakable terms, to be fully paid up and nonassessable, their shares thus acquired are exempt from any liability to further assessment, to pay the debts of the corporation. But the plaintiff invokes the case of *Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N. W. 858, because it was an appeal from a judgment rendered against one of the stockholders of the American Iron Company in the same insolvency proceedings in the Michigan court upon which this action is founded. That case arose upon demurrer by a stockholder (Andrews) against whom liability was charged by the bill of complaint, and the opinion states that "the sole question presented by the record is the right to enforce an assessment by a personal judgment or decree against the stockholder." It was there enforced against one apparently a general stockholder, and the question of a bona fide holder of stock issued as full paid did not arise, and the opinion distinguishes it from *Young v. Iron Co.* upon that ground. The decision is not applicable. It fails to support the plaintiff's contention here, but, making the distinction as noted, is inferentially against it.

The further claim is made in behalf of the plaintiff that the decree in the Michigan court relative to the principal insolvency matter is, in some unexplained manner, conclusive upon this defendant, and establishes his liability, although it is conceded that he was not served as a party, and was not before that court, except as an integral part of the corporation. It is true, as held in *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, and in *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, that, "in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack"; and that "the stockholder is to be deemed privy to the proceedings touching the body of which he is a member." But this rule applies only so far that he cannot question the findings of insolvency and the foundations of an assessment upon the stockholders. Upon any question of individual liability in which are involved his rights as a

bona fide holder, or in respect to his special holding of stock, a stockholder is entitled to his day in court, and cannot be bound by any *ex parte* adjudication of liability. There is no adjudication affecting the defense interposed by this defendant, and he is not liable upon his shares of stock.

Findings may be prepared in accordance with this opinion, and judgment will be entered in favor of the defendant accordingly.

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ROSE v. NORTHWEST FIRE & MARINE INS. CO.

(Circuit Court, D. Oregon. April 22, 1895.)

No. 2,157.

1. ACTION ON JUDGMENT—DEFENSES.

In an action on a judgment rendered in another state, defendant may show that the judgment was obtained by collusion between plaintiff and one who represented himself to be an agent of defendant for the purpose of being served.

2. SAME—COUNTERCLAIMS.

In an action on a judgment between the original parties, defendant may plead a counterclaim growing out of a contract between them.

Action by Rose, receiver of the Consolidated Mutual Fire Insurance Company, against the Northwest Fire & Marine Insurance Company on a judgment.

R. S. Strahan and Rufus Mallory, for plaintiff.  
Zera Snow, for defendant.

BELLINGER, District Judge. This is an action by Rose, as receiver of the Consolidated Mutual Fire Insurance Company, upon a judgment rendered in Illinois in 1891, for above \$6,000. Plaintiff moves to strike out three separate defenses pleaded by the defendant. These are: (1) That the judgment sued on was fraudulently obtained by collusion of the plaintiff company with, and a pretended service of summons upon, one Louis Iott, who represented himself as the agent of the company for the purpose of being served, to the end that said judgment should be had against the company; that such service was had in pursuance of such collusive understanding, upon which service, and not otherwise, the judgment in question was rendered; that said Iott was not in fact the agent of the defendant, nor authorized to represent it. (2 and 3) Counterclaims growing out of a certain contract of reinsurance by the plaintiff's company of the defendant on account of policies issued by it, under which contract the plaintiff's corporation became liable to the defendant in an amount greater than the judgment in suit.

In an action on a judgment rendered in another state the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, and that the court never acquired jurisdiction of his person. *Thompson v. Whitman*, 18 Wall. 457; *Downs v. Allen*, 22 Fed. 805; note to *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. 609;

Knowles v. Coke Co., 19 Wall. 59. The judgment of one state, sued on in another state, is conclusive as to all matters going to the merits of the controversy, but not as to the facts conferring jurisdiction. I am of opinion that the defendant is entitled to plead the counterclaims relied upon. Under the allegations of the answer, these claims might be made the ground of an independent action. In such an action the judgment of the Illinois court could not be pleaded in bar. The judgment is conclusive only as to matters necessarily within the adjudication that has been had. The judgment in this case was upon the defendant's obligation as a stockholder to pay assessments levied upon its stock. The counterclaims grow out of a contract for reinsurance between the parties. The defendant, as between the original parties, may show payment of the judgment by parol, and with equal reason he may show a counter liability in discharge of it. The rule no longer obtains that the discharge of obligations, resting upon records and sealed instruments, can only be shown by evidence of the same high character as that which creates the obligation. The motion to strike out as to all the separate defenses is denied.

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HOFFLIN et al. v. MOSS.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1895.)

No. 547.

1. PRINCIPAL AND AGENT—DUTY OF AGENT.

Defendant, a manufacturer of medicines, made an agreement with plaintiff by which he authorized plaintiff to make contracts with newspapers for the insertion of defendant's advertisements, and agreed to pay therefor by accepting orders for his medicines from the publishers of the newspapers at a price considerably below the market price, but sufficient to yield a profit, and also agreed to pay plaintiff \$2.75 for his services in procuring each such advertising contract. Plaintiff sued defendant for the agreed commission for procuring a large number of such advertising contracts, and defendant set up, in answer, that the contract between him and plaintiff had been procured by plaintiff's representations that the sole consideration to be given to the publishers of the papers would be the sale of the medicines at the reduced price, whereby defendant would not only make a profit, but would cause his medicines to be put on sale at the places where they were advertised; that such representations were false, and plaintiff in fact never attempted to make advertising contracts on such terms, but inserted the advertisements in papers in which he already controlled the space; and that no orders for medicines had in fact been received by defendant. On demurrer to the answer, *held*, that it presented a good defense; that the agreement between plaintiff and defendant was in effect a power of attorney, constituting plaintiff defendant's agent, and that, in that capacity, he was bound to exercise the utmost good faith in executing the agency in the mode his principal expected and intended it should be carried out.

2. SAME.

*Held*, further, that a stipulation in the contract between plaintiff and defendant that plaintiff did not guaranty the presentation of the orders for medicine was of no avail to plaintiff, since, though he did not guaranty the presentation of the orders, he was bound to do nothing to discourage their presentation, but to do what he could to secure it.

**2. CONTRACTS—WAIVER OF FALSE REPRESENTATIONS.**

A stipulation in a contract that false or fraudulent representations by which one party has induced the other to enter into it shall not affect its validity is itself invalid, and cannot operate either by estoppel or otherwise.

**4. AGENT'S COMPENSATION—WHEN FORFEITED.**

An agent who conceals from his principal the facts that his private interests conflict with his duties as agent, and who seeks to advance his own interests at the expense of his principal's, cannot recover commissions or compensation for his services as agent.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action brought by L. H. Allen, for whom John E. Moss, assignee, was substituted as plaintiff, against Joseph R. Hofflin and Albert D. Thompson, partners as Joseph R. Hofflin & Co., upon two contracts for procuring advertising for defendants. The circuit court sustained a demurrer to the defendants' answer, and directed a verdict for the plaintiff. Defendants bring error. Reversed.

The following is a copy of one of the two instruments on which this suit is founded:

"Town, Minneapolis.

"State, Minn.

"Date, Nov. 11th, 1892.

"Buffalo Newspaper Advertising Agency, L. H. Allen, Proprietor—Dear Sir: You are hereby authorized and employed to make contracts of the following form for the publication of our advertisement in any number of weekly newspapers, not exceeding one thousand, to wit, in the United States:

"(Form.)

"'Exchange Plan' Advertising Contract.

"With the ———.

"Town, ———. State, ———.

"Date, ———, 189—.

"Buffalo Newspaper Advertising Agency—Gentlemen: In consideration of the order described on the reverse side hereof, and of premium offered, the undersigned hereby agrees to publish for and on your account the electrotyped advertisement of Jos. R. Hofflin & Co. in the above-named weekly newspaper, to occupy a space of four inches, single column, for a period of six months. [Signed] ———, Publisher.

"Such publisher's contracts, and signatures thereto, shall be accepted, for all purposes whatsoever, as genuine. On demand, you are authorized to issue a duebill order to the publisher of each newspaper, or order; and we agree to accept said orders, in the following manner, and not otherwise, to wit: when accompanied by \$10 and 80/100 dollars in cash, as full payment for from one to three gross of Liebig's Corn Cure, small, the regular price of which is \$36.00, to dealers \$21.00. Goods to be packed and delivered f. o. b. cars in this city without extra charge. Said orders to be optional and valid for a period of one year only from date of issue. We further agree to pay you for your services the sum of two and 75/100 dollars for each contract made; said sum to be due and payable on delivery of contract and one copy of corresponding newspaper containing said advertisement. You are to furnish an electrotype of said advertisement to each newspaper, and to be responsible for premiums given publishers, and all other expenses involved in the carrying out of this contract, and above corresponding newspapers shall be deemed sufficient evidence of due performance thereof. It is understood that you do not guaranty the presentation of the above-mentioned orders, and that no representation, understanding, or agreement not in this contract shall bind either party, unless in writing and signed by

both parties, as this is the complete agreement of the parties hereto. This agreement shall be and remain in force for a period of one year from date, and the Buffalo Newspaper Advertising Agency agree to furnish proof by affidavit of an average of 85 per cent. of insertions in the newspapers contracted with.

Jos. R. Hofflin & Co.

"Accepted:

"Buffalo Newspaper Advertising Agency,

"L. H. Allen, Proprietor,

"By C. N. Chisholm.

"Signed in duplicate."

The second instrument bears the same date, and is identical in every respect, with the foregoing, save in the name and price of the medicine to be advertised and sold; the second contract relating to "Japanese Pile Cure."

The complaint contained two paragraphs, and alleged that the plaintiff secured and delivered to the defendants 567 advertising contracts under one, and 559 under the other, contract with the defendants, and averred compliance therewith on his part in all respects, and asked judgment on one contract for \$1,559.25, and on the other for \$1,537.25. In their answer the defendants alleged, in substance: That at the time of the execution of the contracts the plaintiff, for the purpose of inducing the defendants to enter into the same, falsely and fraudulently represented that the reduction in the price of the medicines mentioned in the contracts was the sole and only consideration given or allowed, directly or indirectly, to publishers of the newspapers with whom the plaintiff was to place the advertisements, and that the plaintiff would not, directly or indirectly, allow to any of the publishers any additional price, premium, or consideration whatever for the inserting of the advertisements, and that the word "premium," used in the contracts referred to, meant simply the reduction in the price of the medicines. That, in violation of the contracts and his representations to the defendants, the plaintiff offered and gave to each publisher who inserted the advertisements other and additional consideration or premiums, in the shape or form of a lamp, type, printing materials, or other merchandise, and that the plaintiff, at the time of the making of the contracts, knew that the additional consideration or premium so offered and given by him would be the sole and only consideration which would induce any publisher to insert the advertisements, and that the reduction in price of the medicines would be in fact no part of the consideration for such insertions. That the plaintiff agreed with the defendants that the only consideration he would offer to the publishers of papers for the publication of advertisements would be the contract of the defendants to furnish to such publishers their medicines at the prices specified in the contracts; and the plaintiff further represented to the defendants that the publishers would in this manner not only advertise their remedies, but would, by the 'exchange plan,' place the same on sale at the very points or localities where they were being advertised, and that, from his large and varied experience in this method of advertising in all parts of the United States, he was able to state, to his knowledge, that such would be the necessary and inevitable result of such contracts in advertising,—all of which representations were false and fraudulent, and were known to the plaintiff to be so, and were made for the purpose of inducing the defendants to sign said contracts, and the defendants, relying on the truth of such representations, were thereby induced to sign said contracts. That the defendants have not had a single order for their medicines from any of the publishers of the advertisements, and have not, directly or indirectly, sold any medicine by reason of or on account of the advertisements. That, in sales at the prices fixed in the contracts for their medicines, there would have been a considerable net profit to them in the sale thereof to the publishers at the prices fixed in the contract, which profit is particularly stated. That the plaintiff agreed that he would act as the defendants' agent in placing the advertisements with the publishers of such weekly newspapers as would take and accept the same for the medicines mentioned at their reduced prices, whereas at the time of making the contracts the plaintiff owned and controlled the space in most, if not all, of the newspapers in which the advertisements were alleged by the plaintiff to have been

placed; and he did not act in good faith, as the agent of the defendants, in securing the advertisements to be accepted and published for the defendants' medicines, but was acting solely for himself, and was selling space which in fact belonged to himself. That the plaintiff fraudulently concealed from the defendants that he then owned and controlled the space in the newspapers, and that the reduction in price on the medicines would be no consideration for any of the contracts with the publishers, or any inducement whatever to them to insert the advertisements, and that in making the negotiations for the contracts, and in executing the same, and in pretending to carry out same as defendants' agent, the plaintiff acted in bad faith towards the defendants, for the purpose of deceiving and defrauding them for his own advantage and profit. The circuit court sustained a demurrer to the answer, and directed a verdict for the plaintiff for the amounts claimed, upon which judgment was rendered, and thereupon the defendants sued out this writ of error.

H. W. Young (W. A. Lancaster, on the brief), for plaintiffs in error.  
C. J. Rockwood, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The instrument or contract sued on is, in legal effect, a power of attorney. It establishes between the parties thereto the relation of principal and agent. Allen is described as "proprietor" of the "Buffalo Newspaper Advertising Agency" and it is by this title he is addressed by the defendants, and "authorized and employed to make contracts" for them. He avers in his complaint that he "has been doing business under the style and description of 'Buffalo Newspaper Advertising Agency,'" and the answer alleges that he agreed to act as agent for the defendants in the premises, and the demurrer admits the truth of the averment. Assuming, as we must, that the averments of the answer, well pleaded, are true, the plaintiff, as agent for the defendants, for the consideration mentioned in his power of attorney, agreed that the only inducement or consideration offered or paid to the publishers of the newspapers in which he might procure the publication of the defendants' advertisements should be the medicines of the defendants, sold to them at the reduced rates specified in the contract.

The defendants had good reason to suppose that the proprietors of newspapers would not publish their advertisements for nothing, and that if they did publish them they would do so in consideration of getting the medicines at the reduced rates mentioned in the contracts. This reasonable belief, Allen assured them, was well founded, and that the necessary result of such contracts would be, not only to advertise their medicines, but to bring them into use in every locality where they were advertised, through the orders they would receive from the publishers of the papers publishing the advertisements. In view of the relation between Allen and the defendants, it was the duty of Allen, as their agent, to act in the utmost good faith towards his principals, and to do nothing to militate against their interests in this regard. It did not require any special agreement to impose this duty upon him. As the agent of the defendants, the law imposed it upon him. Accepting the averment of the answer as true, Allen



knew at the time he sought and procured the agency that no news paper would publish the defendants' advertisements for the consideration mentioned in his power of attorney; that he did not intend or expect to ask them to do so, and in fact made no effort to do so; that he then himself owned the space in the newspapers in which he intended to insert the defendants' advertisements; that the advertisements were in fact inserted by him only in the papers in which he owned the space at the date of the contract, or in space which he purchased and paid for after the contract was made; and that the clause in the contract which was the chief, if not the only, consideration and inducement that led the defendants to enter into it, was inserted solely for the purpose of deceiving and misleading them. The moment that Allen accepted this agency for the defendants, the law bound him to the exercise of disinterested skill, diligence, and zeal in carrying out the agency. He was bound to act in the utmost good faith towards the defendants, and to execute the agency in the mode he knew his principals expected and intended it should be carried out, and with an eye single to their interests. Instead of so acting, it turns out, he was contracting for and with himself, and that his interests in the matter of the agency were directly inimical to those of his principals. An agent thus acting cannot recover commissions or compensation for his services. *For-dyce v. Peper*, 16 Fed. 516, and note.

The aspect of the case is not altered by the statement in the contract that "it is understood that we do not guaranty the presentation of the above-mentioned orders." The undoubted purpose of this clause was to shield Allen from the fraud which he then meditated, but it can have no such effect. While he did not guaranty the presentation of the orders for the medicines, he was under the highest obligation, imposed on him by law, to do nothing that would have a tendency to discourage their presentation, but, on the contrary, to do what he could to secure their presentation, by not paying or offering any consideration for the insertion of the advertisements other than the medicines at the reduced prices. He made their presentation impossible by himself buying and paying for the space occupied by the advertisements. And the clause in the contract "that no representation, understanding, or agreement not in this contract shall bind either party, unless in writing and signed by both parties, as this is the complete agreement of the parties hereto," is of no avail to the plaintiff. This clause, to the extent that it is valid, expresses no more than the law would imply without it. False and fraudulent representations made by one party to a contract, by which the other party is induced to enter into the contract, render it voidable, at the election of the defrauded party, and a stipulation in such a contract to the effect that the false and fraudulent representations by which the one party induced the other to enter into it shall not affect its validity is itself of no validity. No one can be estopped by anything contained in an instrument, which instrument was itself obtained from him by fraud and deceit. The law will not give effect to a stipulation intended to grant immunity to iniquity and fraud. In the case of *Bridger v. Goldsmith*, 38 N. E. 458, the court of appeals

of New York, discussing a somewhat similar provision in a contract, say:

"A mere device of the guilty party to a contract, intended to shield himself from the results of his own fraud practiced upon the other party, cannot well be elevated to the dignity and importance of an equitable estoppel. If the clause has any effect whatever, it must be as a promise or agreement on part of the plaintiff that, however grossly he may have been deceived and defrauded by the defendant, he would never allege it against the transaction, or complain of it, but would forever after hold his peace. It is difficult to conceive that such a clause could ever be suggested by a party to a contract, unless there was in his own mind at least a lingering doubt as to the honesty and integrity of his conduct. \* \* \* Public policy and morality are both ignored if such an agreement can be given effect in a court of justice. The maxim that fraud vitiates every transaction would no longer be the rule, but the exception. It could be applied then only in such cases as the guilty party neglected to protect himself from his fraud by means of such a stipulation. Such a principle would, in a short time, break down every barrier which the law has erected against fraudulent dealing."

See, to the same effect, *Fashion Co. v. Skinner*, 64 Hun, 293, 19 N. Y. Supp. 62.

In the case of *Allen v. Pierpont*, 22 Fed. 582, upon a contract like the one here in suit, the court held the plaintiffs could not recover, upon the ground that they were agents, under the contract, and had not acted in good faith towards their principal; and their action was the same, in all respects, as the action of the plaintiff in this case. The judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

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## MONTGOMERY v. NORTHERN PAC. R. CO. et al.

(Circuit Court, D. Oregon. April 22, 1895.)

No. 2,165.

### 1. BREACH OF WARRANTY—DAMAGES—CONSIDERATION PAID IN BONDS.

In an action against a railroad company for breach of warranty in a conveyance of land, defendant may show that the consideration paid was unmatured junior bonds of defendant worth less than par, as the measure of damages is the value of the bonds given for the lands, with interest.

### 2. SAME—CONVEYANCE BY RAILROAD.

Under Act March 3, 1887, § 4, providing that innocent purchasers of land erroneously certified or patented to a railroad company as part of its grant shall be entitled to the land upon making proof of purchase at the proper land office, under rules to be prescribed by the secretary of the interior, such purchasers cannot sue the railroad company for breach of warranty, though the secretary has prescribed no rules by which purchasers can avail themselves of the act, as their title and possession are secure without making proof of purchase until such rules are prescribed.

### 3. SAME—ACTION FOR BREACH—PLEADING.

In an action by a purchaser of lands from a railroad company for breach of warranty, an answer alleging that under Act March 3, 1887, § 4, plaintiff is entitled to the lands on making proof of purchase at the proper land office, and that under section 5 plaintiff is entitled to purchase the land from the government for \$2.50 per acre, is demurrable, where it does not allege that the lands in question belong to the class described in the act.

**4. SAME—DEFENSES—PURCHASE BY PLAINTIFF.**

It is no defense to an action against a railroad company for breach of warranty that plaintiff has purchased the land in question under Act March 3, 1887, § 5, providing that where a railroad company has sold to an innocent purchaser, as part of its grant, lands not conveyed to it, they being for some reason excepted from the operation of the grant, such purchaser may purchase them from the government at the government price.

**5. PLEADING—DEFECTS REACHED BY DEMURRER.**

Objection to several parts of a complaint or answer, constituting a single cause of action or defense, must be taken by motion to strike out, and not by demurrer.

Action by one Montgomery against the Northern Pacific Railroad Company and others for breach of warranty. The plaintiff demurred to defendant's answers.

Raleigh Stott and A. H. Tanner, for plaintiff.  
Joseph Simon, for defendants.

**BELLINGER**, District Judge. This is an action to recover damages for alleged breach of covenants of warranty contained in a deed made by the railroad company of certain lands. It is alleged in the complaint that the plaintiff paid the company \$18,789.58, the consideration expressed in the deed; that said deed contained a covenant that the company would warrant and defend the title to the premises conveyed; that in fact it was not the owner of such lands, nor entitled to their possession; and that plaintiff has been evicted therefrom by the United States. The plaintiff prays judgment for said sum of \$18,789.58, with interest from April 10, 1876, the date of the conveyance. The company and its receivers answer separately. These answers deny want of title in the company at the time of the conveyance in question, and allege that at such time the defendant company was the owner of the deeded lands, and they deny that the plaintiff has been evicted. They also deny that plaintiff paid \$18,789.58 for the lands, and allege the fact to be that plaintiff paid, as the only consideration for the conveyance, bonds of the defendant known as the Jay Cooke series of bonds, which bonds were at the time worth no more than \$1,800. For a further defense, it is alleged that the lands conveyed were a part of a grant of lands to the company by the United States to aid in the construction of its line of road; that said grant is one of the grants mentioned in an act of congress subsequently passed to provide for the adjustment of land grants made to aid railroads, and for the forfeiture of unearned lands, approved March 3, 1887; that, by the provisions of this act, the secretary of the interior is authorized and directed to make adjustments of each of the theretofore unadjusted railroad land grants, in accordance with the decisions of the supreme court, and that, if it shall appear that lands have been erroneously certified or patented by the United States for the benefit of any railroad company claiming under a railroad grant, the secretary is directed to demand a relinquishment or reconveyance of the land to the United States, and shall, on failure of compliance with such demand, commence proceedings to cancel all certificates

or patents or other evidence of title held under the said grants; that it is further provided by said act, in effect, that, where there are purchasers in good faith of any of such lands from the companies, such purchasers, or their heirs or assigns, shall be entitled to the lands so purchased, upon making proper proof of the fact of such purchase, at the proper land office, within such time and under such rules as may be prescribed by the secretary of the interior, after the adjustment provided for shall have been had; that, under this act, plaintiff is entitled to the lands in question upon making the proof provided for, whenever the secretary shall adopt rules and regulations therefor, which he has not yet done, and is entitled to become invested with a perfect title to the lands in question from the government of the United States; that the expense incident to such action will not exceed \$1,000, which sum is the only loss, injury, or damage that plaintiff has or can suffer by reason of the complaint he makes. For a further answer, it is alleged that, under the provisions of the act of congress of March 3, 1887, it is provided that when any railroad company shall have sold to citizens or persons who have declared their intentions to become such, as part of its grant, lands not conveyed to or for the use of the company, or that are, for any reason, excepted from its grant, such lands being numbered sections prescribed in the grant to the company, and coterminous with the constructed portions of its road, it shall be lawful for the bona fide purchaser thereof from the company to pay the United States for such lands at the ordinary government price, and that thereupon patents shall issue to such person, or his representative, for such lands; that the lands conveyed by the company to plaintiff aggregate 2,952.48 acres; and that, under the provisions just mentioned, plaintiff may secure title thereto from the government by paying \$2.50 per acre therefor; and that in no event can plaintiff's damage exceed \$7,381.20. For a further answer, it is alleged that plaintiff has availed himself of the provisions of the act in question, and has secured title to certain lots and parcels of said land, which are particularly designated in such separate defense. The plaintiff demurs to each of these separate defenses, and he also "demurs" to that part of the answer in which it is denied that the plaintiff paid for the lands purchased otherwise than with bonds of the company worth only \$1,800. This last objection should be made by motion to strike out.

I am of opinion that the fact of payment in bonds not yet due, or actually worth less than par, may be alleged as showing the damage sustained by reason of the failure of title complained of. It is argued that, since the obligation of the company is to pay these bonds at their face, the company will not be permitted to say that, when it took them in payment for land, it received less in money value than their par value. But if such bonds are not yet due, or are subject to the priority of bonds of another series, or are only a part of the bonds of one series, a recovery by plaintiff of damages to the amount of their par value has the effect to compel their payment before maturity, or in disregard of the rights of other lien holders. If these bonds were at the time actually worth but 10

per cent. of their face, it was upon the assumption that the assets of the company, if applied in payment of its obligations in the order in which such obligations were entitled to be discharged, would only pay that much. The debts of the company are the debts of its assets, beyond which, so far as creditors are concerned, there is no liability. It follows that the bondholders of the company cannot compel the present payment in full of bonds not yet matured, or that are subsequent in order of payment, or that belong to a series for the full payment of which the assets of the company are inadequate. The officers of the company have no right to pay off a part of such bonds at their face, to the injury of the rights of other bondholders, and what they cannot do directly they cannot do indirectly. And yet this is what will happen if the plaintiff, having bought lands with these bonds, can now recover as damages their par value, with interest, upon the company's covenant of warranty of title. The plaintiff is entitled to compensation. It is only to this extent that damages are allowed, and the measure of his damages is the property which he exchanged for the land in question with its increment, or its value in money, with interest.

The act of congress of March 3, 1887, provides for two classes of cases,—one where lands erroneously certified or patented to a railroad company, as a part of a grant made to it, have been sold by the company to innocent purchasers; and the other where such company has sold to such a purchaser, as a part of its grant, lands not conveyed to it, being the numbered sections prescribed in the grant, and coterminous with constructed parts of the road, but for some reason excepted from the operation of the grant to the company. In cases belonging to the first class, the purchasers from the company shall be entitled to the land upon making proof of their purchase at the proper land office, under rules to be prescribed by the secretary of the interior. In such cases the government may compel payment by the company of the government price for the land erroneously disposed of, and the right is reserved to the innocent purchaser to recover his purchase money from the company, less the amount such company has paid to the United States. The effect of this is to compel the company to purchase from the government, for the benefit of innocent purchasers, at the government price, lands erroneously conveyed to it as a part of its grant, and subsequently sold by it to such purchasers, if they make application therefor, in which case such purchasers can recover back the purchase money paid to the company, less the amount paid by the company to secure title in the purchasers. In cases of the second class, the lands not having been conveyed or certificated to the company, an innocent qualified purchaser from the latter may purchase the lands from the government at the government price. In the case of *Burr v. Greeley* (decided in the circuit court of appeals for the Eighth circuit) 3 C. C. A. 357, 52 Fed. 926, it is held that, under this act, the purchaser from a railroad company of lands erroneously patented cannot maintain an action for a breach of warranty while he still retains possession, and has pend-

ing in the land department an application for a patent as a bona fide purchaser. It is clear that a plaintiff cannot have damages on account of his contract of purchase while in the enjoyment of the benefits of that contract. The protection which section 4 of the act of March 3, 1887, extends to him, is because of his contract of purchase from the railroad company. He cannot complain of injury to his rights as a purchaser while the government protects him from such injury.

It appears from the answer that no time has been fixed, nor have any rules been adopted by the secretary of the interior, by which the plaintiff can avail himself of the benefits of a purchaser under the act. It is alleged that whenever the secretary shall prescribe such rules, and fix the time for making proof of the fact of purchase, the plaintiff can perfect his title. But these omissions do not create uncertainty as to the rights of bona fide purchasers. The rights conferred are absolute. The regulations to be prescribed are merely to provide a mode of procedure. Until that is done, a purchaser is not required to make proof of his purchase. His title and possession are secure without it. It does not appear, however, that the lands in question were erroneously patented or certified by the government, and therefore belong to the class provided for in section 4 of the act of March 3, 1887; and this omission is not aided by the allegation that when the secretary of the interior shall prescribe rules and fix the time of proof, etc., the plaintiff can perfect his title. This is a mere conclusion, and is not warranted by what is alleged.

The second separate defense alleges that the plaintiff may, if he so elects, bring himself within the provisions of section 5 of the act, and become the purchaser of the lands in question at the rate of \$2.50 per acre. But, if such right of purchase is otherwise a good defense, the right under section 5 of the act is limited to such lands as are within the numbered sections prescribed in the grant to the company, and are coterminous with the constructed parts of the road. It is not alleged that these are such lands.

The answer contains a still further separate defense, in which it is alleged that the plaintiff has in fact availed himself of the provisions of the act of March 3, 1887, and has perfected his title thereunder to a number of parcels of the land in question, which parcels are particularly described. I assume from this that the plaintiff has availed himself of his right to purchase at government price certain portions of this land from the government, under the provisions of section 5 of the act of March 3, 1887. There can be no intendment in favor of the pleader that the title thus perfected is under section 4. Moreover, such a defense, if made, would be inconsistent with the allegation in the first separate defense to the effect that the secretary of the interior has not yet prescribed the rules under which purchasers can avail themselves of the right to have their titles perfected by making proof of purchase at the proper land office. The purchase by the plaintiff of these lands from the government, under section 5 of the act, will not relieve

the company from its obligation to repay the purchase price received by it from him for such lands. It is not the intention of congress that the company shall retain any part of the purchase price of lands erroneously sold by it. Such a policy would offer inducements to land-grant companies to sell lands not within their grants, and thus perpetrate frauds upon innocent purchasers. The purchaser under section 5 of the act of March 3, 1887, is required to pay "the ordinary government price for like lands" in order to secure title to the lands erroneously sold to him by the company. It does not become a railroad company in such a case, where it has received from the purchaser more than "the ordinary government price for like lands," to try to relieve itself from responsibility by paying the amount of such price to its grantee, and thus take advantage of its own wrong or mistake to keep the difference between what it received for land it had no right to sell and what its grantee had to pay the government to secure his title. Whether the company has sold for more or less than the government price, in cases within section 5 of the act, the measure of its liability is the same,—the amount it has received as the purchase price of the land it attempted to sell, the measure of damages upon a covenant of warranty on failure of title. When the lands purchased have been patented or certificated by the government to the company, the act of congress validates the purchase. Where there has been neither certificate nor patent, the case is different. No title is recognized in the purchaser. The right secured in the latter case is merely a right to purchase. In the one case the government assumes the obligation of the grantor company; looks to such company for the purchase price in an amount equal to the government price of similar lands, without reference to the amount for which the company has sold them. It confirms the sale already made, upon the consideration, so far as the purchaser is concerned, already paid, and the patent which it issues relates back to the date of the original certification or patent. There is no failure of title, but an affirmance of title. In the other case there is a failure of title, with a right of purchase upon a new and full consideration to be paid by the purchaser. In such case there is a failure of title under the conveyance from the company to the purchaser, and this is proof of eviction, which cannot be avoided by the fact of a subsequent purchase by the grantee from the owner.

The demurrer to the second and third separate defenses is sustained. As to all other parts of the answer, it is overruled.

The first separate defense is demurrable, but, instead of demurring to such defense as a whole, defendant has specially demurred to each of five of the six paragraphs constituting such defense. Objection to several parts of a complaint or answer constituting a single cause of action or defense must be made by motion to strike out.

## DAWSON TOWN &amp; GAS CO. v. WOODHULL.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1895.)

No. 509.

## 1. PROMISSORY NOTE—ACTION BY INDORSEE—EVIDENCE OF OWNERSHIP.

In an action on a promissory note by an indorsee, who has the note in his possession, it is not necessary for the plaintiff to offer testimony to establish his ownership of the note before reading it in evidence, though his ownership is denied in the answer.

## 2. EVIDENCE—ADMISSIONS—USING PART OF DEPOSITION.

The defendant in an action took the deposition of the plaintiff, and subsequently took that of the magistrate who took plaintiff's deposition, in order to prove, as admissions, certain statements made by plaintiff in giving his deposition. On the trial, defendant offered the deposition of the magistrate, which was excluded, and then read certain parts of plaintiff's deposition, whereupon plaintiff asked leave, and was allowed, to read the whole, plaintiff himself being present at the trial. *Held*, that both rulings were correct; that plaintiff was entitled to the same privilege as any witness,—of having all he had said on a given occasion, and on a given subject, read to the jury, if it was proposed to use his evidence as an admission.

## 3. SET-OFF—FAILURE OF CONSIDERATION—MISLEADING CHARGE.

In an action on promissory notes, in which the defendant set up misrepresentation and fraud in the sale of the property for which the notes were given, and claimed damages for a failure of consideration, the court charged that where there is a partial failure of consideration, or where the whole contract was the result of fraud, if the parties defrauded wish to avail themselves of the fact, they must repudiate the contract, and tender back what they have received, and, where they have not done so, they cannot repudiate their contract to pay. In a subsequent part of the charge, the court said that the foregoing instruction related to the case of a total failure, perhaps, of consideration, and that if the defrauded party kept the property, and there was a partial failure of consideration, the rule would be different and such failure might be set off against the notes; proceeding to refer to an alleged failure of the seller to deliver all that he had agreed to deliver, but saying nothing more about the alleged misrepresentation and fraud. *Held*, that the error in the former part of the charge, in stating that the defendant could not set off damages caused by misrepresentation and fraud, was not cured by the subsequent part of the charge, permitting him to set off the failure to deliver particular items of property, and that the charge was, at all events, contradictory, and liable to mislead the jury.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Curtis Woodhull against the Dawson Town & Gas Company on two promissory notes. The plaintiff recovered judgment in the circuit court. Defendant brings error. Reversed.

This was a suit which was brought in the circuit court of the United States in the district of Nebraska by Curtis Woodhull, the defendant in error, against the Dawson Town & Gas Company, the plaintiff in error, on two promissory notes, each for the sum of \$6,244, which were executed by the Dawson Town & Gas Company in favor of J. T. Hoile, as payee, and were subsequently indorsed by him to said Woodhull. The defendant company pleaded, by way of defense, the following facts: That the notes did not belong to the plaintiff, Woodhull, but were in fact the property of Hoile, he having transferred them to Woodhull without consideration, and that Hoile and Woodhull had conspired to have the suit brought in Woodhull's name to cut off defenses which existed against Hoile, and rendered the notes non-



collectible in his hands; that the notes were executed and delivered in payment for certain lands in the state of Iowa belonging to the Perry Natural Gas Company, on which were located certain gas wells; that Hoile acted as agent for the sale of said property, and that, for the purpose of inducing a sale thereof to the defendant company, he made the following representations: That the Perry Natural Gas Company was owned in equal shares by him, the said Hoile, and certain other parties, and that he, the said Hoile, was authorized to transfer to the defendant the interests of each and all of said persons in the said Perry Natural Gas Company; that the said gas wells on the lands of the Perry Natural Gas Company had a continuous flow of gas; that the main gas well thereon would produce a flow of 4,000,000 feet of gas per day; and that the said gas wells produced gas at a pressure of about 125 pounds per square inch. The answer further averred that all of said representations so as aforesaid made were false, and were made by said Hoile with intent to defraud the defendant company; that the defendant company was deceived by said representations, and was thereby induced to purchase the land in question, and to deliver to said Hoile, in payment therefor, \$30,000 of its capital stock, and the two notes in suit; that by reason of the fraudulent conduct of said Hoile the defendant had never received any consideration for the notes; and that, in consequence of said fraud, it had sustained damages in the sum of \$25,000, for which it prayed judgment. The trial resulted in a verdict and judgment against the defendant company for the full amount of said notes, and accrued interest, to reverse which the defendant company has brought the case to this court by a writ of error.

John L. Webster, for plaintiff in error.

C. Frank Reavis and B. S. Baker (Isham Reavis, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first error that has been assigned for our consideration relates to the action of the trial court in permitting the notes in suit to be read in evidence without requiring the plaintiff to offer any evidence tending to show that he was the owner thereof. It is insisted in behalf of the plaintiff in error that inasmuch as it had denied the fact of ownership, and had alleged affirmatively that Woodhull had paid no consideration for the paper, and had conspired with Hoile to have the suit brought in his name, but for Hoile's benefit, the court should have required the plaintiff to furnish some proof of ownership before admitting them in evidence. We think that this assignment is untenable. The legal presumption of ownership which exists in favor of one who is ostensibly in possession of negotiable notes indorsed in blank by the payee, as these notes were, and who brings a suit thereon, is not overcome by a mere denial of the fact of ownership contained in the answer. When these notes were offered, they were in the hands of the plaintiff's attorneys. The legal presumption was that they had received them from the hands of their client, that they had ceased to belong to the payee, and that they were the client's property. There was no occasion, therefore, for offering testimony to confirm the presumption before the notes were admitted in evidence. *Collins v. Gilbert*, 94 U. S. 753, 754, and cases there cited; *Brown v. Spofford*, 95 U. S. 474, 478; *Daniel*, Neg. Inst. §§ 812, 574; *Tied. Com. Paper*, § 312.

It is further assigned for error—and these assignments may be considered together—that the court erred in permitting the deposition of Curtis Woodhull, the plaintiff, to be read in his own favor, he being present at the trial, and in refusing to allow the deposition of Thomas Cary Welch to be read in behalf of the defendant company. Both of these depositions appear to have been taken and filed as evidence in the case by the defendant. The plaintiff's deposition was first taken, but not desiring to use it after it had been obtained and filed, for fear, no doubt, that the defendant would be concluded by certain statements therein contained, counsel for the defendant company resorted to the novel expedient of securing the deposition of said Welch, who was the officer before whom the plaintiff's deposition had been reduced to writing, for the purpose of proving by him certain statements that had been made by the plaintiff in the course of his examination. On the trial of the case the deposition of Welch was first offered by the defendant, but the plaintiff interposed an objection to the reading of the same, and it was thereupon excluded by the court. The defendant then offered and read certain portions of the plaintiff's deposition, as admissions made by the plaintiff, whereupon the attorneys for the plaintiff asked and obtained leave to read the residue of the deposition, which had not been read by the defendant's attorney. We are unable to perceive any error in either of these rulings of the circuit court of which the defendant is justly entitled to complain. The object which counsel for the defendant company obviously had in view was to lay before the jury selected portions of the plaintiff's deposition, which the defendant had taken, and caused to be placed on file, without being put to the necessity of reading other parts of the deposition, which he deemed prejudicial to his client's interests. The testimony of Welch, so offered, was in the nature of secondary evidence of the contents of a written document which was then in the defendant's custody and control. Besides, it was manifestly unfair to the plaintiff to put him on the stand as a witness by means of compulsory process, and then call a third party to prove certain admissions which he may have made while testifying as a witness, without giving him the benefit of other statements contained in the deposition that may have tended to qualify and explain such admissions. When a party to a suit is called as a witness by the opposite party, he is entitled to all the privileges of a witness, and among these is the right to have all that he may have said on a given occasion, on a given subject, read to the jury, if his statements were reduced to writing, and it is proposed to use the writing against him as an admission. This is not only an elementary rule of evidence, but it is one that owes its origin to a sense of fair play and fair dealing.

Passing from these assignments of error, neither of which, in our judgment, is well founded, we have next to consider a more important exception, which was taken to the charge of the trial court. The issues raised by the pleadings as to the ownership of the notes, as to the fraud practiced by Hoile, the payee, and as to whether the defendant company had received any consideration for the paper, were submitted to the jury under instructions that seem to have been

applicable to the case, and that also appear to have been substantially accurate as declarations of law. The trial court then proceeded to consider the question whether, in the event of a partial failure of consideration, owing to the alleged fraud that had been practiced, the defendant company was entitled to recoup the damages it had sustained, and thereby lessen the amount of the recovery. With reference to this feature of the case, the circuit court, in its charge, used the following language:

"Now, where there is a partial failure of consideration, or where the whole contract was the result of fraud,—had its inception in fraud,—if the parties who were so defrauded wish to avail themselves of that fact, they must have repudiated the contract; they must disaffirm it, and tender back to the person the property they receive for the giving of the notes in question. They must, it seems to me, repudiate the entire transaction, and not hold on to the property they have received. That won't do. Was there any attempt—has there ever been an attempt—to repudiate the transaction, and to put the parties in statu quo; that is, to surrender the property to the Perry Natural Gas Company which they had received from it? If there was no such arrangement as that, then they are not in a position to repudiate it, because they can't keep the property they got, and refuse to pay for it, at the same time."

Then, after pointing out to the jury that there was testimony before them tending to show that the defendant company had received a conveyance from the Perry Natural Gas Company of land worth \$12,500, subject to an incumbrance for only \$5,000, and that the defendant had subsequently placed another mortgage on the property, and suffered it to be foreclosed, so that it could not in fact restore the consideration it had received for the notes in suit, the trial court continued its charge as follows:

"What I have said with reference to that relates to the transaction where there is a total failure, perhaps, of consideration; but where there is a partial failure of consideration, as it is possible there may be here, the rule would be different. If they did not repudiate the entire transaction, but kept the property they have received, and there is a partial failure of consideration, then that partial failure of consideration might be set off against these notes if the plaintiff had knowledge of the fact (that) such defense existed at the time he purchased the notes. What is the fact about that? You may believe or you may not believe from the testimony that the plaintiff was an innocent, bona fide purchaser before due and for a valuable consideration, and if you don't believe that, from the testimony, you have to fall back and see to what extent the consideration has failed—how far it has failed, if it has failed at all. \* \* \* How much was the defendant injured in consequence of Hoile failing and neglecting to do precisely what he had agreed to do? One witness claims they had to pay six hundred dollars to a party or one of the stockholders in order to secure his interest—one stockholder in the Perry Natural Gas Company. \* \* \* Then it is claimed the interest of Stout never has been secured. That Hoile was to do that before the notes were to be delivered. If that be so what is his interest worth? Of course, you don't know and you have to find out as best you can from the testimony. If there was an interest remaining in that land, 320 acres, and the gas wells upon it, what is his interest worth that has not already been obtained for the defendant? If it is worth anything, six hundred dollars or a thousand dollars or whatever it may be worth, then that would be a proper and valid set-off to the notes, because the defendant would be injured to that extent because Hoile failed to carry out his agreement according to these terms."

In the first paragraph of the above quoted excerpts from the charge, there is an unqualified statement to the effect that even

though the jury should find that the defendant company had been damaged to some extent by the fraudulent representations of Hoile, so that the consideration of the notes had partially failed, yet that the amount of such damages could not be allowed as an offset against the notes, because the defendant had not reconveyed, or offered to reconvey or restore, the property which it had received from the Perry Natural Gas Company. Clearly, this was not a correct statement of the law. The defendant had pleaded, by way of offset, that it had sustained damages, in a given sum, in consequence of the fraud alleged in its answer, and it was entitled to recoup the amount of such damages, if any, if the jury believed, and so found, that the plaintiff was not a bona fide holder of the notes, even though it was not in a position to restore all that it had received, and to demand a rescission of the agreement. We are not able to say that the error so committed was cured by what was said in the subsequent part of the charge. It is true "that the court did remark that what he had previously said related, perhaps, to a case of total failure of consideration"; but the context shows that in making that qualified statement the trial judge had in mind two items of damage which the evidence tended to show that the defendant had sustained in consequence of Hoile's failure to obtain, and to transfer to it, the interest of two shareholders in the Perry Natural Gas Company. It is manifest, we think, that, in making the qualified statement found in the second paragraph of the charge above quoted, the trial judge did not intend to instruct the jury that damages incident to the alleged fraud could be offset against the notes. On the contrary, the direction intended to be given was simply this: that, in so far as the evidence tended to show that the defendant company had not received all of the interests in the Perry Natural Gas Company that Hoile had contracted to sell and convey, there might be an allowance, by way of offset, for the amount that the defendant had actually expended to secure such outstanding interests. This, we think, was the most natural meaning of the charge, taken as a whole. But, if we are mistaken in this view, it is certainly true that the charge was contradictory in the respects above quoted, and for that reason was liable to confuse and mislead the jury. The circuit court appears to have entertained the opinion—in which we fully concur—that there was some evidence in the case which tended to show that Hoile had intentionally deceived the promoters of the defendant company by making the false representations alleged, and by resorting to artifice to conceal from them certain material facts, relative to the operation and flow of the gas wells, that were well known to him, but were unknown to the parties with whom he was dealing. There were also some facts in evidence from which, as we think, a jury would be authorized to infer that Woodhull was not an innocent purchaser for value of the notes in suit. Such being the state of the case as disclosed by the record, we feel constrained to hold that the error in the charge was of such nature as to necessitate a new trial. The judgment of the circuit court is accordingly reversed, and the case is remanded, with directions to award a new trial.

**MEMPHIS & C. R. CO. et al. v. HOECHNER.**

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 228.

**1. RAILROAD COMPANIES—RECEIVERS—LIABILITY FOR NEGLIGENCE.**

A railroad company is not liable for personal injuries caused by the negligent operation of the road while in the exclusive possession and occupation of receivers.

**2. RECEIVERS—LIMITATION OF ACTIONS—RUNNING OF STATUTE.**

Where an action is brought against a railroad company for personal injuries caused while it was in the exclusive control and possession of receivers, but the receivers are not made parties until a year later, when they are brought in by amendment, the cause of action against the receivers is barred by Mill. & V. Code Tenn. § 3469, requiring actions for personal injuries to be brought within one year after the right of action accrued.

In Error to the United States Circuit Court for the Western Division of the Western District of Tennessee.

Action by J. J. Hoechner against the Memphis & Charleston Railroad Company, and Charles M. McGhee and Henry Fink, receivers, for personal injuries. There was a judgment for plaintiff, and defendants bring error.

Frank P. Poston, for plaintiffs in error.

F. Zimmermann, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. The defendant in error recovered a judgment against the Memphis & Charleston Railroad Company, and Charles M. McGhee and Henry Fink, as receivers of said company, for damages for an injury sustained while in the service of the receivers, and while the road was operated by them under appointment of the United States circuit court at Memphis, Tenn. Many errors have been assigned, but, in the view we have taken of the case, it is only essential to rule upon two of them. The first presents the question of the liability of the railroad company for an injury sustained by a servant of the receivers who were in the exclusive possession and occupation of the railroad owned by the corporation. The second question involves the application of the Tennessee statute of limitations to the suit against the receivers.

McGhee and Fink were appointed receivers in July, 1892, under a bill filed by creditors. Defendant in error sustained the injury for which he sued in December, 1892. His first employment was in November, 1892, and was by the receivers. The decree appointing McGhee and Fink, among other things, ordered:

"Each and every one of the officers, directors, agents, and employes of the said Memphis & Charleston Railroad Company are hereby required and commanded forthwith upon demand of said receivers, or their duly-authorized agent, to turn over and deliver to such receivers, or their duly-constituted representatives, any and all books or accounts, money, or other prop-

erty, in his or their hands, or under his or their control; and each and every one of such directors, officers, agents, and employes are hereby commanded and required to obey and conform to such orders as may be given to them from time to time by said receivers, or their duly-constituted representatives, in conducting the operation of said property, and in discharging their duties as receivers; and each and every one of such officers, directors, agents, and employes of the said Memphis & Charleston Railroad Company are hereby enjoined from interfering in any way whatever with the management of any part of the property over which the receivers are hereby appointed, or interfering in any way to prevent the discharge of their duties or operating same under the court's order."

There was no evidence tending to show anything like a joint occupation, operation, or control of the railroad by the corporation and the receivers. Upon the contrary, all the evidence tended to show that the road had, from the qualification of the receivers, been in their exclusive possession, control, and operation. There was, therefore, nothing in the case making applicable the doctrine of *Railroad Co. v. Brown*, 17 Wall. 445-450, or *Railroad Co. v. Jones*, 155 U. S. 354, 15 Sup. Ct. 136.

Under this state of facts, the court was requested to charge the jury that:

"If you find from the evidence that plaintiff was injured on the 24th day of December, 1892, and that, at the time of said injuries, Charles M. McGhee and Henry Fink were the duly-appointed receivers of said Memphis & Charleston Railroad Company, and as such were in the actual and exclusive control and operation of the properties and line of railroad of said company, and of the agents and employes engaged in the operation thereof, and that said Memphis & Charleston Railroad Company had no voice in the selection and control of such agents or employes, or in the management or control of said railroad properties, then said company would not be liable for the injury sustained by plaintiff, and your verdict must be for it."

This was refused. On this subject, the court, among other things, instructed the jury that:

"This suit was originally brought against the Memphis & Charleston Railroad Company. Its liability is denied on the ground that, at the time of the injury to the plaintiff, the road was operated by receivers under an order of court in that behalf; and the wrong done, if any, was done by the receivers, and not by the company; and therefore I am asked to charge you that your verdict should be for the company, in any event. There are cases or dicta of cases which support this contention perhaps, but, in my judgment, that is not the law of this case so far as relates to the technical liability to the plaintiff."

We think the court erred in refusing to charge as requested. A receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad is not the agent of the insolvent railroad corporation, and is not a substitute for the board of directors. He is but the hand of the court appointing him, and holds, manages, and operates the property under the orders and directions of the court as its custodian, and not for or under the control of the directors or shareholders of the corporation. His management is for the benefit of those ultimately entitled under decree of the court. His acts are not the acts of the corporation, and his servants are not the agents or servants of the corporation.

In defining the attitude of railroad receivers towards the property intrusted to their management, and of the relation borne by

such custodians to the debtor corporation and its creditors, Chief Justice Fuller, speaking for the court, said:

"Receivers are mere ministerial officers, appointed by a court of chancery to take possession of and preserve pendente lite the fund or property in litigation; mere custodians, coming within the rule stated in *Union Bank v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, where the court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to charge the title, or even the right of possession in the property.'" *Railroad Co. v. Humphreys*, 145 U. S. 82-97, 12 Sup. Ct. 787; *Fosdick v. Schall*, 99 U. S. 251; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268-278.

The receivers, as such, are liable for their negligent acts. Both to the public and to employes they stand responsible to the full extent of the earnings resulting from their management, and, under some circumstances, the property itself may constitute a fund which may be reached and subjected by those sustaining injuries. But we know of no legal principle which would justify a court in holding a corporation, which is excluded from all control and management, responsible for the torts of such receivers, or for the negligent acts of their servants. The relation of master and servant does not exist between the excluded corporation and the servants of the receivers. If the possession of the receivers be exclusive, as was the case under the decree appointing McGhee and Fink, the corporation can neither employ, discharge, nor control such servants; and it would be a gross injustice to say that, under such circumstances, it should be liable for the conduct of servants which it neither employed nor controlled.

In *High on Receivers* the rule is thus stated:

"Since the receivers of a railway who are vested with its absolute control and management are thus liable for injuries resulting from negligence in operating the road to the same extent that the company might have been liable, it would seem to be clear, upon principle and in the absence of any absolute liability created by statute, that the corporation itself cannot be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employes." *High, Rec. § 396.*

This is in accord with the doctrine as stated by other text writers of repute: *Rorer, R. R. p. 896; Jones, Ry. Secur. p. 285; Patt. Ry. Acc. Law, § 134; Wood, R. R. §§ 385-482.* The direct question has not often arisen for decision, but, when it has, the courts have almost uniformly announced the doctrine we have stated. *Metz v. Railroad Co.*, 58 N. Y. 66; *Turner v. Railroad Co.*, 74 Mo. 604; *State v. Wabash Ry. Co.*, 115 Ind. 466, 17 N. E. 909; *Godfrey v. Railroad Co.*, 116 Ind. 30, 18 N. E. 61; *Railroad Co. v. Stringfellow*, 44 Ark. 322; *Railway Co. v. Dorrough*, 72 Tex. 111, 10 S. W. 711; *Meara v. Holbrook*, 20 Ohio St. 145, 146; *Thurman v. Railroad Co.*, 56 Ga. 376; *Davis v. Duncan*, 19 Fed. 477. The principle upon which the doctrine rests is that applicable to the liability of the lessor

for the torts of the lessee company when the lease is authorized by law. *Arrowsmith v. Railroad Co.*, 57 Fed. 178; *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605. When the possession or control is in fact a joint one, the rule is otherwise, for the obvious reason that the servants are the joint servants of two masters, and each would be liable. But the cases making this distinction recognize the general rule to be as we have stated it. The nonliability of the corporation depends upon the control being really and exclusively in the receivers. *Railroad Co. v. Brown*, 17 Wall. 445-450; *Railroad v. Jones*, 155 U. S. 354, 15 Sup. Ct. 136; *Railway Co. v. Johnson*, 76 Tex. 421, 13 S. W. 463.

This brings us to the consideration of the errors assigned peculiarly affecting the judgment against McGhee and Fink as receivers. The declaration alleged that the plaintiff sustained the injury for which he sued on the 24th day of December, 1892. He instituted suit on the 10th of March, 1893, against the Memphis & Charleston Railroad Company alone. On the 29th of January, 1894, on motion of the plaintiff, the summons and declaration were amended so as to make McGhee and Fink defendants, as receivers. The principal defense presented by the pleas filed by the receivers was that of the Tennessee statute of limitations, prescribing that all actions for personal injuries shall be brought within one year after right of action accrued. With reference to this defense the court was requested to charge that:

"If the jury should find from the evidence that the plaintiff was injured on the 24th day of December, 1892, and that Charles M. McGhee and Henry Fink, as receivers of the Memphis & Charleston Railroad, were not joined or made parties defendant to this suit until the 29th of January, 1894, then the cause of action in favor of plaintiff, as against said McGhee and Fink, receivers, is barred by the one-year statute of limitations provided in Code of Tennessee by section 3469 (Mill. & V.), and your verdict as to the cause of action against them must be in favor of said receivers."

This was refused. The court, on the other hand, instructed the jury, in effect and substance, that, if the suit was begun against the Memphis & Charleston Railroad Company within the time prescribed by the statute, it would operate to stop the running of the statute in favor of the receivers. The erroneousness of this action of the court is manifest if we are correct in our conclusion that the corporation was not liable for the torts of the receivers. If the plaintiff had no cause of action against the Memphis & Charleston Railroad Company, it must follow that a suit against that company would not be a suit against the receivers, and could not operate to stop the running of the statutory limitation in favor of the receivers.

The appointment of receivers for the Memphis & Charleston Railroad Company was by decree of a court of record, and was an act of such notoriety as that all persons have constructive notice. The fact that the plaintiff was a foreigner, and unable to read or speak the English language, and that he had no actual notice that the road was operated by receivers, was immaterial. He was employed and paid by the receivers, and was injured through alleged negligence of other servants of the receivers. If he chose to make no inquiry as to who employed him and paid him, and there was in fact no



joint operation of the road by the corporation and the receivers, but an exclusive possession and operation of the road by receivers as custodians under decree of a court having jurisdiction, then it was immaterial whether the plaintiff knew or did not know how the road was operated, and equally immaterial whether his attorneys knew that the road was operated by receivers. There was no evidence tending to show any concealment of the facts. Public notices were posted about the premises giving notice of the receivership, and, if the plaintiff did not know it, it was his own fault, and cannot have the legal effect of suspending the statute of limitations affecting his suit, or estop the receivers from relying upon it.

Many other errors have been assigned, but, in the view we have taken of the case, we have not deemed it at all important to pass upon them. For the errors indicated, the judgment must be reversed, and a new trial awarded.

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FIDELITY & CASUALTY CO. OF NEW YORK v. ALPERT et al.

(Circuit Court of Appeals, Third Circuit. May 3, 1895.)

No. 16.

INSURANCE—REPRESENTATIONS—QUESTION FOR JURY.

Where the application for a policy of insurance is not made a part of the contract between the parties, and the policy contains no warranty of the truth of the statements in the application, both the materiality and the truth of the statements of the assured in applying for the policy are to be determined by the jury in an action on the policy; and a recovery cannot be defeated unless such statements, or some of them, are found to be both material and untrue.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action by F. Alpert and Lottie Alpert against the Fidelity & Casualty Company of New York on a policy of insurance. The plaintiffs recovered judgment in the circuit court. Defendant brings error. Affirmed.

W. P. Potter, for plaintiff in error.

Charles M. Thorp, for defendants in error.

Before DALLAS, Circuit Judge, and WALES and BUFFINGTON, District Judges.

WALES, District Judge. This was an action by F. Alpert and Lottie Alpert, his wife, in the right of the wife, against the Fidelity & Casualty Company of New York, on a policy of insurance against accidental personal injuries, issued to Thomas P. Lavery, and dated January 5, 1893, whereby the company agreed to pay a certain weekly indemnity sum during his disability resulting from any accident, and the sum of \$3,000 in case of his death, if caused by accident, and happening within 90 days thereafter. In the event of the death of the assured from accidental injury, the principal sum of \$3,000 was made

payable to his daughter, Lottie Laverty, who, at the date of the policy, and at the time of bringing the action, was the wife of F. Alpert. At the trial there was evidence to show that on January 31, 1893, the assured met with an accident, in falling on the pavement in front of his residence, in Pittsburgh, from the effects of which he died on February 11th of the same year. The defense chiefly relied on was the alleged false representation, made at the time the policy was applied for, as to the age of the assured. The testimony was that the assured had had no personal communication with the company, or with its local general agent; the policy having been procured for Mr. Laverty by his son-in-law, Mr. Alpert. The agent testified that the age limit with the company was 65 years, and that the company did not issue policies to persons who were over that age; that when Mr. Alpert came to him about insuring Mr. Laverty, and before the risk was taken, the subject of Mr. Laverty's age was discussed between them, and Mr. Alpert then told him that Mr. Laverty was 64 years old, or in his sixty-fifth year, and had not reached his sixty-fifth birthday. Further evidence was introduced to show that Mr. Laverty was, at the date of the policy, over 70 and nearly 74 years old; this evidence consisting of two affidavits which had been made by the assured, one in 1890, and the other in 1891,—the first in an application for a pension, and the second in an application for insurance in another company. There was a verdict for the plaintiffs for the full amount claimed, and the case is here on exceptions to the charge of the court, the assignments of error being these:

"(1) The court erred in the general charge in this: that after using the following language, 'What was Mr. Laverty's age when the policy of insurance sued on was obtained? Was he under 65, or was he over 70, years old? This is a question for you to determine from all the evidence,'—the court further stated: 'It is also a question for you to determine, under the evidence, whether the misrepresentation alleged to have been made to the insurance company as to Mr. Laverty's age was a material misrepresentation? Did it, or not, fairly act to induce the defendant company to issue the policy? If you find from the evidence that the alleged representation with respect to Mr. Laverty's age was in fact made, and was a material representation, and that it was not true, your verdict should be for the defendant. If you do not so find, then this particular defense would fail.' (2) The court erred in refusing to affirm, without qualification or modification, the defendant's fourth point, which was as follows: 'If the jury believe that the age of the assured, Thomas P. Laverty, was not truthfully stated to the defendant company at the time of the application for the policy, then the contract between the defendant and the assured was void, and the verdict should be for the defendant. Answer. This point is affirmed, if the jury find that the alleged statement as to age was material.'"

In the course of his charge to the jury, the learned judge had said:

"In a contract of insurance, good faith requires that the assured shall truthfully represent to the insurer every fact with respect to which he speaks, material to the risk, which lies exclusively within the knowledge of the assured, and constitutes an inducement to the insurer to enter into the contract."

Taken in connection with other portions of the charge, the jury were thus fully informed of the issues of fact on which they were to pass, and also of the duty incumbent on the assured in making his application for insurance. The record does not set out the application,

nor account for its absence, nor does it appear that it formed any part of the written contract between the parties. An insurance company, in taking risks on lives or on property, has the right to determine the conditions on which they will issue a policy, and to insist upon their literal fulfillment; and when these conditions are expressed in, and made a part of, the written contract, their materiality is settled. In such cases the intention of the parties is to be gathered from the terms of the contract. The statements of the assured are incorporated into the conditions on which the insurance is undertaken, and, being made the basis of contract, if untrue, will render the contract invalid. The assured warrants his statements to be true, and covenants that if they are untrue the policy shall be void, whether the statements were or were not material to the risk. The agreement of the parties is conclusive, and the question of materiality is no longer an open one. But, in the absence of a warranty of the character just described, the representations of the assured, when applying for insurance, may or may not be material to the risk, and this may be a subject on which minds will reasonably differ, and come to different conclusions. The materiality of a representation, then, becomes a matter of proof, to be found by the jury like any other fact, under all the circumstances of the particular case, and, in action on a policy, must be proved by the insurer, in order to prevent a recovery. This distinction between warranties contained in the contract, and parol representations made by the assured as inducement to the insurer to assume the risk, is a well-settled rule of law. The principle has been recognized by the highest authorities, and is nowhere more clearly defined than in the case of *Ander-son v. Fitzgerald*, 4 H. L. Cas. 484, which went up from the courts of exchequer and exchequer chamber in Ireland, was elaborately discussed, and carefully considered. The lord chancellor, in his opinion, said:

"There is a great distinction between that which amounts to what is called a warranty, and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, 'I warrant such and such things here stated,' and that is a part of the contract, then whether they are material or not is quite unimportant. The party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made bona fide, unless it is material, it does not signify whether it is false or not false. Indeed, whether made bona fide or not, if it is not material, the untruth is quite unimportant."

The question of law had been previously submitted to all the judges, and Mr. Baron Parke, in replying for them, and treating the proviso in the policy of insurance which was the cause of action, said:

"It prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not (which, in the case of a dispute, a jury would have to decide), leaving the company to determine entirely for itself what matters it deems material, and what not."

It has been held that, if there was nothing expressed in the terms of a policy which required a particular statement to be made, nevertheless, if the omitted fact was a material one, the keeping it back

would be fatal, and whether the omission was a material one was a question for the jury. *Huguenin v. Rayley*, 6 Taunt. 186. In *Insurance Co. v. Ruden*, 6 Cranch, 339, Chief Justice Marshall said:

"It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a subject for the consideration of a jury"; reaffirming the rule laid down in *Livingstone v. Insurance Co.*, Id. 274 (decided at the same term).

In *Insurance Co. v. Lawrence*, 10 Pet. 516, it was decided that the trial court had rightly rejected instructions to the jury which proceeded upon the ground that, if there was any misrepresentation of the interest of the assured, that alone, whether material or not to the risk, would avoid the policy, and that it was still more objectionable to ask the court to declare to the jury, as matter of law, that the nondisclosure of the true nature and extent of the title and interest of the assured in the premises was a concealment of circumstances materially affecting the risk, which canceled the policy, thus taking from the jury the proper examination of the fact whether it was material to the risk or not. In *Lindenau v. Desborough*, 8 Barn. & C. 586, it was said to be the duty of a party effecting an insurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance, and it is a question for the jury whether any particular fact was or was not material.

An examination of the authorities cited by counsel for the appellant will show that they are, for the most part, cases where the materiality of the statements of the assured was settled by the parties themselves, and constituted the conditions on which the contract was made, thus leaving only the truth or the untruth of the statements to be ascertained by a jury. In *Anderson v. Fitzgerald*, *supra*, which was relied on to sustain the exception, it was distinctly held that the untrue answers of the assured, *ipso facto*, avoided the policy, because the assured had warranted his answers to be true, and by so doing had excluded the question of their materiality. In a case of warranty, the question of materiality does not arise, but in the case of representation it always does; and in the latter case, if this materiality depends upon facts and circumstances, it is a question for the jury, as is also the materiality of a concealment. *May, Ins.* 193. On a review of the whole record, and a full consideration of the arguments of counsel, we are satisfied that there was no error in the charge of the circuit court, or in the refusal to grant the instructions prayed for, and its judgment is therefore affirmed.

## MISSOURI PAC. RY. CO. v. SIDELL.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

No. 120.

## 1. CORPORATIONS—CONTRACTS OF OFFICERS—RATIFICATION.

A contract, made with the president of a railway company, who has general charge of its entire system, and whose acts the company is accustomed to ratify in all cases, binds the corporation. Following Railroad Co. v. Sidell, 66 Fed. 27.

## 2. SAME—CONTRACTS—ULTRA VIRES—KANSAS STATUTE.

The statutes of Kansas, as amended in 1887 (Act March 4, 1887, c. 186), provide that: "Any railroad company \* \* \* may aid any railroad company of this state in the construction of its road and branches by purchase of its stock and bonds \* \* \* or otherwise. Such purchase \* \* \* may be made \* \* \* or aid furnished upon such terms and conditions as shall be agreed upon by the directors, \* \* \* but the same shall be approved or ratified by the persons holding or representing two-thirds in amount of the capital stock of each of such companies, at a \* \* \* meeting \* \* \* or by the approval in writing of two-thirds: \* \* \* Provided that no purchase, lease or guaranty \* \* \* shall be entered into, unless the line of railroad \* \* \* shall, when constructed, form a continuous line with the road of the company purchasing \* \* \* either by direct connection therewith or through an intermediate line or lines \* \* \* which such company shall have the right \* \* \* to use or operate \* \* \* or a majority of whose stock it has purchased." *Held*, that a contract made by the M. Ry. Co., while this statute was in force, to pay for the construction of an extension of the road of the I. Ry. Co., a Kansas corporation, owning a line of railroad which was connected with the line of the M. Ry. Co. by two intermediate roads, one of which was leased by the M. Ry. Co., and all the stock of the other of which was owned by that company, was not ultra vires.

## 3. SAME—RATIFICATION.

It appeared that such a contract had been made by the M. Ry. Co., and fully executed by the contractor, the M. Ry. Co. receiving the benefit thereof. There was no formal approval of the contract by the stockholders of the M. Ry. Co. at a meeting or in writing, but the work was all done under the supervision of the engineers of the M. Ry. Co., its progress was reported in the annual reports of that company, the greater part of the cost was paid by that company, and the fact stated in the annual reports, and all the bonds and stock issued by the I. Ry. Co. on account of the extension were turned over to the M. Ry. Co. *Held*, that the M. Ry. Co. could not escape liability on the contract because of its failure to comply with the requirements as to approval by the stockholders.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Cornelius V. Sidell against the Missouri Pacific Railway Company and the Interstate Railroad Company to recover a balance due upon a contract. Judgment was entered in the circuit court for the plaintiff, pursuant to a verdict directed by the court. Defendant the Missouri Pacific Railway Company brings error.

Rush Taggart, for plaintiff in error.

Albert Stickney, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This action was brought by Cornelius V. Sidell, as assignee of Simmons & Sidell and of the Occidental Construction Company, to recover a balance due under a contract with the Missouri Pacific Railway Company for work done and materials furnished in building an extension of the Interstate Railroad from the westerly line of Coffey county, in the state of Kansas, to the town of Madison, in Greenwood county, in said state, a distance of 10.87 miles, at an agreed price. The complaint also includes a claim for extra work, and the answer of the Missouri Pacific Railway Company, while denying the making of such contract, or any liability thereunder, sets up a counterclaim. There is no question raised as to the amount of the judgment if plaintiff be entitled to recover at all. The contract was made with Jay Gould, the president of the Missouri Pacific, and it was insisted upon the trial that the proof failed to show a contract with the defendant railway company. That point was reserved by exceptions and assignment of errors, but before this case came on for argument the opinion of this court in *Railroad Co. v. Sidell*, 66 Fed. 27, was filed. The evidence in that case touching authority of the president and ratification of his acts was substantially the same as in the case at bar, and counsel for plaintiff in error has therefore not argued this assignment of error. It need not be further discussed.

There is, therefore, but a single question left in the case. The contract was entered into July 13, 1887. By its terms the contractors were to build the 10 miles as an extension of the Interstate Railroad owned by the Interstate Railroad Company, a Kansas corporation, whose stock was held by the Missouri Pacific, which agreed, through its president, to pay the contractors for building such extension. The defendant insists that "such a contract was wholly ultra vires as to the Missouri Pacific Railway; that under the laws of the state of Kansas, under which the Missouri Pacific Railway Company was incorporated, and within which state the extension was built, it did not have the power to enter into a contract for the construction of a road belonging to the Interstate Railroad Company, and that such contract, under the authorities, was null and void." The trial judge took this view of the case, and the verdict was rendered on the theory that a corporation which receives the benefit of a full performance of a contract not contrary to its charter or the statute cannot deny that it was within its power to make such contract to the prejudice of the party who has performed the contract. We are satisfied, however, that under the extremely broad language of the statute of Kansas such a contract was not ultra vires. Authority was given to railroads to make contracts for the purchase or lease of other roads by chapter 92, § 2, Laws 1870. Such grant of power being evidently not broad enough, the legislature of Kansas, in 1886, amended the section so as to read as set forth below. And the very next year it still fur-

ther enlarged the powers of railroad companies to aid other railroads, as will be seen in the quotation from chapter 186 of the Laws of 1887, passed March 4th of that year, and also set forth below in parallel column.

Act of 1870, as Amended by Act of February 18, 1886 (chapter 184).

Sec. 2. Any railroad company of this state may sell or lease its road &c. &c., and any railroad company in this state existing under general or special laws, may buy or lease the road, with all the rights, privileges and franchises thereto pertaining or buy the stock and bonds of guarantee the bonds of any railroad company incorporated and organized within or without this state whenever the roads of such companies shall form in the operation thereof a continuous line or lines &c., &c.

Act of 1870, as further Amended by Act of March 4, 1887 (chapter 186).

Sec. 2. Any railroad company of this state may sell or lease the whole or any part of its railroad branches &c. &c., \* \* \*; and any railroad company organized under the laws of this state, or any state or territory of the United States may aid any railroad company of this state in the construction of its road and branches by purchase of its stock and bonds, or any portion thereof, or by guaranteeing its bonds, or the interest thereon, or otherwise. Such purchase, sale or lease may be made or guaranty entered into, or aid furnished, upon such terms and conditions as shall be agreed upon by the directors of the respective companies; but the same shall be approved or ratified by persons holding or representing two-thirds in amount of the capital stock of each of such companies respectively, at an annual stockholders' meeting, or at a special meeting of the stockholders called for that purpose, or by the approval in writing of two-thirds in interest of the stockholders of each company respectively. Provided, however, that no purchase, lease or guaranty under this act shall be entered into unless the line of railroad so purchased or leased, or whose stock or bonds are purchased, or the bonds of which are guaranteed, shall when constructed form a continuous line with the road of the company purchasing, leasing or guaranteeing, either by direct connection therewith, or through an intermediate line or lines constructed or to be constructed, which such company shall have the right by contract or otherwise when completed to use or operate or the principal or interest of whose bonds it has guaranteed, or a majority of whose stocks it has purchased, [here follow other provisos which are immaterial.]

These amendments are most suggestive. If it were desired to secure legislative authority for the making of such a contract as the one at bar, it is difficult to see how the proposer of the amendment could have better expressed himself than by adding to the enumeration of powers already conferred, to buy, to lease, to buy the stock, to buy the bonds, and to guaranty the bonds, the further power to "otherwise aid." The words are broad enough to cover a loan of money made directly to the aided company, or an agreement to pay for the extensions or betterments added to its road. Nor is such construction obnoxious to any objection that such a grant of power is not appropriate to the original purposes for which the aiding road was chartered. The qualification limiting the power to otherwise aid (and it may fairly be construed as limiting that power as well as the power to guaranty) to cases where the aided road connects

with the other, and may thus be available as a feeder to increase the business of the latter over its own lines, does away with any such objection. No Kansas authority construing this statute has been called to the attention of this court; the one cited on the argument (*Railroad Co. v. Davis*, 34 Kan. 199, 8 Pac. 146) having been decided before the amendment. The evidence shows a continuous line within the terms of the qualification. From Sedalia, a station on a line owned by the Missouri Pacific, to Monteith Junction, there runs the Missouri, Kansas & Texas Railway, which, when this contract was made, was operated under a lease to the Missouri Pacific. From Monteith Junction to the eastern extremity of the Interstate Railroad there runs the St. Louis & Emporia Railroad, which in 1887 was operated by the Missouri Pacific; not under a lease, but apparently because of ownership of its stock. It is included in the annual report of the Missouri Pacific as part of the new lines constructed in 1886, and the vice president of the latter road testified that lines thus stated to be part of the Missouri Pacific system were either under lease, or their stock owned by the company, or were built under a contract which would turn the road over when complete to the hands of the Missouri Pacific, although it was built for some other company. The evidence seems sufficient to sustain a finding that the St. Louis & Emporia was, within the language of the statute, "an intermediate line," which the company giving the "aid" (the Missouri Pacific) had "the right by contract or otherwise, when completed, to use or operate." But if it be conceded that the proof is not sufficiently positive to bring it within that category, and there was some conflict of evidence as to how it was operated, there can be no doubt upon the proof that it was an intermediate line, a majority of whose stock was owned by the Missouri Pacific. The treasurer testifies that the Missouri Pacific owned stock of the St. Louis & Emporia. How many shares, he does not state; but he does testify that the latter road was merged with the Interstate Railroad Company into a new corporation, the Interstate Railway Company, the result being that all the shares of the Interstate Railway Company—fourteen thousand and odd—passed to the Missouri Pacific, manifestly in exchange for its holdings in the old companies. As to the shares of the Interstate Railroad Company, which received the "aid," he testified at first that he did not remember how many of them belonged to the Missouri Pacific (they stood in his name as trustee for that company), but afterwards admitted on cross-examination that the Missouri Pacific held them all. In the absence of any decision in the state courts of Kansas construing the act of 1887 otherwise than in accordance with its plainly expressed terms, it must be held to authorize a railroad company, situated as was the Missouri Pacific, to aid a Kansas railroad company by paying in the first instance for its extension, and taking bonds and stock in repayment of its advances, when the road thus aided connects with the road which gives the aid, either directly or through intermediate line or lines, as set forth in the statute. And if the Missouri Pacific had such authority, the contract it entered into with the plaintiff's assignor was not ultra vires.



It only remains to determine whether the plaintiff is to be barred from recovery because it is not shown affirmatively that his contract with the Missouri Pacific to build an extension of the Interstate Railroad was ratified by "persons holding or representing two-thirds in amount of the capital stock of each of such companies, respectively, at an annual stockholders' meeting, or at a special meeting of the stockholders called for that purpose," or was "approved in writing by two-thirds in interest of the stockholders of each company respectively." All the work called for by the contract was performed under the direction of the engineer of the Missouri Pacific, who certified from time to time to the proper performance of the work. Upon such certificates the Missouri Pacific paid all of the stipulated price of over \$90,000 except about \$15,000, and the items of extra work. The annual reports of that road to the stockholders for 1887 and 1888 refer to this extension as one of the items of new construction of branch lines, describing such branch lines as forming "important connections with the main arteries, which, with favorable conditions, should thereafter yield satisfactory revenues from local business and increased traffic for the main lines." The annual report of 1888 states that the cost of such new construction was paid by the Missouri Pacific. The annual report of 1893 states that it is still the owner of the Interstate Railway from Monteith Junction to Madison, including this extension. From the time of completion of the extension it has been operated as a part of the Missouri Pacific system. The treasurer testified on cross-examination that all the bonds and stocks issued by the Interstate Railroad Company against this 10-mile extension were turned over to the Missouri Pacific Company; that no one except that company ever had any control over the construction or alteration of the extension, or had control of its operations, or ever got a cent of income out of it, although it operated such extension through the officers of the Interstate Railroad Company and its successors; that "from the very beginning, through these successive corporations, the Missouri Pacific owned all the stock and bonds, and has been entitled to all the income." The Missouri Pacific has received the full benefit of the contract, for the completion of that contract has extended the road of a Kansas railroad company, which road, being completed, formed a continuous line in connection with its own, available for its uses through the control which its ownership of stock assured to it. Whether or not it held the legal title to the completed structure is immaterial. The plaintiff had turned over his materials and the results of his labor to the road which the Missouri Pacific was authorized to aid, and, having promised to pay when they were thus turned over, the obligation to pay arises.

This brings the case within the principle of law approved by the supreme court in *Hitchcock v. Galveston*, 96 U. S. 351, that—

"Although there may be a defect of power in a corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and

perform his part thereof, the corporation is liable on the contract. \* \* \* Having received the benefit at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

See, also, *Arms Co. v. Barlow*, 63 N. Y. 70; *Railway Co. v. McCarthy*, 96 U. S. 267. And, as to inference of ratification, when the corporation has received the benefit of a contract made by its agents for a purpose authorized by its charter, *Bank v. Patterson's Adm'rs*, 7 Cranch, 299; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770.

There is no force in the suggestion that the remedy of plaintiff is not upon the contract, but, if at all, upon a quantum meruit; nor do the cases cited in support of that proposition apply here. *Davis v. Railroad Co.*, 131 Mass. 275; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 389, 9 Sup. Ct. 770; *Louisiana v. Wood*, 102 U. S. 294; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 316, 6 Sup. Ct. 1094. In all of them there was a total want of power, not a mere failure to comply with prescribed requirements or conditions; and, as was said in *Davis v. Railroad Co.*, supra:

"There is a clear distinction \* \* \* between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a particular instance, when such abuse or failure is not known to the other contracting party."

In the case at bar, power to make contracts in aid of other roads had been conferred by statute upon the defendant; but in making the contract sued upon, which was within the range of its authority, it failed to comply with a requirement as to ratification, which it should not have neglected, but which it chose to disregard. *Zabriskie v. Railroad Co.*, 23 How. 398. The judgment of the circuit court is affirmed.

# BLYDENSTEIN et al. v. NEW YORK SECURITY & TRUST CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

No. 95.

## FACTORS—PLEDGE—NEW YORK STATUTE.

L. & Co., merchants at Dundee, entered into an agreement with B. & Co., bankers at London, by which, in consideration of the acceptance by B. & Co. of drafts drawn against shipments to L. & Co.'s New York house, they agreed to deliver to B. & Co. the bills of lading of such shipments, which should then be regarded as consigned by B. & Co. to L. & Co.'s New York house, the proceeds to be specially accounted for, as soon as the goods were sold. Goods were shipped, and drafts drawn and accepted, pursuant to this agreement, for a considerable time, but no special remittances of proceeds were made, B. & Co. not requiring the same so long as they were kept in funds to meet the drafts. When shipments were made, the bills of lading and other documents were sent by L. & Co. to B. & Co. in London, and by them, in turn, delivered to L. & Co.'s New York house, enabling them to take the goods from the custom-house and deal with them as their own, and taking, in return, a so-called

"trust receipt," by which L. & Co. acknowledged receipt of the goods, on consignment from B. & Co., and agreed to remit the proceeds specially. The goods, when received by L. & Co. at New York, were placed in a bonded warehouse, and receipts taken for them, and were afterwards delivered, from time to time, on orders of L. & Co., to persons to whom they were sold, L. & Co.'s dealings being large, and shipments being received every two or three days, and deliveries made from day to day. About the time of their agreement with B. & Co., L. & Co. established with the bonded warehouse a course of dealing by which the warehouse issued negotiable "open receipts" to L. & Co. for certain specified quantities of burlaps, without specifying any particular bales, and held, against such open receipts, those bales which had been longest in store, delivering on L. & Co.'s orders the oldest bales, and substituting later bales under the open receipts, holding always a sufficient quantity to cover the outstanding open receipts, under which the holders could at any time call for the quantities specified in the receipts, from the warehouse. In September, 1892, the N. Trust Co. made a loan to L. & Co. solely upon the security of certain of the open receipts of the warehouse for bales of burlaps. About the same time, B. & Co. accepted drafts against a shipment of burlaps, and forwarded the bills of lading, etc., according to their custom, to L. & Co. at New York, who placed the goods in the warehouse, the owners of which had no notice of any interest of any other persons than L. & Co. in such goods. In December, 1892, L. & Co. failed, and, at that time, by the process of transfer in the warehouse, the bales of burlaps consigned by B. & Co. to L. & Co. at New York in September were held under the open receipts in the hands of the N. Trust Co., as security, and, upon the request of the N. Trust Co. for a new receipt in its own name, were held under such receipt. *Held*, that the pledge of the open receipts to the N. Trust Co., as security, gave that company a valid lien upon the bales then in store; that the release of older bales constituted a valuable consideration for subjecting the new bales, as deposited, to the same lien; and that, under the New York factors' act (Laws 1830, c. 179), providing that every factor or agent, intrusted with the possession of a bill of lading or other document, or of merchandise, for sale or as security, shall be deemed the owner so as to give validity to a sale or of advance upon the same, the N. Trust Co. acquired a lien upon the bales consigned by B. & Co. to L. & Co. at New York, superior to the rights of B. & Co.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by Benjamin W. Blydenstein and others against the New York Security & Trust Company to recover the proceeds of certain merchandise, to which both parties claimed title. A demurrer to one of the defenses interposed by the defendant was sustained. 59 Fed. 12. Upon the trial of the remaining defenses a verdict was directed by the court, and judgment entered accordingly. Plaintiffs bring error.

This is a writ of error to review a judgment of the United States circuit court in favor of the New York Security & Trust Company, the defendant below, upon a verdict rendered upon the issues by direction of the court. The assignment of errors is confined to the rulings of the court upon the direction of the verdict. The following excerpt from the brief of defendant in error concisely states the manner in which the legal questions arising upon the evidence were presented to the court below: "The New York Security & Trust Company had sold certain 38 bales of burlaps under a stipulation with Blydenstein & Co., the plaintiffs, that the proceeds should stand in place of the bales, subject to the same claim as the respective parties had to the bales themselves, and had realized from the sale in January, 1893, net, \$4,347.98. This sum of money Blydenstein & Co. demanded of the trust company, and the trust company refused to pay. Both Blydenstein & Co. and the trust

company claimed title to the bales and their proceeds from and through certain manufacturers and importers doing business under the name of Lipman & Co., understanding, respectively, that they had received such title, and intending to receive such title, as security for loans made by them, respectively, to Lipman & Co. The legal questions are: (1) Had Blydenstein & Co. at the time when the bales were sold any title at law (or even in equity) to the same? (2) If so, was that title superior to the title of the New York Security & Trust Company?"

Antonio Knauth, for plaintiffs in error.

Wm. B. Hornblower, for defendant in error.

Before BROWN, Circuit Justice, and WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The facts in the case are complicated, and a complete presentation of them is necessary to a proper understanding of the legal points involved. The plaintiffs are bankers doing business in London, England. Lipman & Co. were manufacturers and importers of merchandise doing business in Dundee, Scotland, and having a branch office in New York under the control of one Gutman as their general agent. Wishing to obtain advances upon shipments to this country, Lipman & Co., on October 14, 1891, applied in writing to Blydenstein & Co., proffering a general stipulation or agreement as to the future conduct of any such business to be carried on between them, which proposed agreement proved acceptable to the plaintiffs. It reads as follows:

"Dundee, Oct. 14, 1891.

"To Mess. B. W. Blydenstein & Co.—Dear Sirs: In consideration of such advances as you may from time to time make to us, by your acceptance of drafts drawn by us on you against goods shipped by us to Lipman & Co., New York, for sale by our house there, we beg to state the understanding and agreement between us in regard to all such transactions, which is as follows: The complete set of the bills of lading of the goods as shipped are to be delivered by us to you, the goods being by such bills of lading made deliverable to you or to your order, and until full repayment of your advance such bills to be treated and considered as your property, and as simply consigned by you to our New York house for sale on your account, and the net proceeds of such sale as and when received are to be specially remitted by them to you direct in the first-class bills on London. As such you will kindly, from time to time, transmit the bills of lading as received by you from us to our house at New York, with the needed instructions to deal with the goods. We undertake that remittances from New York to meet the amount of your acceptances shall be in your hands not later than two days prior to the maturity thereof, and failing such remittances, or to the extent to which the same shall be insufficient to cover your advance, with interest, commission, and charges, we engage to pay you the amount in cash in London prior to the maturity of the bills, or any renewal thereof; the intention being that you are at all times to be kept by us out of cash advance, which we hereby undertake to do accordingly.

"Yours, truly,

Lipman & Co."

Subsequently, and down to the time of the failure of Lipman & Co., in December, 1892, plaintiffs accepted drafts against shipments of merchandise by Lipman & Co. The 38 bales in controversy consist of two lots, 22 of them having come over in September, and 16 of them in December, 1892. A statement of the transactions as to a single lot will be sufficient, since in each case, *mutatis mutandis*,

the course of events was the same. On September 5, 1892, Lipman & Co. mailed to the plaintiffs in London a copy of an invoice of 50 bales of burlaps (including said 22 bales) shipped per steamer Aberdeen to London, and thence per steamship of the A. T. Line to New York, for £1,094. 4s. 3d., and another for 40 bbls. of glue, shipped by Britannia, for £174. 3s. 8d., together with two bills of lading for each shipment, indorsed in blank by Lipman & Co. They drew against the same upon plaintiffs for £1,268. 7s. 11d., which draft was accepted, discounted in the open market, and at maturity paid by Blydenstein & Co. Except for the small shipment by Britannia, the amount thus paid on this acceptance has not been received by plaintiffs from Lipman & Co. At or about the same time Lipman & Co. sent the third bill of lading indorsed in blank, with the two consular invoices, containing the affidavit of one of the partners of Lipman & Co. to the effect that he was one of the owners of the merchandise, to the general correspondents of Blydenstein & Co. in New York, the banking firm of Knauth, Nachod & Kuhne. On September 7, 1892, plaintiffs forwarded to this last-named firm the invoice and the two bills of lading received from Lipman & Co., and also a letter from Blydenstein & Co. to Lipman & Co., and an unsigned letter of reply thereto (called a "trust receipt"), with a request that Knauth, Nachod & Kuhne would hand plaintiffs such trust receipt and the proceeds in due course. The letter to Lipman & Co. is as follows:

"London, Sept. 5, 1892.

"Messrs. Lipman & Co., New York—Dear Sirs: Inclosed we beg to hand you bills of lading of 50 bales jute goods and 40 barrels glue shipped to New York per Aberdeen and Britannia to your consignment. These documents have been received by us from your Dundee house, to whom we have made an advance against the same, the shipping documents and goods represented thereby being our security for the repayment of our advance. As such you must please treat them as our property, and as simply consigned by us to you for sale on our account, and the full net proceeds thereof, as and when received, are to be specially remitted by you to us direct in first-class bills on London, and meanwhile you must keep any such proceeds separate and distinct from all your other funds, and as simply in your hands held for us, and as our special property. To carry out and give effect to this arrangement, please sign the inclosed letter of acknowledgment, and return the same to us, duly dated, by the first mail.

"Yours, truly,

Blydenstein & Co."

On September 15, 1892, Knauth, Nachod & Kuhne turned over to Gutman, as general agent for Lipman & Co., all the bills of lading, consular certificates, and invoices, together with the letter last above set forth. Thus the goods, which had gone out of the possession of Lipman & Co. when they transferred the bills of lading to the plaintiffs and plaintiffs' correspondent, came again into the possession and control of that firm, since they now held all the shipping and customhouse documents necessary to obtain manual delivery. Upon receipt of these documents Lipman & Co. dated and signed the following letter, or so-called "trust receipt":

"New York, Sept. 15th, 1892.

"Dear Sirs: We beg to acknowledge the receipt of your letter, copy of which is annexed, covering bills of lading of 50 bales jute and 40 barrels

glue per Aberdeen and Britannia, consigned to us by you for sale on your account, and which, as also the said goods on their arrival, and the proceeds thereof when sold, we hereby engage specially to hold in trust for you accordingly in terms of your said letter, and as and when the goods are sold to remit to you direct, in first-class bills on London, the full net proceeds thereof, or to pay the same to your correspondents, Knauth, Nachod & Kuhne, of this city.

"Yours, truly,

pp. Lipman & Co.,  
"Ludwig Gutman.

"Messrs. Blydenstein & Co., London."

This trust receipt was at once sent to plaintiffs by Knauth, Nachod & Kuhne. The course of proceedings above described was pursued with all the shipments of Lipman & Co. against which plaintiffs accepted drafts from October, 1891, down to the latter part of 1892. It is a suggestive fact that never from the beginning to the end of the transactions were any "full net proceeds" of any sale of goods so shipped "specially remitted," either as soon as received from the sale or at any other time. Nor was any account of sales ever rendered to Blydenstein & Co. nor ever requested by them. So long as Lipman & Co. paid the drafts, neither plaintiffs nor their correspondents concerned themselves whether the proceeds of sales of any shipments exactly corresponded to the amount of the remittances, nor whether there was a profit or a loss on any sale.

Being thus possessed of all the necessary documents, Lipman & Co., on September 29, 1892, entered the 50 bales of burlaps (with 61 others) at the customhouse, and on the same day a permit was issued by the customs authorities directing that the merchandise be sent to the bonded warehouse, Rossiter's Stores. These stores belong to the Terminal Warehouse Company, and, before noting the deposit of the 50 bales therein, it is desirable to review the course of business between Lipman & Co. and the warehouse company. The oral testimony on this branch of the case is somewhat involved, but from it and the various exhibits the course of business appears to be as follows:

Lipman & Co. began to deposit merchandise with the Terminal Warehouse Company a year or more before the failure. Whenever any bales of burlaps were delivered to the warehouse, a nonnegotiable receipt was given for them. This document was dated and numbered, and stated that there were "received from Lipman & Co. on storage in Rossiter Stores, and subject to their order," so many bales said to contain burlaps. It sets forth in most instances the marks and numbers of the bales, and the vessel from which they came, and contained the words "Not negotiable." This receipt was practically a memorandum that the goods are in store. It was not returnable or necessary to be returned, but the goods named therein were to be disposed of (storage charges and duties being paid) agreeably to whatever directions might thereafter be given by Lipman & Co. They entered the receipt of such goods in their books, and apparently kept the nonnegotiable receipts in their possession, such receipts being valuable in the event of any dispute with the warehouse company as to whether

any particular goods had or had not been received, but not in any other way made use of in conducting the business. Lipman & Co. were in the habit of putting in and taking out goods daily. They had two or three or more shipments every week, so that there was a continual going and coming of goods. There were days when Lipman & Co. had 3,000 and 4,000 bales in the warehouse, and may be more, and on other days less. They always kept a large number of goods on balance from which they could draw. They sold goods from day to day, and sent to the warehouse from time to time for such goods as they had sold or contracted to sell, and these withdrawal orders were of course obeyed without production of the nonnegotiable receipt. The stores were in a United States bonded warehouse, and no goods could be removed without a customhouse permit. That permit gave marks and numbers, so that when an order to deliver sold goods was received the permit identified the goods. Besides the orders to deliver to purchasers goods which had been received, and for which nonnegotiable receipts had been given, Lipman & Co. gave in some cases, as will now be shown, other orders as to their disposition. Apparently, in 1891, certainly in December of that year, that firm commenced the practice of so-called "open" or "negotiable" receipts, and Gutman arranged on their behalf with the officials of the warehouse company as to the form of such receipts. The value of a bale of burlaps depends upon its weight, and the prices by the bales are about the same, because a bale containing shorter yardage contains heavier weight goods, and the lighter the cloth was by the yard the larger the yardage in the bale, so that the weight of the bale would be about the same. Apparently all the burlaps warehoused by Lipman & Co. were of their own manufacture, and substantially uniform. There was testimony to show that there is a custom in the case of certain staple commodities to issue what are known as "open warehouse receipts," covering a named quantity, but not giving marks and numbers, the quantity remaining constant, but its constituent units subject to change by substitution. Such receipts are given for wool sometimes that comes in bulk, and generally when they are asked for. Lipman & Co., wishing to avail themselves of this custom, asked on December 1, 1891, for open or negotiable receipts, covering 500 bales, requesting that such receipts should not specify the various marks, so that Lipman & Co. could take out bales and put in new bales without always making out new receipts. At that time they had 801 bales in store, and the warehouse company issued five negotiable receipts for 100 bales each. Each of these receipts, below the heading, receipt number, and date, contained these words:

Received in Rossiter Stores, No. 4 U. S. bonded, on storage for account of Lipman & Co.

Marks:  
various (100).

Contents unknown. Said to contain  
100 bales burlaps.

Negotiable.

Deliverable only upon return of this receipt and the payment of charges accrued thereon.

**It was signed by an officer and the manager of the company. On the back was printed:**

The property mentioned below is hereby released from this receipt for delivery from warehouse.

Date.	Quantity.	Merchandise.	Signature.
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The agreement expressed in this document is plain. The warehouse company undertook to deliver 100 bales of the burlaps stored with it by Lipman & Co., either to Lipman & Co. or to their assignee, but only upon the return of the receipt. It undertook to so manage its warehousing that it should always, while the receipt was outstanding and the amount called for by such receipt was not reduced in quantity by a properly executed release indorsed thereon, have on hand and ready for delivery the quantity of such bales called for by the receipt, but it did not undertake so to deliver bales with any particular marks. As above stated, on December 1, 1891, five of these open receipts were issued, and from time to time, during the year 1892, other open receipts for upwards of 1,100 bales were also issued. Although the bales covered by these five open receipts were not specified therein by marks, there were in the warehouse when they were issued bales sufficient to meet them and 301 additional bales. On the same day, however, December 1, 1891, other negotiable receipts were issued; how many of them does not appear, but they covered an aggregate of 301 bales, of which 15 were described on the receipt by marks, the others being not so described. Lipman & Co. thereafter continued to deposit goods in warehouse and to sell burlaps, and to call for deliveries to their purchasers, and to produce customhouse permits. These permits, as was said before, identified bales by marks and numbers, and in the course of time they thus called for all the 801 bales which were in warehouse when the open receipts of December 1, 1891, were issued. By that time, however, new goods which were not in store on December 1, 1891, and for which only nonnegotiable receipts "subject to their order" had been issued to Lipman & Co., had been warehoused. Acting, then, in accordance with the arrangement made with that firm, whereby, as Gutman testifies, "they could take out bales and put in new bales without always making out new receipts," only seeing to it, when they took out goods, "the limit did not go below the amount for which the warehouse company had issued open receipts," the company filled Lipman & Co.'s orders for the delivery of the old goods, and at the same time substituted, in their place as bales to be held to make up the amount of outstanding open receipts, a sufficient number of such new bales as were still subject to Lipman & Co.'s order under the nonnegotiable receipts. The oldest bales were always held for delivery on the open receipts, and when those were delivered the next oldest bales were substituted. Gutman testifies in one part of his examination that he did not give any instructions to the warehouse company as to whether any of these goods which he subsequently sent there should be substituted for others. This statement does not harmonize with the rest of his testimony, unless it means that he did not give specific instructions in each specific case of sub-



stitution. Specific instructions in each case, however, were unnecessary. On behalf of Lipman & Co., he had asked for open receipts, which should not contain any marks, for the express purpose, as he testifies, of enabling Lipman & Co. "to take out bales, and put in new bales, without always making out new receipts." When, after making such an arrangement with the warehouse company, Lipman & Co. called for deliveries of all or a part of the bales which were on hand when the open receipts were issued, without returning such open receipts, such call was a plain notification that they were availing themselves of their privilege of substituting new bales for old, and as to such new bales as the warehouse held "subject to their order" was in itself an order to substitute a sufficient number of them, in place of the called bales, to meet the outstanding open receipts. As time went on, and these substituted bales became old stock, and were themselves withdrawn, other new goods were substituted in their place, and at no time did the number of bales of Lipman & Co.'s burlaps fall below the amount called for by outstanding negotiable or open receipts. During all these transactions all evidences of title to the goods were in the possession of Lipman & Co., and the warehouse company had no notice that the goods stored with it were claimed to be the property of any one other than that firm.

On September 7, 1892, the defendant herein, the New York Security & Trust Company, loaned to Lipman & Co. the sum of \$50,000, on their note for four months, accompanied with a pledge, in the usual form of a collateral note, of the five receipts of the Terminal Warehouse Company dated December 1, 1891, each for 100 bales burlaps. At the time of the loan and pledge they delivered to the trust company the five receipts, and before the loan was made the trust company sent one of its clerks with Gutman to the warehouse, where there were pointed out to him bales of burlaps of Lipman & Co. aggregating more than 500. Thereupon, not being advised that any one else had any claim to the goods, finding the warehouse keeper's receipt to be in the name of Lipman & Co., and having the additional assurance from the clerk's inspection that the bales of burlaps were actually in the warehouse, the president of the trust company made the loan, paying no attention to the financial standing of Lipman & Co., but induced to make it by the borrowers' pledging collateral for it, and relying upon the warehouse receipts as evidence of Lipman & Co.'s ownership of such collateral.

Returning, now, to the 22 bales (part of the lot of 50 bales) for which the customhouse permit to land and warehouse was issued on September 29, 1892, we find that on October 6, 1892, the warehouse company delivered to Lipman & Co. 22 old bales of burlaps, which it had on storage, and received in exchange from that firm the 22 new bales, permitted September 29, 1892. For these a non-negotiable receipt was given. It does not appear whether the withdrawal of the old 22 bales reduced the total quantity that was in warehouse prior to October 6th below the aggregate amount of all outstanding open receipts, so that the substitution of these specific 22 new bales for old was made on that day; but it is certain that

eventually the withdrawals made it necessary for the warehouse company to substitute these 22 bales for bales withdrawn, so that the amount called for by open receipts should not be reduced by such withdrawal, and it did so. Whenever it did in fact make this substitution, however, the warehouse company gave up and delivered to Lipman & Co. or on their order an equal number of bales, which, under the arrangement between them as already explained, had theretofore been substituted for still earlier bales upon the open receipts; and, as it appears affirmatively from the evidence that the amount of bales in store never fell below the amount named in outstanding open certificates, such substitution and withdrawal, whenever it did occur, was a single transaction.

It will not be necessary separately to rehearse the transactions as to the lot of 16 bales. They are substantially the same, the bales being received at the warehouse on December 8, 1892, in exchange for 16 old bales, at the same time redelivered by the warehouse to Lipman & Co. On October 31, 1892, Lipman & Co. paid to defendant on account of the loan \$10,000, and received back from defendant one of the open receipts, which was thereupon turned in to the warehouse company, and canceled November 1, 1892, 100 bales being thus left open to Lipman & Co.'s order; and on November 4, 1892, the further sum of \$20,000 was paid, and two more open receipts were returned and canceled, 200 more bales being thus set free. On October 31, 1892, for what reason the testimony does not disclose, Lipman & Co. executed on the back of the two remaining open receipts an assignment thereof in blank. On or about December 14, 1892, the firm failed. Thereupon, and on December 15th, the trust company presented to the warehouse company the two remaining negotiable receipts of December 1, 1891, thus indorsed in blank by Lipman & Co., and gave them up, receiving in exchange a single similar receipt for 200 bales, "marks various, on storage for account of New York Security & Trust Company." On December 15th there were 204 bales of Lipman & Co.'s burlaps in the warehouse, of which 4 bales, "diamond L, Nos. 2,447, 2,448, 6,364, and 6,365," were claimed by Haynes, Lord & Co., having been sold to them on August 15, 1892, and no negotiable or open receipts covering any of Lipman & Co.'s burlaps were outstanding except the two presented on that day by the trust company. The note of Lipman & Co. was not paid at maturity, and the trust company sold the 200 bales, and applied the proceeds towards its liquidation. The 38 bales declared on in the complaint were included among these 200 bales.

Upon this state of facts the trial judge held that the original transaction in London was that of pledgor and pledgee, accompanied by symbolic delivery of the pledged property to the pledgees, the goods being then upon the ocean; but that assuming that by virtue of the London agreement the legal title to the property became vested in the plaintiffs, and the firm of Lipman & Co. subsequently became their factors, a valid lien was obtained by the trust company, under the New York factors' act, upon the 200 bales in the warehouse on December 15, 1892, including the 38 bales which are the subject of this suit. Verdict was directed for the defendants. The New York

factors' act is chapter 179 of the Laws of 1830, and its third section provides as follows:

"Sec. 3. Every factor or other agent entrusted with the possession of any bill of lading, custom-house permit, or ware-house-keepers' receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be entrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable or other obligation in writing given by such other person upon the faith thereof."

It has been held by the state courts that the object of this act was to modify and make certain the general common-law rule that where one of two innocent persons must suffer loss from the act of a third person, such loss shall be borne by him who has placed the third person in the position which enabled him to do the act causing the loss; that it made the factor's possession such evidence of ownership as to enable him to do all acts which the true owner might, requiring the owner to use his precautions when he selected his factor, and thereafter leaving him to be responsible for the acts of his agent, and protecting a bona fide third person in any transaction fairly effected with the apparent owner; and they hold that the statute should be liberally construed. *Cartwright v. Wilmerding*, 24 N. Y. 521.

Assuming that the ownership of the goods passed from Lipman & Co. to the plaintiffs in London, and did not pass back by the subsequent transaction, Lipman & Co. were indisputably factors entrusted with the possession both of the documentary evidence of title and of the goods. *Cartwright v. Wilmerding*, 24 N. Y. 521; *Pegram v. Carson*, 10 Bosw. 505. As such, they are to be deemed the true owners so far as to give validity to any contract they might make with any other person of the kind enumerated in this section of the factors' act. The contracts enumerated are: (a) Contracts for sale of such merchandise for advances of money, or negotiable or other obligations in writing given by such other person. (b) Contracts for any other disposition of such merchandise (as, for example, a pledge thereof) for advances of money, or negotiable or other obligation in writing given by such other person, provided that such contract is entered into by such other person upon the faith of the factor's possession of the merchandise or of the documentary evidence of title thereto or of both. In other words, the factor may dispose of the merchandise in any way he pleases,—just as an owner might,—and if the person who, because of such disposition, advances money or gives a negotiable or other obligation in writing, does so on the faith of the apparent ownership with which possession clothes the factors, the law will hold that apparent ownership to be real. Lipman & Co. were in possession of the 801 bales in warehouse on December 1, 1891. Indeed, for aught that appears in the case, it may be assumed that they were the owners, nor in fact is there anything to show that they were not the owners, of all the bales which from time to time thereafter they deposited there-

in, except the 38 bales in suit. There is no need, therefore, to turn to the factors' act for support of the proposition that the contract then made with the warehouse company as to the disposition of such bales was a valid one. No authority cited on the argument gives support to the proposition that there is anything unlawful or contrary to public policy in an agreement between bailor and bailee whereby the latter contracts to hold and safely keep a specified quantity of the bailor's goods, and to give such quantity up only on presentation and redelivery of a receipt which the bailee signs, nor in the further agreement between them that whenever the bailor, without presenting the receipt, asks to withdraw a part of or even the whole quantity covered thereby, he may be allowed to do so upon substituting a like quantity of the same goods in their place, but shall be refused any of his old goods unless he does offer such substitute. The New York warehouse act (Laws 1858, c. 326, § 6) no doubt prohibits the delivery of any property covered by a warehouseman's negotiable receipt, except on surrender or cancellation of such original receipt, or an indorsement thereon in case of partial delivery; but it seems an overstrict construction of that act to extend its prohibition to a case where the total amount of a staple commodity in warehouse is increased by the depositor beyond the quantity stated in some negotiable receipt, and then reduced by withdrawals to an amount equal to that stated in such receipt, the well-known method of transferring grain in bulk, which is one of the commodities expressly enumerated in the section.

On September 7, 1892, when the trust company discounted Lipman's note, that firm was in possession of the 500 bales, which, whether original or substituted, were held by the warehouse against the outstanding five receipts. For aught that appears in the case, Lipman & Co. owned all these bales; but, if they did not, they certainly were intrusted with the possession of them, and as certainly the loan was made by the trust company upon the faith of such possession. The contract evidenced in the collateral note, whereby Lipman & Co. pledged the 500 bales which the five December negotiable receipts called for, was therefore valid, and it is difficult to see how it could be affected by the circumstance that there had theretofore been changes in the units, the aggregate being the same, and precisely what the receipts called for, viz. 500 bales of Lipman & Co.'s burlaps of various marks and numbers. Upon these 500 bales the trust company, by the contract of September 7, 1892, obtained a valid lien to the extent of its advances. There was much discussion on the argument as to whether or not the transfer of open receipts which called for a given quantity only, without specifying marks or numbers, would constitute a present pledge of anything. It is unnecessary to review the various authorities, or to determine to what extent the rules of law which have been applied to grain in bulk (*Kimberly v. Patchin*, 19 N. Y. 330); to bricks in a kiln (*Crofoot v. Bennett*, 2 N. Y. 258); to barrels of flour (*Pleasants v. Pendleton*, 6 Rand. [Va.] 473); to mill culls (*Wagar v. Railroad Co.*, 79 Mich. 648, 44 N. W. 1113); and to apple barrels (*Carpenter v. Graham*, 42 Mich. 191, 3 N. W. 974),—apply to bales of burlaps, substantially alike in

kind, quality, and value. The objection is based on the assumption that not only did the receipts fail to state what bales were pledged, but that when the pledge was made the pledged bales referred to in the five receipts were in no way segregated from those not pledged. This, however, is not the testimony. It is true that the warehouseman was unable, at the time of the trial, to tell which bales, by marks and numbers, were evidenced by these five negotiable receipts on December 1, 1891, but he by no means testified that they were not known *then*. On the contrary, he expressly stated that "on December 1st, if you had called, we could have given you the list,—an exact list of every bale." No permanent record of the memoranda by which new bales were substituted in place of bales withdrawn was kept, so that the witness was unable at the trial to state the bales which in succession were represented by each open receipt ever since it was issued by the company; but substitution for old bales, when made, was made from the next oldest bales, and while the memoranda themselves existed there could have been no difficulty about determining which these were. Had the transaction of September 7, 1892, been a sale of 500 bales evidenced by the December receipts, the warehouse company would not, so far as the evidence shows, have had any difficulty in producing from the total quantity in store on that day the bales which, by the process of substitution arranged for between its officers and Lipman & Co., had taken the place of those originally on December 1st held by it to meet the negotiable receipts.

The trust company, therefore, on September 7, 1892, obtained a valid lien on 500 bales of Lipman & Co.'s burlaps then stored in the warehouse. Thereupon the warehouse company became its bailee, and held the bales for it. *Gibson v. Stevens*, 8 How. 384. Whenever thereafter Lipman & Co. asked to substitute other similar goods of their own for those originally delivered as collateral, the surrender of an equal quantity of the original security of equal value would be a valuable consideration for the giving of the new security. The pledgee as to the latter would be a holder for value, and the exchange would have no effect upon the rights of the pledgee as founded upon the original contract. *Colebrooke*, Col. Sec. § 15; *Clark v. Iselin*, 21 Wall. 360. The same rule should apply where the goods offered in substitution and in exchange, for which goods already pledged are surrendered, are such as have been intrusted to the factor in the manner provided for by the factors' act, when the surrender is made upon the faith of the factor's possession. The contract for disposition of such goods is not for "advances of money," but it would be too narrow a construction of the state statute, which, according to the decisions of the state courts, should be liberally construed, to hold that one who parts with money's worth in the form of valuable property is deprived of its protection because he did not first transform such property into cash. When, therefore, Lipman & Co., after having deposited the 38 bales in warehouse subject to their order, called upon the warehouse company to deliver 38 bales already covered by the pledged receipts, and with no older free bales than these to substitute in their place, they did in fact apply for an exchange of part of the security collateral to their loan, thus offering

to pledge the new 38 bales if the old ones were delivered to them. The offer was accepted, and, on the faith of their possession of the bales which they thus offered to pledge, the older bales were given up to them. This was a valuable consideration, parted with in good faith, and entitles the person paying it to the protection of the factors' act, as against the plaintiffs who had intrusted Lipman & Co. with the possession of the goods. The trust company on December 15, 1892, had a valid lien on all of the 200 bales remaining in the warehouse under the two uncanceled open receipts of December 1, 1891, and they certainly did not lose such lien by returning the original receipts to the warehouse, and accepting in exchange a single one in their own name for the full account. The judgment of the circuit court should be affirmed.

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KANSAS & A. V. RY. CO. v. WHITE.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1895.)

No. 567.

CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

In an action against a railroad company for negligently causing the death of a person who, at the time of the accident, was standing on the platform of the caboose attached to the wrecked train, the court charged the jury that if they found that the fact that the deceased was on the platform did not contribute in any degree to his injury, but that he would have been fatally injured if he had been inside the caboose, then the plaintiff was entitled to recover, if the defendant was found to have been negligent. *Held* no error.

In Error to the United States Court in the Indian Territory.

This was an action by Alonia White, administratrix of Warner B. White, deceased, against the Kansas & Arkansas Valley Railway Company, to recover damages for causing the death of the plaintiff's intestate. The plaintiff recovered a judgment in the circuit court. Defendant brings error.

Geo. E. Dodge, B. S. Johnson, and C. B. Moore, for plaintiff in error.

William T. Hutchings, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This suit was commenced by Alonia White, as administratrix of the estate of Warner B. White, deceased, the defendant in error, against the Kansas & Arkansas Valley Railway Company, in the United States court in the Indian Territory, to recover damages for the killing of Warner B. White, the plaintiff's husband. On the 4th day of May, 1892, Warner B. White, the deceased, was traveling on a freight train of the defendant, in charge of cattle. The accident which resulted in his death occurred about 2 o'clock at night, at Wagner, in the Indian Territory, and was brought about by a mistake in making a drop or flying switch. The engineer intended that the engine should go on the switch, and

the stock train, and the caboose on which White was riding, on the main track; but by some mistake the engine went on the main track, and the stock train on the switch, where it came in collision with some loaded coal cars standing on the switch track, with so much force and violence that the caboose was thrown over, and more or less broken up. The end which came in contact with the coal cars was "swished around, and the track torn up"; and the other end was jammed into the cattle car in front of it, and White, who was standing on the platform of that end of the caboose, was thrown into and against the cattle car, and killed. The plaintiff in error contends that the evidence does not show that the company was guilty of negligence, and does show that the deceased was guilty of contributory negligence. These were questions of fact, which were properly submitted to the jury by the court in a charge to which no just exception can be taken. On both these issues there was evidence from which the jury might infer that the company was negligent, and that the deceased was not negligent.

The instructions asked by the defendant, and refused, were fully covered by the court's charge in chief, and the court properly refused to repeat them in the language of counsel. The court gave the following instructions to the jury: "If you find that the deceased was, at the time of the accident, riding upon the platform of the caboose,—and that is not denied,—and if you further find that the deceased would not have been injured if he had been inside the caboose, and not on the platform, you will find for the defendant, notwithstanding the defendant may have been negligent in the operation of its trains, because the platform of the caboose was a place where the deceased had no right to be. [But if you believe from the evidence that, although the deceased was upon the platform at the time of the accident, that his being there did not contribute in any degree to his injury,—that is, if you believe that he would have been fatally injured if he had been inside the caboose,—then the plaintiff is entitled to recover, provided you find that defendant was guilty of negligence as before charged.]" The defendant duly excepted to so much of the paragraph of this charge as is contained within brackets. The clause of the instruction to which exception was taken stated the law correctly. It is now well settled that a passenger on a railroad train, who is injured by the negligence of the railroad company, is not debarred from a right to a recovery because he was at the time he received the injury negligently riding on the platform of the car, or in some other exposed or dangerous position, if such action on his part did not contribute in any degree to the accident or to his injury. If the accident which occasioned the injury would have happened, and would have been attended with the same results to the passenger, if he had been in his proper place on the train, then his negligence is not "contributory negligence," in a sense that would preclude a recovery, because it in no manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause essential to constitute contributory negligence that will bar a recovery. *Jacobus v. Railroad Co.*, 20 Minn. 125 (Gil. 110); *Carrico v. Railway Co.* (W. Va.) 19 S. E. 571, 575; *Railroad Co. v. Thomas*, 79 Ky. 166; *Railway Co. v.*

Chollette (Neb.) 59 N. W. 921; *Railway Co. v. Rice*, 51 Ark. 467, 476, 11 S. W. 699; *Woods v. Southern Pac. Co.* (Utah) 33 Pac. 628; *Bonner v. Glenn* (Tex. Sup.) 15 S. W. 572; *Dewire v. Railroad Co.*, 148 Mass. 343, 19 N. E. 523; *Hutch. Carr.* § 651.

We are not called upon to decide whether, as a matter of law, a stockman in charge of his stock which is being transported on a freight train is guilty of negligence in looking after his cattle from the platform of the caboose, when there is a movement in the train which may place his stock in a position which would call for his immediate attention. The rule that obtains as to stockmen in charge of stock on a freight train is very different from that which obtains as to passengers on a passenger train. Stockmen, charged with the duty of looking after their stock, may ride in places and positions, and do many things, on the freight train, without being guilty of negligence, which, if done by one riding on a passenger train, would undoubtedly constitute negligence. The exigencies of the business of looking after and caring for cattle on a freight train sometimes compel those in charge of them to climb up the ladder of a stock car while the train is in motion (*Insurance Co. v. Snowden*, 7 C. C. A. 264, 58 Fed. 342, 12 U. S. App. 704), and to get on top of a train, and walk back to the caboose, or to ride on the top of a car for some distance, until the train stops (*Railway Co. v. Carpenter*, 12 U. S. App. 392, 56 Fed. 451, 5 C. C. A. 551). We make these remarks that we may not be understood as affirming or denying the soundness of the first clause of the instructions quoted, in which the court lays it down, as a matter of law, that a stockman looking after his cattle on a freight train is guilty of contributory negligence if, while so doing, he rides on the platform of the caboose. The defendant, of course, did not except to this clause of the instruction, and it is not, therefore, before us for consideration, and we express no opinion upon it. The judgment of the lower court is affirmed.

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KAHNWEILER et al. v. PHENIX INS. CO. OF BROOKLYN.

(Circuit Court of Appeals, Eighth Circuit. April 26, 1895.)

No. 388.

1. PLEADING—DEFENSES—CONDITION PRECEDENT.

A policy of fire insurance contained a condition that, upon the parties failing to agree upon the amount of damage, the same should be submitted to arbitrators, chosen as therein provided, and a further condition that no suit on the policy should be sustainable until after an award should have been obtained fixing the amount of damage. *Held* that, under the system of code pleading, permitting a general averment of performance of conditions precedent, the insurance company, in order to take advantage of nonperformance of this condition, must set up such nonperformance specially in its answer to a suit on the policy.

2. PRACTICE—FORM OF JUDGMENT ON DILATORY PLEA.

*Held*, further, that such defense would be a dilatory defense, upon which, if properly pleaded, judgment could only be entered that the action abate until after an award should have been obtained, and not finally in defendant's favor.



**8. CONTRACTS—INTERPRETATION—INSURANCE POLICY.**

*Held*, further, that, under the terms of the condition, the insured was not more bound than the insurance company to demand an arbitration, after a disagreement as to the amount of damage; and, when neither party demanded an arbitration, such condition was to be deemed waived by both.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by A. B. Kahnweiler & Bro. against the Phenix Insurance Company of Brooklyn on a policy of insurance. Judgment was rendered in the circuit court for the defendant, and a motion for a new trial was denied. 57 Fed. 562. Plaintiffs bring error.

This suit was commenced in the circuit court of the United States for the district of Kansas by the plaintiffs in error, A. B. Kahnweiler & Bro., against the defendant in error, the Phenix Insurance Company of Brooklyn, to recover the amount alleged to be due on a fire insurance policy. The policy contained, among many others, the following conditions: "(10) The amount of sound value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured, or, failing to agree, the same shall then be submitted to competent and impartial arbiters, one to be selected by each party, the two so chosen, in case of disagreement, to select an umpire to whom they shall refer each subject of difference, and the award of any two of them, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question except only the amount of such loss or damage. Each party shall pay their own arbitrator and one-half the cost of the umpire. It shall be optional with the company to take the whole or any part of the articles at their appraised value." "(12) It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, which is agreed to be a condition precedent." After the goods were burned, 8 or 10 adjusters went to Lawrence, Kan., where the loss occurred, to adjust the same. Differences arose between the adjusters and the insured as to the amount of the loss, and this is what occurred at their final interview: "After they had been through the books, they sent for my brother and myself [the plaintiffs]. We went up there. Mr. Hamlin was spokesman for the adjusters, and had papers in his hands, and said: 'Mr. Kahnweiler, you have had \$22,700 worth of goods. We have got to get away, and want to settle.' And said: 'We have had dealings with your nationality before.' He said this amount the companies were ready to pay, and he was ready to pay the proportionate part of that amount due from the Phenix Company. I told him we had over \$45,000 worth of loss, and would not accept any such settlement. My brother and I took the books out of the room. Hamlin followed me into another room, and said, 'We'll beat you before a farmers' jury in your own courts.' That was the last that was said between us." Thereafter suit was brought on the policy. The policy was annexed to and made part of the plaintiffs' petition, which averred that the plaintiffs had "performed all the conditions of the said policy on their part." The defenses set up in the answer were—First, a general denial; and, second, that the plaintiffs willfully burned the goods. After the plaintiffs' evidence was introduced, and they had rested the case, the defendant demurred to the evidence for this, among other reasons: "Because the evidence does not show that before the commencement of this action there was any arbitration and award as to the amount of damages, while it does appear from the plaintiffs' evidence that there was a difference between the plain-

tiff and defendant as to the amount of the loss mentioned in the petition before the commencement of this action." The court sustained the demurrer to the evidence upon this ground, and rendered judgment "that the plaintiffs take nothing by their action, and that the said defendant go hence without day"; whereupon the plaintiffs sued out this writ of error.

Clifford Histed (W. H. Rossington, Charles Blood Smith, and E. J. Dallas, on the brief), for plaintiffs in error.

H. M. Jackson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the threshold of this case we are confronted with some questions of pleading and practice. In pleading the performance of a condition precedent under the code system, it is not necessary, as it was at common law, to state the facts showing such performance, but it is sufficient to state generally "that the party duly performed all the conditions on his part; and, if such allegations be controverted, the party pleading must establish on the trial the facts showing such performance." Gen. St. Kan. 1889, § 4205. The policy in suit contains the usual conditions in such policies with reference to notice and proofs of loss, etc., and declares that "until such proofs, plans and specifications, declarations and certificates are produced by the claimant, and such examinations and arbitrations permitted and had, the loss shall not be payable." The plaintiffs' complaint made the policy in suit a part thereof, and contained the averment that the plaintiffs had "performed all the conditions of the said policy on their part." The only answer to this allegation of the complaint was a general denial. Assuming for the present that the obtaining of an award was a condition precedent to the right of the plaintiffs to maintain their action, did this general denial put in issue the allegation that the plaintiffs had complied with that condition of the policy? In other words, was the general allegation of due performance properly "controverted," within the meaning of the Kansas Code? We think it is clear that it was not. If the defendant intended to rely upon the nonperformance by the plaintiffs of one or more of the numerous conditions of the policy, it should have pointed them out specifically and alleged their breach. In no other way could it be known to the parties or the court what issues were to be tried. Under the Code, when a defendant relies upon a breach of a condition precedent in a contract as an excuse for not performing the contract on his part, he must set out specifically the condition and the breach, so that the plaintiff and the court will be advised of the issue to be tried. Bliss, Code Pl. (3d Ed.) § 356a; Nash, Pl. pp. 300-302, 782. In the case of Preston v. Roberts, 12 Bush, 570, 583, the court of appeals of Kentucky said:

"The plaintiff being expressly authorized to plead in that manner [general performance of conditions precedent], the defendant must, if he relies upon the fact that any of the conditions precedent has not been performed, specify the particulars in which the plaintiff has failed (Newm. Pl. & Prac. 510, 511; Railroad Co. v. Leavell, 16 B. Mon. 362), thus confining the issue

to be tried to such particular condition or conditions precedent as the defendant may indicate as unperformed."

See, to the same effect, *Gridler v. Bank*, 12 Bush, 333.

The cases of *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, and *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133, arose in a code state, and in these cases the defendant set up the condition precedent relied upon as a defense, and specifically alleged its breach, and this is believed to be the uniform practice in all code states. It is also the practice in England under a statute which, like our codes, permits a general averment of the performance of conditions precedent by the plaintiff. Under that statute, where such a general averment is made in the declaration, any condition precedent, the performance or occurrence of which is to be contested, must be distinctly specified, and its performance negated in the defendant's answer. For English cases illustrating the rule, see *Glenn v. Leith*, 22 Eng. Law & Eq. 489; *Graves v. Legg*, 25 Eng. Law & Eq. 552. In the case last cited Lord Chief Baron Pollock observes:

"The declaration having averred, according to the 57th section of the common-law procedure act, the performance of conditions precedent generally, the defendants proceeded in their plea to specify this condition of declaring the names of the vessels as one of the breaches of which they insist."

Moreover, if the plaintiffs failed to show compliance with the alleged condition precedent, their cause of action was not thereby barred or extinguished; at most, it could only operate to suspend the cause of action and abate the suit. *Clark*, Cont. 666, 667. In the language of the policy, it would simply operate to abate the suit "until after an award shall have been obtained." In other words, when properly pleaded, it is a dilatory defense, and not one going to the merits of the action. It does not impugn the right of action altogether, and is not, therefore, a peremptory plea. At common law dilatory pleas were waived by a pleading to the merits. *Steph.* Pl. 433. Under the Code system, matter in suspension or abatement of the action may, and, if intended to be relied upon as a defense, must, be set up in the answer. It is a defense, and under the Code all defenses, whether dilatory or peremptory, are set up in one answer in separate paragraphs. *Ehrman v. Insurance Co.*, 1 *McCrary*, 123, 1 Fed. 471; *Bliss*, Code Pl. § 345. Where a dilatory defense is embraced in the answer, the court will direct the jury to determine that issue first, and, in case their finding on that issue is for the defendant, will see that the proper judgment is rendered thereon. *Ehrman v. Insurance Co.*, *supra*; *Bliss*, Code Pl. § 345. By failing to set up the condition precedent and its breach in its answer, the defendant waived that defense. If the rule were otherwise, a degree of uncertainty would be introduced in the practice in this class of cases much greater even than that which obtained under the general issue at common law. It would be a snare and a pitfall, and neither the plaintiff nor the court would have any knowledge of the issue to be tried. No matter how many conditions precedent the contract contained, the plaintiff would be obliged to go to the expense

of preparing to prove performance or waiver of every one of them. An objection of this character cannot be held back, as was done in this case, until, at great expense, a trial has been gone through with, and the plaintiffs have closed their case upon the evidence, and then be brought forward for the first time by way of a demurrer to the evidence. Such a practice would be intolerable. In this connection it is proper to notice another error in the record. If this dilatory defense had been properly pleaded, and the issue had been rightfully found for the defendant, the judgment in the case would still be erroneous. Mr. Stephens (Steph. Pl. 107) says that, upon the determination of an issue "on a dilatory plea, the judgment is that the writ (or declaration) be quashed, upon such pleas as are in abatement of the writ or bill, and that the suit do stay or be respited until, etc., upon such pleas as are in suspension only,—the effect, in the first case, of course, being that the suit is defeated, but with liberty to the plaintiff to begin another in more correct form; in the second, that the suit is suspended until the objection be removed. If the issue arise upon a declaration or peremptory plea, the judgment is in general, that the plaintiff take nothing, etc., and that the defendant go thereof without day, etc., which is called a judgment of nil capiat." The court below rendered a judgment of nil capiat in this case, which would forever preclude the plaintiffs from obtaining an award, or recovering on the policy in suit after they had obtained an award. The judgment should have been that the action abate "until after an award shall have been obtained fixing the amount of" the plaintiffs' claim as provided by the policy.

We think the court erred in its interpretation of the clause of the policy relating to arbitration. If the clause which declares that no action on the policy shall be sustainable "until after an award shall have been obtained" in the manner provided therein is to be taken literally, then all the insurance company has to do to escape liability altogether is to refuse to appoint an arbitrator, and thus make it impossible for the insured to comply with this condition. This shows these conditions of the policy are not to be taken literally. They are to be construed together, and must receive a reasonable interpretation. When it is once established that the meaning of any provision in a policy of insurance is ambiguous or capable of two meanings, then all doubt as to its proper construction vanishes. It must receive that interpretation most favorable to the insured.

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because these instruments are drawn by the company. *National Bank v. Insurance Co.*, 95 U. S. 673, 678." *Thompson v. Insurance Co.*, 136 U. S. 287-297, 10 Sup. Ct. 1019; 2 Whart. Cont. 670.

Another well-settled rule for the interpretation of all contracts is that the court will lean to that interpretation of a contract which will make it reasonable and just. Bish. Cont. § 400. Applying these rules to the tenth clause of this policy, its proper interpretation seems quite clear. When there is a difference between the company and the insured as to the amount of the loss the policy declares:

"The same shall then be submitted to competent and impartial arbitrators, one to be selected by each party \* \* \*." It will be observed that the obligation to procure or demand an arbitration is not, by this clause, in terms imposed on either party. It is not said that either the company or the insured shall take the initiative in setting the arbitration on foot. The company has no more right to say the insured must do it than the insured has to say the company must do it. The contract in this respect is neither unilateral nor self-executing. To procure a reference to arbitrators, the joint and concurrent action of both parties to the contract is indispensable. The right it gives and the obligation it creates to refer the differences between the parties to arbitrators are mutual. One party to the contract cannot bring about an arbitration. Each party is entitled to demand a reference, but neither can compel it, and neither has the right to insist that the other shall first demand it, and shall forfeit any right by not doing so. If the company demands it, and the insured refuses to arbitrate, his right of action is suspended until he consents to an arbitration; and if the insured demands an arbitration, and the company refuses to accede to the demand, the insured may maintain a suit on the policy, notwithstanding the language of the twelfth section of the policy, and, where neither party demands an arbitration, both parties thereby waive it.

Undoubtedly there is much implied in every writing, whether it be a statute or a contract. It is a maxim that "what is implied in a statute is as much a part of it as what is expressed." *Wilson County v. Third Nat. Bank of Nashville*, 103 U. S. 770; *Gelpcke v. Dubuque*, 1 Wall. 222. And this maxim is equally applicable to the interpretation of contracts. The interpretation contended for by the defendant in error would have the effect to import into the tenth clause of the policy, after the words "failing to agree," a clause to the effect that "the insured shall thereupon demand an arbitration"; and also to import into the twelfth clause, in order to give it validity, this qualifying clause: "Unless the insured has demanded an arbitration, and the company has refused to accede thereto." The rules for the interpretation of policies of insurance which we have adverted to preclude the court from importing any such clauses into this policy. The effect of doing so would be to construe the ambiguities and uncertainties of the policy in favor of the company and against the insured. We think it is necessarily implied in the tenth clause that, before either party can derive any advantage or benefit from this provision, he must indicate his readiness to be bound thereby, and demand compliance therewith by the other party. The clause is to be construed the same as if it read, "Upon the request of either party." These words or their equivalent are commonly found in similar clauses in policies of fire insurance, and they are necessarily and plainly implied in this policy. This is the interpretation placed upon a policy of the defendant in error identical with the one here in suit, by the supreme court of Montana. That court, construing the clause in the policy declaring that no suit thereon shall be sustainable until after an award, say this provision "will come into action to bar plaintiff's recovery where he has refused to arbitrate

after the matter for arbitration arose, and the same was seasonably sought in conformity with the terms of the policy, as was the case in *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, and other cases cited in *Randall v. Insurance Co.*, *supra* [25 Pac. 953]." *Randall v. Insurance Co.*, 25 Pac. 960.

The conclusion reached is also in harmony with the adjudged cases on this subject arising on other policies. In *Nurney v. Insurance Co.*, 63 Mich. 633, 30 N. W. 350, the policy provided that in case of differences as to the amount of damages the matter should, "at the written request of either party, be submitted to the judgment of two competent persons, to be mutually appointed by the assured and the company"; and the policy further provided that no suit should "be sustainable in any court of law or chancery until after an award shall have been obtained in the manner provided." The lower court instructed the jury "that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and the defendant had refused or neglected to comply with the request." The supreme court held this instruction erroneous, and, construing this provision of the policy, the court said:

"Arbitration becomes imperative only after the written request for one has been made. The request as it stands in this policy is optional with either party, and, neither of them having availed themselves of the right to arbitrate, it must be deemed waived by both, and in such case was left to the mode of redress provided by the law."

In the case of *Insurance Co. v. Badger*, 53 Wis. 283, 10 N. W. 504, the policy provided that the differences should, "at the written request of either party, be submitted to impartial arbitrators," and that no action should be sustainable in any court until an award had been obtained. Construing this policy, the court said:

"The imperative part of the first clause is that 'the matter shall be submitted to impartial arbitrators, etc.,' conditional, however, upon the written request of one or both of the parties. It is therefore optional and voluntary, or the duty rests upon each party alike, to make such written request, and in this case both parties have neglected such duty alike, and neither party can complain of the neglect of the other. \* \* \* That there never has been an award is the fault of the company as much as the insured, and therefore the company is estopped from taking advantage of the fact that there has not been an award."

In the case of *Wright v. Insurance Co.* (Pa. Sup.) 20 Atl. 716, the provisions of the policy were the same as those contained in the policy in suit in the case of *Insurance Co. v. Badger*, *supra*, and the court said:

"It was the right of either party to demand arbitration. It was the right of either party to waive it; and the defendant having made no such demand must be presumed to have waived it."

And to the same effect is *Wallace v. Insurance Co.*, 4 McCrary, 123.

The case of *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, cited and relied on by the defendant in error, is not in point. The supreme court rested its judgment in that case upon the fact "that the defendant had requested in writing, and the plaintiff had de-

clined, the appraisal provided for in the policy." There was in this case no such request by the insurance company, either oral or in writing, but, on the contrary, when the difference arose between the parties over the amount of the loss, instead of suggesting or demanding an arbitration, the defendant's agent, addressing the insured, declared to them, "We'll beat you before a farmers' jury in your own courts," thus plainly inviting a suit at law to settle their differences. The insured accepted the gage thus thrown down by the company, and it is now too late for it to recede from the conflict in the arena chosen by itself. The judgment of the circuit court is reversed, and the cause remanded, with directions to grant a new trial.

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**SELBY v. MUTUAL LIFE INS. CO. OF NEW YORK.**

(Circuit Court, D. Washington, N. D. March 18, 1895.)

No. 387.

**1. PLEADING—SUFFICIENCY OF DENIAL.**

A mere general denial of the allegation, in an action on a life insurance policy, that the insured in his lifetime fully complied with all the requirements and performed all the conditions of his contract, raises no issue.

**2. LIFE INSURANCE—EFFECT OF WARRANTY.**

Where neither a policy of life insurance nor the application upon which it is granted contains any stipulation that a breach of a warranty contained in the application shall ipso facto nullify the policy, the breach of such a warranty renders the policy voidable, but does not render it void, nor entitle the insurer to defeat a recovery upon it, unless he has seasonably manifested an intention to rescind the contract, and returned or tendered a return of the premiums.

At law. Action by Christine Selby on three life insurance policies issued by the Mutual Life Insurance Company of New York on the life of her husband. The defendant pleaded, in avoidance of liability, that the plaintiff's husband, in his written application, upon which the policies were issued, made and warranted certain statements which were not true. Verdict in plaintiff's favor for the full amount of the policies and interest. Argued on motion for a new trial. Motion denied.

Fred H. Peterson and L. C. Gilman, for plaintiff.  
Strudwick & Peters, for defendant.

HANFORD, District Judge. The answer in this cause contains no denial of the allegations of the complaint, except the allegations that the plaintiff's husband in his lifetime fully complied with all the requirements, and performed all the conditions, of his contract with the defendant. A mere general denial of such a general statement raises no issue, and, according to the rules of pleading, all the facts well pleaded in the complaint are admitted. I can find no fatal defect in the plaintiff's case as set forth in her complaint; therefore she is entitled to a judgment on the pleadings for the full amount demanded, unless the affirmative allegations of the

answer are sufficient, if true, to avoid liability on the policies. The sum and substance of said affirmative defense is this: The husband of plaintiff, in his application for the insurance, warranted certain statements of fact concerning himself; the policies sued on were issued in consideration of said warranty, and the warranty is a part of the contract; there was a breach of the warranty, for certain specified statements made in said application were untrue. It is not alleged that the defendant has returned or tendered a return of the premiums; fraud is not charged, and it is not alleged that the defendant has been damaged by breach of the warranty, nor that it made an agreement which it would not have consented to if the truth had been given in said application. And it is not alleged that by any stipulation in the application, or in the policies, or otherwise, the parties agreed or consented that a breach of the warranty should ipso facto nullify the policies, or entitle the defendant to claim a forfeiture of the premiums paid. In fact, the application and policies introduced in evidence on the trial show that no such stipulation is contained therein. The policies, which were the only written evidence of the contract delivered to or retained by the insured, are free from the mass of verbiage found in many forms of life insurance policies, and quite liberal in terms. It is not unlikely that the advantage of policies in such form was urged upon plaintiff's husband, by the defendant's soliciting agent, as an inducement for preferring this company over other life insurance companies, and the particular plan of insurance selected over other plans.

The theory of this defense is that the warranty is like a condition precedent, and that, notwithstanding the receipt and retention by the defendant of the premiums, and the issuance of the policies, and although the parties did not incorporate into their contract a stipulation to that effect, a mere breach of the warranty renders the policies void ab initio. A warranty as to any fact, which becomes an integral part of the basis of a contract, differs from a mere representation of such fact in this: it precludes any controversy as to the materiality of such fact,—whereas a false representation is not ground for avoiding a contract, unless the party to whom it is made relies upon it, and is actually induced by it to enter into an agreement or consent to terms disadvantageous to him. Keeping this distinction in view, it is plain that the facts pleaded would be sufficient to entitle the defendant to rescind the contract if, after being apprised of the breach, it had, with reasonable promptness, elected to rescind, instead of retaining whatever profit or advantage the contract afforded. But the same facts would afford no ground for the insured to treat the contract as a nullity. He could not, against the will of the defendant, withdraw his application for insurance, and compel a return of the money paid as premiums. Authorities are numerous holding that the insurer may waive a breach of warranty, and abide by the contract, and this seems to be in accordance with elementary principles of the law. 2 May, Ins. (3d. Ed.) §§ 497–501, 502; *Insurance Co. v. Raddin*, 120 U. S. 183–197, 7 Sup. Ct. 500.



Assuming the answer to be true, a question of law arises whether the policy is absolutely void, or only voidable at the election of the insurer. Since the insurer may, in a case like this, waive a breach of warranty, it is obvious that the insured cannot, before giving an opportunity to waive, take advantage of his own wrong by avoiding the contract; hence the validity of the contract depends upon the will of the insurer, rather than upon any inflexible rule of law. By this test, the contract, as it is set forth in the pleadings, is shown to be one which must necessarily be classed as voidable. In the argument and brief of counsel for the defendant, many cases have been cited in which courts have held, in actions upon insurance policies, that the right to recover is barred by breaches of warranty. But on examination I find that in the leading cases of *Jennings v. Insurance Co.*, 2 Denio, 75, and *Jeffries v. Insurance Co.*, 22 Wall. 47-57, the parties fixed the penalty for a breach of warranty by stipulating in the contract that, in case of the violation of any of the conditions upon which the same were based, the policies should become null and void; and it is probable that in other cases the facts were similar, or that the courts, in deciding them, failed to take note of the particular stipulations to which effect was given in cases which were supposed to be precedents and followed. I find, also, that, in the light of later decisions by the supreme court of the United States, many of these decisions must be regarded as erroneous. For example, in the case of *Cooper v. Insurance Co.*, 50 Pa. St. 299, Mr. Justice Strong, in the opinion of the court, cites and follows *Jennings v. Insurance Co.*, supra, holding that parol evidence is not admissible to show that the insured truly informed the agent of the insurers of particulars which the agent had incorrectly stated in the application written by him for the insured, the statements in the application having been made warranties. And in the case of *Insurance Co. v. Mahone*, 21 Wall. 152, the same learned justice wrote the opinion of the supreme court of the United States, in which it was ruled that parol evidence to show that the insured made true answers to questions in the application to the agent of the insurers, different from the answers as written by the agent, was admissible in an action on the policy, notwithstanding the fact that the answers as written by the agent were subsequently read to the insured, and voluntarily signed by him. I do not find in any of the authorities a reason given for departure from elementary principles in order to relieve an insurance company of the obligation to pay according to its promise while it retains the money paid upon the faith of that promise. The case of *Insurance Co. v. Fletcher*, 117 U. S. 519-536, 6 Sup. Ct. 837, is relied upon by counsel for the defendant. But I do not regard that case as controlling, for this reason: the insurance company, before defending, made a lawful tender of the premiums received, and did everything necessary to a rescission of the contract; hence the question whether the contract was void, or only voidable, was not in the case. This answer is defective for the reason that it shows only a right to rescind the contract. A complete defense on the ground of a breach of the warranty could

be made only by alleging that the defendant had claimed and exercised its right within a reasonable time, and that there had been an actual rescission of the contract, or at least the answer should disaffirm the contract, and plead a tender of the premiums. 3 Am. & Eng. Enc. Law, 929-932; 2 Pars. Cont. (7th Ed.) 677-681. This objection is not answered by saying that the legal representatives of the deceased may recover the premiums, and that the defendant is not required to make a tender to this plaintiff. Conceding that a tender, to be valid, must be made to the legal representative, it is nevertheless essential to a rescission of the contract that the defendant should return, or at least offer in good faith to return, the premiums to whomsoever may be lawfully entitled to receive the same. No such repayment or offer having been made, the contract is operative, so that the plaintiff may enforce it in this action. *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Gray v. Association* (Ind. Sup.) 11 N. E. 477.

As the answer contains no defense whatever, errors in rulings during the trial, if any were committed, cannot be prejudicial to the defendant. It is therefore unnecessary to discuss any of the other propositions advanced in the argument upon this motion. The motion is denied, and a judgment will be entered upon the verdict.

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### PHINNEY v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. Washington, N. D. March 26, 1895.)

No. 418.

#### 1. PLEADING—CONCLUSION OF LAW.

An answer, in an action on an insurance policy, which alleges merely that the contract was waived, abandoned, and rescinded, is bad, as alleging only conclusions of law.

#### 2. SAME.

An answer which merely attacks the constitutionality of a statute on which the plaintiff's claim is supposed to rest is bad, as alleging only matter of law, and not facts.

#### 3. CONTRACTS—LAW OF PLACE—LIFE INSURANCE POLICY.

The M. Life Ins. Co., a New York corporation, issued a policy of life insurance to one P. The application for the policy was made and signed in the state of Washington, and transmitted to New York. The policy was written in New York, and transmitted to Washington, where it was delivered to P., and the first premium was collected. The policy provided that the premiums, and the insurance when it accrued, should be paid in New York, and that proof of death should be made there. The application, which, by the terms of the policy, was made part thereof, declared that it was made subject to the charter of the insurance company and the laws of New York. *Held*, that the contract, as to all matters relating to its performance, was governed by the law of New York, and was therefore subject to a statute of that state, making it a condition of the right of the company to forfeit the policy for nonpayment of premiums that a certain notice of the accruing of premiums should be given, notwithstanding the policy contained a waiver of any other notice than the terms of the policy itself.

#### 4. STATUTES—WAIVER OF CONDITION—PUBLIC POLICY.

The condition imposed by such statute, being in pursuance of a general policy, cannot be waived by an individual, though intended for his benefit.

**5. CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — NOTICE OF INSURANCE PREMIUMS.**

The statute of New York, requiring life insurance companies, doing business in that state, to give notice to the holders of policies of the accruing of their premiums, as a condition of the right to forfeit the policies for nonpayment of premiums, is not a violation of the constitution of the United States, as operating unequally upon companies of New York and of other states doing business therein.

**6. LIFE INSURANCE—BREACH OF WARRANTIES.**

Breach of warranties does not ipso facto render the policy void, in the absence of any express stipulation to that effect either in the application or policy, but merely makes it voidable; and the insurer remains liable, unless he seasonably manifests an intention to rescind the contract, and tenders back the premium. Reaffirming *Selby v. Insurance Co.*, 67 Fed. 490.

This was an action by Nellie Phinney against the Mutual Life Insurance Company of New York on a policy of insurance. The plaintiff demurred to the defendant's answer.

S. Warburton, for plaintiff.

Strudwick & Peters, for defendant.

HANFORD, District Judge. This case was argued upon demurrer to the affirmative defenses in the answer.

The second affirmative defense pleads no facts. A mere naked conclusion that the contract of insurance was waived, abandoned, and rescinded is alleged. That is not a good pleading, and for that reason the demurrer to that defense is sustained.

The third affirmative defense pleads a breach of warranty as a defense, and, in accordance with the opinion which I have filed in the case of *Christine Selby* against this same defendant (67 Fed. 490), that defense is insufficient. The case is exactly like the *Selby* Case, and comes within the rule that I have given in the opinion in that case. On that ground the demurrer to the third affirmative defense is sustained.

The fourth affirmative defense is entirely made up of conclusions of law. This defense anticipates the claim and contention of the plaintiff (which is not set out in any other part of the pleadings) in regard to the effect of the New York statute upon life insurance policies issued by companies doing business in that state, and attacks the statute for being repugnant to the constitution of the United States, and void. This is entirely a matter of law, and contains no facts constituting a defense. The demurrer to that defense is sustained on that ground.

Now I go back to the first affirmative defense. This sets forth the place and the manner of the making of the contract, and the terms of the contract. It shows that the application for insurance was written and signed by Mr. Phinney in the state of Washington, and transmitted through a local agency of the insurance company in this state to the general Pacific coast agency in San Francisco, and thence to the home office in New York. The policy was written in New York, and transmitted through the general Pacific coast agency in San Francisco to the local agency in this state, and delivered to Mr. Phinney, and the first premium upon the

policy was collected in this state. By the terms of the policy the premiums are payable annually, on a specified day, and the policy is to be void if the premiums are not paid. It shows that two annual premiums, after the first one, accrued before Mr. Phinney's death, and were not paid. It shows also that the policy contains a provision that notice that the premiums are due and payable on the dates mentioned in the policy is given and accepted by delivery of the policy, and any other notice or obligation to give notice is waived. Now, that is a complete defense under the general law governing the making of contracts. An agreement to insure, upon condition that the insured shall make periodic payments of premiums, binds the insurer only if the premiums are paid, and failure to pay the premiums avoids all liability, and relieves the insurer of all liability to pay. But the state of New York has made a statute of a radical nature, intended to check somewhat the large accumulation of money in the hands of life insurance companies through forfeitures of premiums, by giving the people dealing with these companies some percentage of advantage, making it a condition of the right of an insurance company to avoid the policy and forfeit the premiums that have been paid that the company shall issue a certain prescribed kind of notice; and the decisions of all the courts of this country, in New York and other states and the federal courts, tend to sustain this law, and to hold the insurance companies to a strict compliance with the statute, as a prerequisite condition to the avoidance of a policy for nonpayment of premiums. In numerous cases it has been adjudged that the insurance company is liable notwithstanding the failure to pay premiums when due, by reason of their failure to prove that the notice was sent as required by the statute. So that, under the law of New York, this defense is insufficient, because it does not allege that the insurance company sent the notices prescribed by the statute of New York. There being this difference between the general law of contracts and the law of New York, the question is squarely raised whether this contract and the rights of the parties are to be in accordance with the statute of New York or with the general law of contracts, which is the law of the state of Washington. The defendant contends that this is a Washington contract, because the contract was made here. It was made here because the last act necessary to complete the making of the contract was in this state, and according to all the rules and authorities it is the law of the place of the contract, in the sense that this is the place where the contract was made; and it is a general rule of law that contracts are subject to the laws of the place where made, as regards the formalities necessary, in entering into a contract, to bind the parties, and as to the validity of the contract itself. The law of the place where the contract is made is also the law by which the contract must be construed, and by which the obligations of the parties are to be determined, unless it appears that they have contemplated, at the time of making the contract, a different law; and usually it is understood that they do contemplate a different law to govern the liability of the parties where they expressly contract that the perform-

ance is to be at a place where there is a different law. I must decide this case according to what appears from the pleadings to have been the intent of the parties as to what law should govern its construction, and determine the obligation of the parties as to performance. In the first place, it is expressly provided that the premiums to be paid are payable at the home office of the company in New York; that the amount of money which the insurance company agreed to pay as insurance shall be payable at the company's office in New York, and proof of the death is to be made there; so that in all particulars this contract is to be performed in New York. New York, therefore, is the place of the contract in the sense that it is the place at which the parties agreed to perform their contract on both sides,—pay the money for the premiums there, and pay the insurance, if any accrues, there. In addition to that, the application for the insurance, signed by Mr. Phinney, contains the declaration that the application is made to the Mutual Life Insurance Company of New York, subject to its charter and the laws of New York. This application, by its own terms, and by the express provisions of the policy issued upon it, is a part of the contract.

It is contended that the parties have not adopted the law of New York as to the policy, but only as to the application. I can hardly understand why parties would intentionally complicate a contract by making the law of New York applicable to one part of it, and yet have it in other respects governed by the laws of the state of Washington. It is not made to appear to me in any way what particular law of New York they wanted to avoid by having the contract executed here, or what particular law of the state of Washington they wanted to avoid by having the application made subject to the laws of New York. If there was any such intention, it would look as if this provision made by the company in the printed blank which they used for making the application was an intentional trick to operate against the insured in any way in which the laws of New York would be prejudicial to him without binding the company to the strictness prescribed by the laws of New York, so far as they operate in favor of the insured. If I should give the contract such a construction, I do not think that it would be fair. There is, at least in the contract itself, evidence that the parties had in contemplation the law of New York as an element of the contract, and by having expressly provided that the contract is to be performed in New York they have made the laws of New York the law of the place of the contract, so far as it affects the obligation of the parties in respect to performance. The law of New York, by its terms, applies to all life insurance companies transacting business in that state. It is contended that this statute, if it is made to apply to contracts of life insurance entered into outside of the state, is unconstitutional, because it will not operate equally upon all life insurance companies doing business in New York; that the legislature has not the power to prescribe an obligation of this kind to affect a Connecticut life insurance company doing business in New York and also doing business in the state of Washington, as regards the contracts of the Connecticut

company made in Washington, and that, therefore, a home company would be placed at a disadvantage, as compared with a company of a different state, transacting business in New York. I think that argument is based upon false premises. I think that the binding force of the statute applies to all companies equally. It applies to all New York companies as to all business which they do in that state, and it applies to Connecticut companies as to all business that they do in New York. I think that if a Connecticut company, having an office in New York, writing and issuing policies there, collecting premiums there, and doing all the business of life insurance companies in the state of New York, should receive an application at its office in New York from Washington, act upon it there, issue a policy there, which by its terms would be performed in the state of New York, the contract would be governed by the law of New York, just the same as though its incorporation was under the law of New York, instead of being under the law of Connecticut. This statute has been upheld by so many decisions that it is beyond question a valid statute with respect to all business transacted within New York. Now, this transaction, although the contract was made in the state of Washington, is business done in New York. The policy was written there; the default of the insured, and right of forfeiture, could only occur in New York, because there could be no default in payment until, on the date when the premiums were due, the insured failed to pay the premium in New York. There is where the default occurred upon which alone this company can claim to be released from its liability under the policy. This subject of the law of the place of contracts has received attention from the supreme court of the United States in a number of cases, and the difference between cases where the law of the contract is the law of the place where the contract is entered into and those in which the contract is governed by the law of the place of performance is illustrated in a number of decisions,—in some of the older decisions as well as the late ones. One of the clearest expositions of the law is to be found in the opinion of Mr. Justice Hunt in the case of *Scudder v. Bank*, 91 U. S. 406. In the course of the opinion, Justice Hunt makes this statement:

"The rule is often laid down that the law of the place of performance governs the contract. Mr. Parsons, in his treatise on Notes & Bills, uses this language: 'If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated.' Page 324. For the purpose of payment and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill, are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule that the place of performance governs the bill. The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary

to the validity of the contract. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing. *Dacosta v. Davis*, 24 N. J. Law, 319. So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment. *Aymar v. Sheldon*, 12 Wend. 439. So if a note, payable in New York, be given in the state of Illinois, for money there lent, reserving ten per cent. interest, which is legal in that state, the note is valid, although but seven per cent interest is allowed by the law of the former state. *Miller v. Tiffany*, 1 Wall. 810; *Depau v. Humphreys*, 8 Mart (N. S.) 1; *Chapman v. Robertson*, 6 Paige, 634; *Andrews v. Pond*, 13 Pet. 65. Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions."

That case has been referred to, and the distinction is further brought out in a later decision of the supreme court in *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102. It is also referred to, and its doctrine is recognized as sound, in the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, where Mr. Justice Gray reviews the American and English decisions. His application of the rule may seem to be inconsistent with my conclusion in this case. The supreme court certainly held in that case that the law of the place of making the contract governed as to the validity of a stipulation by which one party agreed in advance to waive all claim for damages by reason of a breach of the contract by the other party. The principle of that case would be applicable to the case we have in hand if the conditions were exactly the same; but they are not. That was a contract of a carrier for transportation of merchandise from New York to England. The performance began in New York, and was to have been finally completed in England. There is a difference between the law of this country and the law of England as to the right of a carrier to exempt itself entirely from liability for damage caused by negligence of its servants. The supreme court applied the laws of this country, and nullified a provision in the bills of lading by which the carrier sought to be thus exempted. I do not think, under the principles recognized by the supreme court, the case would have been so decided if it had been a contract which was to have been entirely performed in England. The opinion makes it very plain that the court intended to rest its decision upon the facts that the contract was made in New York, the shipowner having a place of business there, and the shipper being an American. The contract was single; its principal object, the transportation of goods, being one continuous act, to begin in New York, to be chiefly performed on the high seas, and to end at Liverpool; and there was nothing in the contract or surrounding circumstances tending to show that the parties looked to the law of England, or to any other law than that of the place where the contract was made.

The case of *Scudder v. Bank* is cited with approval by the supreme court in the opinion of the supreme court in *Coghlan v. Railroad Co.*, 142 U. S. 101, 12 Sup. Ct. 150. The syllabus reads:

"When a contract for the payment of money at a future day, with interest meanwhile payable semiannually, is made in one place, and is to be performed in another, both as to interest and principal, and the interest before maturity is payable according to the legal rate in the place of performance, the presumption is, in the absence of attendant circumstances to show to the contrary, that the principal bears interest after maturity at the same rate."

And that is shown to be so, because the law of the place of performance governs the contract as to the manner of performance. The opinion is by Mr. Justice Harlan, and he reviews a great many decisions, and squarely recognizes the doctrine laid down by Judge Hunt and by Judge Matthews in the cases above referred to, and shows that it is in harmony with the decision of the supreme court by Judge Gray in the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*

The waiver of notice is in the policy itself, and the provisions of the statute must prevail, notwithstanding a waiver of notice in the contract; and that is upon a principle, recognized in a number of decisions of the supreme court of the United States, that parties cannot make a contract whereby the requirements of a statute which is made in pursuance of a general policy can be evaded. This waiver of notice is contrary to the policy of the law of New York, and, although it is a provision made for the benefit of individuals, the individuals cannot, by their contracts, abrogate the positive provisions of a statute. The reasons for this rule are well stated by Mr. Justice Gray in the opinion of the supreme court in the case of *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, supra, in which it was held that the policy of the laws of this country is against carriers making contracts in advance, securing exemption from liability for their own negligence. That was a case where the shipper expressly contracted to relieve the carrier from all risk and all liability resulting from the negligence of officers or crew of the ship or agents of the company handling the merchandise. Notwithstanding that contract, the supreme court held that the laws of the country in which the contract was made forbid such contracts. It is certainly the policy of the New York law to prohibit insurance companies from avoiding their policies for nonpayment of premiums where they fail to give the notice prescribed. I hold that the law of New York is applicable to this contract, and the defense is not sufficient, because it would not be a good defense in New York. The demurrer is sustained.

Mr. Strudwick: I call your honor's attention also to the fact that the demurrer to the second, third, and fourth affirmative defenses was rested in part upon the ground that by the provision of this policy the policy was incontestable after a certain length of time, and I submitted at the time the reasons why I did not think that clause would prohibit the setting up of these defenses if they



were otherwise valid, and I would like to know what conclusion your honor reached upon that proposition.

The Court: I think the incontestable clause in the contract was intended to shut off such a defense as you have set forth in the second affirmative defense after two annual premiums have been paid. I do not think the company would be bound by the clause, or precluded from contesting the liability within any length of time, unless the policy had been lived up to on both sides for two years. The second premium would have to be paid in order to give the insured the right to shut off a defense by virtue of that clause.

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ZION v. SOUTHERN PAC. CO.

(Circuit Court, D. Nevada. March 18, 1895.)

No. 585.

**CARRIERS—EJECTION OF PASSENGER—EXCESSIVE DAMAGES.**

Plaintiff was ejected from a train at a station, but without violence, because the conductor was not satisfied as to his identity with the original purchaser of the ticket, his signature being different from the one made at the time of purchase. Plaintiff offered to write his name again the same as it was on the ticket, but the conductor refused. The conductor refused to return the ticket, and plaintiff was put off by the conductor on the next division. The additional expense caused was slight, and the jury was instructed that exemplary damages could not be given. *Held*, that a verdict of \$1,700 was so excessive as to indicate prejudice and bias.

Action by J. M. Zion against the Southern Pacific Company for damages. There was a judgment for plaintiff, and defendant moved for a new trial.

R. M. Clarke and Charles A. Jones, for plaintiff.  
J. L. Wines and W. E. F. Deal, for defendant.

**HAWLEY**, District Judge (orally). This action was brought by the plaintiff upon the 5th day of December, 1893, to recover damages alleged to have been sustained by reason of his having been wrongfully ejected from a passenger car on defendant's railroad at Reno, Nev., on April 3, 1893. The case was tried before a jury, and a verdict rendered in favor of plaintiff for \$1,700. Defendant moves for a new trial upon the ground that the verdict is so excessive as to indicate passion, prejudice, and bias upon the part of the jury.

The facts of the case are as follows:

The plaintiff is 46 years old, a married man, and resides in Indiana, and is engaged in farming and growing fruits. He had a contract with D. Appleton & Co., book publishers, for the sale of their Universal Geography at points west of the Rocky Mountains, and had been engaged in that business, off and on, for about 15 years. On the 18th day of October, 1892, he purchased a tourist ticket in Chicago to San Diego and return, for which he paid \$104, which ticket was good over the road of defendant from Ogden,

Utah, to Los Angeles, Cal., and return, subject to the following, among other, conditions:

"(5) It is not good for return passage unless the holder identifies himself as the original purchaser, to the satisfaction of the authorized agent at the return starting point on or before date of departure returning; and when officially signed, dated in ink, and duly stamped on back hereof by said agent, this ticket shall then be good only to date canceled in margin. [The time canceled in the margin had not expired.] (6) The holder will identify himself as the original purchaser of this ticket by writing his name, or by other means, if necessary, when required by conductors or agents."

The ticket, upon its face, contained a description of the passenger, as to sex, size, age, color of eyes, and character of beard, which, in all these particulars, answered the description of the plaintiff. The plaintiff traveled upon this ticket from Chicago to San Diego unmolested. Upon his return he complied with the fifth condition thereof. His signature on the ticket at the time of purchase at Chicago and upon his return at San Diego were substantially alike. He traveled upon his return on the defendant's road from Los Angeles to Lathrop. There he got a stop-over check; paid his fare from Lathrop to Berkley. The ticket entitled him to stop-over privileges. After remaining in that city for about one month he bought a ticket to Sacramento, and checked his trunk to Colfax. At Sacramento he presented his regular ticket on the main line of the defendant's road, over which he was entitled to ride. The conductor took off the coupon "Los Angeles to Ogden." After leaving Sacramento, plaintiff asked the conductor for a stop-over check at Colfax, as he wished to go to Nevada City, Cal. The conductor took his ticket, and he was asked to sign his name on the conductor's memorandum book, which he did. He signed his name with a different signature from the signature on the ticket. The plaintiff testified that when he signed his name at Chicago it was at a small window, with little space, and the initials "J. M. Z." were lettered, while in writing his name for the conductor he wrote the initials in the usual way. The conductor came back, and informed plaintiff that he could not issue a lay-over on that ticket. Plaintiff said: "Is that so? Why not? That is pretty rough on me." The conductor said, "It ain't the same name that is on the ticket." Plaintiff said: "Surely, you are mistaken. The name on the ticket is J. M. Zion, and my name is J. M. Zion, and I wrote my name on that piece of paper. Do you doubt it? There might be some difference in the style of the signature, but that is my name; and, if you will please hand me back my ticket, I will write my name the same as it is on the ticket. Then you can see whether it is my name or not." The conductor said, "No, you can't fool me that way." Plaintiff then said, "Probably you think I am lying about it, or forged it." The conductor replied, "It looks like it." This conversation occurred in the presence of several passengers. The conversation continued for some time. The conductor refused to return the coupon for Ogden, or to give a stop-over. When the train arrived at Colfax the conversation was renewed. Plaintiff got off the train with his valise and hatbox, and, at the request of the conductor,

wrote his name on loose slips of paper, two or three different ways, but none of the signatures bore a close resemblance to the signature on the ticket. There was considerable excitement. The bell was ringing, and passengers crowded around to see how the matter would terminate. The train commenced moving, and the conductor said, "They are just going to take water." Plaintiff hurried up, and succeeded in getting in the last coach. After the train left Colfax the conductor said to plaintiff:

"I have received a dispatch from Mr. Goodman, general passenger agent of the road, that, if I am satisfied you are a scalper, not to allow you to proceed. I will have to put you off unless you pay your fare."

Plaintiff declined to pay his fare, stating that he had paid it once, and explained to the conductor under what surroundings he had signed the ticket in Chicago. He told the conductor that he did not want any trouble, and asked him to give a receipt for the coupon from Los Angeles to Ogden, which he had taken up and refused to return, so that it could be shown to the next conductor. The conductor refused to give any receipt, or to give up the ticket. This request and refusal were repeated several times. At Truckee, which is the end of the division, a new conductor came on the train. Plaintiff handed him the remaining part of his ticket, reading from Ogden to Chicago. The conductor said: "There is no transportation on that over my division. You will have to pay your fare or get off." This conductor treated plaintiff considerably and fairly. After he had taken up the ticket, he approached plaintiff and said: "What is the trouble between you and the other conductor?" What occurred thereafter is testified to by plaintiff as follows:

"I told him what had passed, where I had been, when I left my home, in Berkley, and the trouble I had had with the conductor about the signature; told him I could satisfy him that I was J. M. Zion, and was willing to do anything reasonable. Then I showed him my hatbox,—I didn't think about it till afterwards,—that the name 'J. M. Zion' was on the bottom. I showed him that. I had told the former conductor that I had put all my papers in the trunk, but I thought I would look in my valise; and in the back part I found an old letter from D. Appleton, and a shipping receipt given by the express company, and \* \* \* a card addressed to 'J. M. Zion.' He wanted to know if there was anything else, so I took off my cuff, and showed the initials inside, 'J. M. Z.' I didn't want to get into any trouble, and said I was satisfied to do anything. I said: 'Are you not satisfied that I am J. M. Zion and entitled to ride on this train? Are you not absolutely positive that I am J. M. Zion?' He said: 'That is good evidence. I will telegraph back and find out.'"

Nothing more was said until the train arrived at Reno, when the conductor approached plaintiff, and said:

"Excuse me. I am very sorry to inform you that you will have to pay your fare, or get off the train. I don't want you to think I am acting on my own motion or judgment. I have received strict orders, and I will have to carry them out."

After further conversation the conductor took the plaintiff by the arm off the train, without using any force or violence. The plaintiff was detained in Reno two days, at an expense of \$7.50.

After getting his trunk, and receiving money in answer to a telegram for funds, he paid his fare to Ogden, \$29.50.

On the trial, defendant admitted that the ticket which the plaintiff had was a regular passenger ticket, which entitled him to the rights and privileges of a regular passenger upon its train between the points designated therein. It was also admitted that defendant and its agents had no right to expel plaintiff from the train, and that its act in so doing was wrong. No exceptions were taken to the charge of the court.

As to the measure of damages, the court charged the jury: "That under the pleadings and evidence in this case the plaintiff is entitled to recover as damages from the defendant the amount paid by him for the ticket from Reno to Ogden, \* \* \* and the amount of expenses necessarily incurred by reason of his delay at Reno. \* \* \* He is also entitled to recover reasonable compensatory damages for being wrongfully and unlawfully expelled from the train at Reno. In estimating that amount you should take into consideration all the facts and circumstances in connection with his expulsion from the train, \* \* \* whether any insults or indignities were at any time offered to him by the conductors or agents of the defendant, and all the facts and circumstances which occurred upon the train, and which led to his being expelled from the train." That exemplary, vindictive, or punitive damages could not be given. That the jury could only award such damages as would fully, fairly, and justly compensate plaintiff for the indignities or humiliation, if any, which he received, in addition to the actual expenses. The charge of the court is in substantial accord with the universal current of decisions upon the measure of damages in such cases. The mere fact that plaintiff was wrongfully and unlawfully expelled from the train authorized the jury to find, independent of any other proof upon the subject, that plaintiff had suffered feelings of humiliation, for which it should assess some damages; and if the expulsion is accompanied by insult, abuse, or undue violence, the jury is authorized to consider the injured feelings of the plaintiff, the indignities endured while a passenger on the train, the humiliation and wounded pride which one in his condition in life and standing in the community would naturally experience, and to award compensatory damages therefor. *Quigley v. Railroad Co.*, 11 Nev. 351, 367; *Gorman v. Southern Pac. Co.*, 97 Cal. 6, 31 Pac. 1112; *Railway Co. v. Fix*, 88 Ind. 381, 389; *McGinness v. Railway Co.*, 21 Mo. App. 399, 411; *Carsten v. Railroad Co.*, 44 Minn. 454, 47 N. W. 49; *Railway Co. v. Chisholm*, 79 Ill. 585; *Railroad Co. v. Connell*, 127 Ill. 419, 20 N. E. 89; *Paddock v. Railway Co.*, 37 Fed. 841; *Du Laurans v. Railroad Co.*, 15 Minn. 49, 58 (Gil. 29); *Railway Co. v. Rice*, 38 Kan. 398, 16 Pac. 817; *Lucas v. Railroad Co.*, 98 Mich. 4, 56 N. W. 1039; *Stutz v. Railway Co.*, 73 Wis. 147, 40 N. W. 653; *Boster v. Railway Co.*, 36 W. Va. 324, 15 S. E. 158; *Beach*, Ry. Law, § 891, and authorities there cited.

Under all the facts and circumstances of this case, was the jury justified in assessing the damages at \$1,700? Is the amount

awarded so excessive as to indicate passion, prejudice, or undue influence upon the part of the jury? With the exception of *Bass v. Railway Co.*, 42 Wis. 654, which was a case of extreme wrong, abuse, and violence, where the sum of \$2,500 was allowed to stand, under the peculiar circumstances of that case, my attention has not been called to any decided case where the appellate court has declined to interfere where the damages exceeded \$1,000, in cases at all analogous to the one in hand. An examination of the decided cases relative to the amount of damages rendered by juries for the wrongful expulsion of a passenger from a train for refusal to pay fare, when he has a ticket entitling him to ride, clearly shows that the verdict in this case is much greater than has been allowed to stand. Verdicts, in such cases, which have been sustained, as not excessive, range from \$50 to \$800. The following cases have been examined: (1) Where the judgment was less than \$500: *Railway Co. v. Howerton*, 127 Ind. 236, 26 N. E. 792; *Railway Co. v. McDonough*, 53 Ind. 290; *Railroad Co. v. Johnson*, 67 Ill. 312; *Railway Co. v. Wilkes*, 68 Tex. 619, 5 S. W. 491. (2) Where the judgment was \$500: *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 Pac. 1112; *McGinness v. Railway Co.*, 21 Mo. App. 399; *Railway Co. v. King*, 88 Ga. 443, 14 S. E. 708; *Du Laurans v. Railroad Co.*, 15 Minn. 51 (Gil. 29); *Boster v. Railway Co.*, 36 W. Va. 319, 15 S. E. 158. (3) Where the judgment was over \$500, and not exceeding \$800: *Railway Co. v. Myrtle*, 51 Ind. 566; *Railway Co. v. Fix*, 88 Ind. 382; *Railroad Co. v. Milligan*, 50 Ind. 393; *Graham v. Railroad Co.*, 66 Mo. 536. In the following cases judgments were held to be excessive: (1) For sums of \$500 and under: *Railroad Co. v. Cunningham*, 67 Ill. 316; *Huntsman v. Railway Co.*, 20 U. C. Q. B. 24; *Finch v. Railroad Co.*, 47 Minn. 36, 49 N. W. 329; *McLean v. Railway Co. (Minn.)* 52 N. W. 966. (2) For the sum of \$1,000: *Railroad Co. v. Parks*, 18 Ill. 460; *Railroad Co. v. Vanatta*, 21 Ill. 188; *Railroad Co. v. Peacock*, 48 Ill. 257; *Goins v. Railroad Co.*, 59 Ga. 426; *Railway Co. v. Chisholm*, 79 Ill. 585. (3) For sums above \$1,000: *Railroad Co. v. Slusser*, 19 Ohio St. 157; *Railroad Co. v. Griffin*, 68 Ill. 500; *Doran v. Ferry Co. (City Ct. Brook.)* 19 N. Y. Supp. 172; *Cunningham v. Power Co.*, 3 Wash. St. 472, 28 Pac. 745; *Palace-Car Co. v. Reed*, 75 Ill. 125; *Railroad Co. v. Weaver*, 16 Kan. 456; *Quigley v. Railroad Co.*, 11 Nev. 351.

In several of the cited cases the facts were entirely different from the case at bar. In some the plaintiff suffered no indignity or insult. In others the plaintiff was at fault, but greater force was used in expelling the plaintiff than was necessary. In a few cases the plaintiff was expelled at a place where there was no station, the conductor acting in violation of the laws of the state where such expulsion occurred. In others more or less actual violence was used. In all of these particulars the cases are not directly in point. But several of them are in many essential respects similar to the present case. In nearly all the cases where the courts declared the verdicts to be excessive a new trial was granted without any discussion as to what amount would be proper for the jury to award. In the very nature of the cases, it would

be impossible to state any general rule upon the subject, as each case would have to be decided upon its own peculiar facts and circumstances. It is well settled, however, that the court should never interfere upon the sole ground that the verdict is greater than the court would have given. It is the province of the jury to determine the amount. In assessing the damages in cases of this character, there is naturally a wide divergence of opinion among jurors. Some latitude must be allowed to the jury in fixing the amount upon a fair, just, and reasonable basis. Unless it is clearly shown, to the satisfaction of the court, that the jury, in the determination of the case, were influenced by passion, prejudice, or some improper motive, the court ought not to interfere; but where it is apparent that the jury were governed by such influences, or acted under a misapprehension of their duty or of the facts of the case, it is not only proper, but it is the duty of the court, to interfere. It is evident that the jurors in this case were not misled as to their duty in the premises. The court charged the jury to take into consideration the fact that the ticket constituted a contract between plaintiff and defendant; that by the terms of the ticket the plaintiff was required to identify himself as the original purchaser thereof, by writing his name, or by other means, when so required by the conductor or agents of the railroad; that the conductor had the right, and it was his duty, to require the plaintiff, if there were doubts as to his identity, to sign his name and make such other proof as was proper, in order to identify himself as the holder of the ticket; that they should consider whether the conductors, or either of them, exceeded their duty in this respect,—whether they offered any insults or indignities, or simply made the necessary inquiries; that the conductors, in acting upon appearances, were acting at the peril of the corporation, and that if it afterwards turned out, as it did in this case, that they acted upon an erroneous impression as to the facts, then, no matter how much they were mistaken, nor how honestly they may have acted under the belief that plaintiff had not paid for his ticket, nor how little force was used in ejecting plaintiff, the act was nevertheless unlawful and wrong, and for any injury which the plaintiff received he is entitled to full compensation and nothing more.

It was contended by defendant's counsel that no indignities, other than the mere fact of expelling plaintiff from the car, were shown by the evidence; that the remarks made by the first conductor, to the effect that it looked like the plaintiff was lying, or had forged the ticket, were provoked by the language and conduct of the plaintiff himself. The jury evidently did not accept this view. There was some slight conflict in the testimony, but the jury were fully justified in accepting the plaintiff's version as to what occurred. By referring to the testimony, it will be observed that the conductor was at fault. It was his duty to be courteous, polite, and civil. The plaintiff was explaining to him in a respectful manner that he was the original purchaser of the ticket; that his name was J. M. Zion; that his signature on the ticket was not signed in the usual manner owing to the fact that there was but

little space in the window of the office, and said to the conductor that if the ticket was given back to him he would write his name the same as it is written on the ticket, whereupon the conductor said, "No, you can't fool me that way." Here is a direct insinuation that plaintiff was not acting honestly; that he was trying to deceive the conductor; that he intended to fool him by imitating the signature. With such an insinuation, it was natural for the plaintiff to reply, "Probably you think I am lying about it, or forged it," and the thought of the conductor when he told the plaintiff, "You can't fool me," found expression in the answer, "It looks like it." The language of the conductor cast reflection upon the honor and integrity of the plaintiff, and must have been so considered by the other passengers who heard all the remarks. It is unnecessary to review the evidence as to what occurred at Colfax. As to everything that passed between the first conductor and the plaintiff, it may be conceded that the plaintiff was not entirely free from blame. It is perhaps true that if the plaintiff had not become excited, and had thought of his hatbox, with his name printed thereon, and the cuffs, with his initials, and had searched his valise for letters, and had exhibited all these proofs, the conductor would have been satisfied, and no further trouble would have occurred. But the plaintiff was not to blame for becoming excited. In *McGinness v. Railway Co.*, *supra*, the conductor, after taking the ticket from the passenger, told him that the ticket was forged or tampered with, and, if he did not alter it, somebody else did. The court said: "This was a most unmanly innuendo, wholly unwarranted by the circumstances, and grossly offensive and insulting to any gentleman of ordinary sensibility and pride." Any man of spirit would naturally become excited under such circumstances. To a man of ordinary sensibility and self-respect, it is always humiliating, in the presence of others, to be arraigned by a conductor about his right of passage. The indignity is much greater when statements affecting his honor, integrity, and truthfulness are directly or impliedly made. Moreover, the first conductor was at fault in refusing to return the coupon from "Los Angeles to Ogden," thus depriving the plaintiff from making satisfactory proof of his right to travel thereon. Under the rules of law heretofore announced, the defendant is responsible for the indignities offered by its agents to plaintiff while a passenger upon its train, as well as for the act of expulsion therefrom. The acts and conduct of the two conductors cannot be segregated, as was suggested by counsel for defendant, and the act of the second conductor, who expelled plaintiff from the train, alone be considered. All damage sustained by plaintiff as the direct and natural consequence of the fault of the first conductor in refusing to give plaintiff the coupon from "Los Angeles to Ogden," or a check as evidence thereof, was a proper matter for the consideration of the jury. *Yorton v. Railway Co.*, 62 Wis. 367, 21 N. W. 516, and 23 N. W. 401; 2 Sedg. Dam. § 865. Notwithstanding the fault of the first conductor in this respect, the second conductor ought not to have put the plaintiff

off, if the proofs offered to him were of such a character as to satisfy him that the plaintiff was entitled to ride. *Railway Co. v. King*, 88 Ga. 443, 14 S. E. 708.

But the question still remains as to whether or not the verdict for \$1,700 is excessive. The jury was especially admonished by the court that the damages must be confined to a reasonable compensation, and that nothing could be added as punitive damages, by way of punishment. It is impossible to reconcile the verdict with the charge. The jury must have been actuated to some extent, at least, by a bias or prejudice against the defendant. On no other theory can the amount of the verdict be explained. While the court is disposed to allow great latitude in the assessment of damages, in cases of this character, it is unwilling to give its sanction to any excessive verdict. As was said by the supreme court in *Railroad v. Parks*, 18 Ill. 460:

"We cannot hesitate to say that the damages allowed are grossly \* \* \* excessive. Although, in a case of this kind, this court will interfere with a verdict with great reluctance, yet we will not hesitate to do so where it is apparent at first blush that the jury have misapprehended the law of the case, or misunderstood the facts, or else have been influenced by their passions or their prejudices rather than the law and the facts. It is not the duty of courts to enforce the arbitrary edicts of juries, but it is their duty to firmly and fearlessly stand between the party and the jury whenever it is manifest that the party has been made a victim to their prejudices. In this class of cases great latitude should no doubt be allowed to juries in their estimate of the damages, but to this there must be a limit; and, should we refuse to interfere in this case, it would be equivalent to saying to juries, in all cases of this kind, 'We will shut our eyes to the facts of the case, and let you work your will with all parties placed in your hands. Now, do with them as you please. We will not interfere.'"

Juries must be made to understand that an excessive verdict is really prejudicial to the plaintiff in the action, resulting in delays and in new trials, involving unnecessary loss of time and additional and useless expense. In consideration of all the facts, after a thorough review of the authorities, it is ordered that the motion for a new trial be, and the same is hereby, granted, unless the plaintiff, within five days, remits the amount of damages in excess of \$850, and if the same is remitted the new trial will be denied.

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#### FINALYSON v. UTICA MINING & MILLING CO.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1895.)

No. 474.

##### 1. MASTER AND SERVANT—RULE OF SAFE PLACE.

The rule requiring a master to provide a reasonably safe place in which his servant may perform his service does not apply to cases in which the very work the servant is employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety, as the work progresses, but in such cases the servant assumes the risk of the dangerous place, and of the increase of danger caused by the work.

##### 2. SAME—FALL OF EARTH IN MINE.

In an action against a mining company for negligently causing the death of one F., it appeared that F., while at work in preparing a place to



set a timber to make a level in a mine safe for the workmen, had been killed by a fall of a mass of earth that was uncovered by a blast fired a short time before by a miner named A. After the blast A. worked with a pick for an hour to get this mass down, and was about to blast it down when the foreman came along, and A. told him that this was a treacherous chunk, and he replied that he could get it down, and took a pick and tried in vain to do so. The foreman then said that there was lots of time and that they would lose the smelting ore in sight if they blasted it down then, and both men went to work picking up and sacking ore alongside of the mass of earth, where, if it fell, it must strike them unless they could fortunately jump from under it. About twenty minutes after they commenced to pick up and sack the ore, F. came along to timber the level, and asked the foreman where he should cut the notch for the next stull, and the foreman pointed to a place lower than and a little to one side of the mass that fell. F. sat down directly under the mass of earth which fell, and commenced to drill the notch, and after he had drilled in the wall for about half an hour the mass fell and killed him and injured A. *Held*, that there was not sufficient evidence of negligence of the defendant to sustain a verdict for the plaintiff. Caldwell, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by Mary Finalyson against the Utica Mining & Milling Company to recover damages for causing the death of plaintiff's husband. The circuit court directed a verdict for the defendant. Plaintiff brings error.

On March 28, 1893, Daniel Finalyson, who was in the employment of the Utica Mining & Milling Company, a corporation, the defendant in error in this case, was so injured by the fall of a mass of sticky mud and other material weighing about 1,200 pounds, which composed a portion of a vein in the Utica mine and is called gouge, that he died. Mary Finalyson, the plaintiff in error, is the widow of Daniel, and she brought this action under the statutes of Colorado to recover damages for the alleged negligence of the company that she averred caused this death. The negligence she alleges in her petition is that the entry in the mine where Finalyson was at work was imperfectly constructed, unsafe, and defectively timbered; that it was the duty of the company to prepare a safely-timbered place, and to keep and maintain the entry in good repair and order, or the timbers thereof in such good repair and quantity as to protect the lives of Finalyson and his co-laborers, but that the company conducted itself so negligently in the procurement and erection of timbers to be used in said mine, and in the preparation of places where the miners were compelled to work, as to leave the place where Finalyson was to work in an unfit and dangerous condition; that the company knew of this condition, and that this negligence caused the injury. These allegations were denied by the answer.

The evidence disclosed the following facts: A level called the 400-foot level had been driven in this mine, and the miners were stoping the ore from the roof of this level. Holes were drilled and charged with explosives, which were fired, and in that way the ore bodies were shot down and fell into the level below, or upon a staging built over it. The original roof of this level was about seven feet above its floor, and when the miners had shot down the material as high as they could conveniently work from the level itself and the material that accumulated in it, they constructed of timbers a staging or second floor, about six feet above the bottom of the level, so that the men could work in the drift below this floor while those above it were stoping down the ore higher up in the vein. After ore bodies had been removed to a considerable height, the workmen erected at convenient distances upright posts at each end of a mudsill, which was laid across the floor of the level, placed a cap upon these posts, and then laid a flooring of light sticks of timber from cap to cap. The miners then worked in the drift below this flooring removing the material that had accumulated there, and passing to and fro, while those above it were taking out the ore bodies

from the vein above. This timbering had been completed along this level to within 25 feet of the place of the accident. From this point to a place within 8 feet of the place of the accident, stulls or heavy timbers, the ends of which rested in notches cut in the respective walls of the vein, had been placed across this level, and upon these the light sticks of timber had been placed to make the necessary flooring. Up to this point, 8 feet distant from the place of the accident, the ore bodies in the vein had been taken down to a height varying from 20 to 65 feet from the floor of the level. In this space of 8 feet the workmen were engaged in shooting down the ore from the original roof of the level, and putting in the timbering, working forward along this roof as fast as the ore bodies were removed to a height beyond their reach. Within this 8 feet the level below had become filled with materials that had fallen from above to a height of 6 feet, so that the workmen could stand upon this material to take out the ore bodies along the roof. One Reed was the superintendent of the company, and one Talbert was the underground foreman, who hired and discharged men, and told them when and where to work and what to do. In the forenoon of the day of the accident one Austin, a fellow servant of Finalyson, put a blast into the breast of this stoping just above the original roof of the level, and shot down a body of material. When he returned after dinner, he discovered for the first time that this blast had opened up on the foot wall of the vein, just where the roof had been, a mass of gouge 3 feet long, 2 feet wide, and 18 inches thick. This mass had not been visible until after the morning blast had been fired. Austin took his pick, and worked at it for nearly an hour, but could not get it down, and was about to get his drills and hammer to shoot it down, when the foreman, Talbert, came along, and Austin told him that this was a treacherous looking chunk. Talbert said: "You can get that down." Austin said he could not. Talbert then took a pick, and tried to get it down himself, but he could not. He then remarked: "There is lots of time; if we shoot that, we lose the smelting ore that is alongside of it." Thereupon both men went to work picking up and sacking the ore. They worked so close to this mass of gouge that if it fell it must inevitably fall upon their bodies, unless they fortunately jumped from under it, but Austin testified that he was not satisfied, and thought it might fall at any time. Finalyson had been at work in this mine for two years. He was employed in any work required to be done in the mine, but generally worked at timbering, because he was more apt than others at that work. About 20 minutes after Austin and Talbert had tried to get this gouge down, Finalyson came along, asked Talbert where he should cut the hitch or notch for the next stull so as to have it on a level with those already in place, and Talbert pointed to a place on the foot wall a little lower than, and a little to one side of, this gouge,—a place that was neither in nor under it. Finalyson then cleared away a place, and sat down with his back and shoulders against this chunk, and commenced to drill in the foot wall a place for the notch. After he had drilled away in this wall for half an hour the mass of gouge fell upon and injured him. Upon this state of facts the court below held that there was no evidence of negligence on the part of the company, directed a verdict in its favor, and entered judgment accordingly. This ruling is the error assigned.

H. B. Johnson, for plaintiff in error.

Willard Teller, Harper M. Orahood, and Edward B. Morgan, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts, delivered the opinion of the court.

In granting the motion of the mining company to direct a verdict in its favor, Judge Hallett, who tried this case in the court below, declared that it was immaterial in his opinion whether the foreman was or was not a vice principal of the company, and that if he had been its president there would have been no evidence of negligence in

this case that would warrant a verdict against the company. We have been forced to the conclusion that this ruling was right on two grounds: (1) Because the ordinary rule of "safe place" cannot be justly applied to this case; and (2) because there is no evidence in the case that would warrant a verdict that the company or the foreman was guilty of actionable negligence.

It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. *Railway Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, 10 U. S. App. 439. But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous, safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them. *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433; *City of Minneapolis v. Lundin*, 58 Fed. 525, 529, 7 C. C. A. 344, 19 U. S. App. 245; *Railway Co. v. Jackson*, 12 C. C. A. 507, 65 Fed. 48. In *Armour v. Hahn*, *supra*, the foreman of the carpenters at work upon a building in process of erection directed two of them to push a joist out to the end of timbers which rested upon and projected 16 inches beyond the wall of the building. One of the carpenters in obeying this order stepped on the projecting part of one of the timbers, which tipped up, and he fell, and was injured. Mr. Justice Gray, in delivering the opinion of the supreme court, said:

"There is no evidence tending to prove any negligence on the part of the firm of which the defendant was a member, or of their superintendent, or of the foreman of the gang of carpenters. The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows."

In *City of Minneapolis v. Lundin*, *supra*, a servant was hurt while at work in the construction of a sewer, because the place in which he was injured had been made dangerous by the prosecution of the work. This court declared that:

"The comparative safety of the place where each man worked was necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress."

And in *Railway Co. v. Jackson*, *supra*, a servant was employed by a railroad company to assist in taking up and removing a railroad

track in the night to save the railroad from the encroachments of a flood in a river. He was injured by the stumble and fall of a co-workman over some obstruction on the surface of the ground, as they, with others, were hurriedly carrying a rail away from the dismantled track. He complained that the company was negligent in furnishing a safe place, because it had not sufficiently lighted the place in which he was working, and had permitted the surface of the ground to be covered with unnecessary obstructions. But this court held that the doctrine of "safe place" had no application to this case, and declared that:

"It frequently happens that men are employed to tear down buildings or other structures, or to repair them after they have become insecure, or, it may be, that the work undertaken by the employé is of a kind that is calculated to render the premises or place of performance for the time being to some extent insecure. In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place where he is required to exercise his calling, and the doctrine above stated cannot be properly applied."

These cases warrant the instruction given by the court below. Austin and Finalyson were engaged in stoping out ore and timbering the space opened by the stoping. The blasting necessarily made the place opened by it insecure. There was constant danger of the fall of material loosened by the blast. The mass which fell was not visible or dangerous until the morning blast disclosed it. Not only this, but it was probably the very work of making this place safe, that Finalyson himself performed, that was the immediate cause of the accident. The gouge had resisted the efforts of workmen with picks, but it was doubtless loosened from its place by the jarring of the foot wall upon which it rested by Finalyson's drilling. It was not the negligence of the company or its foreman, but the necessary progress of this work, that made the place dangerous, and the dangers from the fall of these loosened materials, which some one must take in order that the timber should be placed in the mine at all, Finalyson voluntarily assumed when he entered upon this employment.

The case of *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, 70, cited by appellant, was not of this character. In that case a miner, who was working about a hundred yards from the place in which he was injured, went out through a passageway to get a car, and was injured by a rock which fell from the roof of the slope as he was passing under it. It was necessary for him to pass under this roof to get his cars and to go to and from his work. The railway company knew that this roof was composed of treacherous rock, and that it was a roof that might possibly fall and that needed watching. The only way such a roof could be properly tested was by sounding it with the hand or with a pick or cane, and there was no evidence that this roof had been so tested for weeks. Upon this state of facts this court held that there was some evidence of negligence on the part of the company, and applied to the case the rule of "safe place." But the roof which fell in that case had long been completed by the railway company, and was furnished to Jarvi as a safe cover for a way through which his duties required him to pass. He had no work to perform in making it safe, or in changing the character for safety in

which the company furnished and maintained it. On the other hand, in the case at bar Austin and Finalyson were engaged in removing ore from the breast of the stope, and in making the place from which it was removed safe for subsequent work. The very timbering upon which Finalyson was engaged was the work of making a place safe that was necessarily made dangerous by the progress of the work. The complaint in this case is that the master was negligent because it did not, before Finalyson commenced to timber, safely timber and make safe a place necessarily made dangerous by the progress of the work, which it had employed Finalyson himself and his fellow servants to make safe. In other words, the complaint is that the master was negligent because it did not render unnecessary the work it employed the servant to do, before he commenced to do it. The distinction between this and the Jarvi Case is marked and clear, and in our opinion it brings it squarely within the other class of cases to which we have already referred.

There is another reason why this case is not ruled by the Jarvi Case, and it is that this record discloses no evidence of negligence of the company or its foreman that would warrant a verdict. The negligence which charged the railway company in the Jarvi Case was its failure to inspect and sound with the hand or with a pick or cane the roof of a finished way through which its employes were constantly passing. There was no such negligence in the case at bar. Both the foreman and the man who was engaged in blasting tested with a pick the mass which fell upon Finalyson, and strove vigorously but in vain to bring it down, within an hour of the accident that befell him. It is only an injury that could have been foreseen and reasonably anticipated as the natural and probable result of an act of negligence that is actionable. *Railway Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949; *Railway Co. v. Kellogg*, 94 U. S. 469; *Hoag v. Railroad Co.*, 85 Pa. St. 293, 298, 299.

Who that had tried with a pick to break off from the foot wall and bring down this 1,200 pounds of earth, and had tried in vain, could have reasonably anticipated that it would fall of its own weight within an hour? It is true that one witness, Austin, says that he was not satisfied with the trial, and thought it might fall at any time, but he testifies that he did not after the trial make this statement to the foreman nor to Finalyson. The following is a portion of his cross-examination:

"Q. From the time you went there, one o'clock to two o'clock, what were you doing? A. I was picking down the shot. Q. Trying to get this mass down, and did not succeed? A. Yes; and Mr. Talbert. Q. How long did Mr. Talbert work at it trying to get it down? A. A minute or so. Q. And could he get it down? A. No, sir. Q. What did Mr. Talbert say about it, now? A. He says, 'There is lots of time; if we shoot that we lose this smelting ore that is alongside of it.' Q. What else? A. Then we started. Q. I mean is that all he said then? A. That is all he said then. Q. Didn't you and he discuss the question whether it was likely to fall or not? A. No, sir. Q. Nothing said about it? A. No, sir; not to my knowledge. Q. After you had tried it that way, you were both satisfied it was not likely to fall, was not you? A. No, sir; I was not satisfied, because I thought it might fall any time. Q. Did you think it was dangerous, and likely to fall then? A. Yes, sir; if I did not I would not want to put this hole in. Q. You went and sat right

down where it could fall on your body? A. Yes, sir; afterwards. Q. Although you thought at that time, it was liable to fall any time? A. I was not sitting. Q. You say there was not anything said between you it was not likely to fall after you tried it? A. No, sir; not to my knowledge. Q. You went and stood where it could fall on your body, and Talbert went and stood where it could fall on him, didn't he? A. Yes, sir."

Actions speak louder and more truthfully than words, and the acts of Austin and the foreman conclusively prove to our minds that they did not anticipate any such result as the fall of this mass of earth. They stationed themselves at work opposite and beneath it, so that if it fell it must strike their bodies, unless they could fortunately jump from under it. Finalyson evidently did not anticipate its fall. If he had, he would not have seated himself beneath it to drill a hole that was aside from it, and that he might have drilled as well from its opposite side, where the falling mass could not have struck him. After a careful perusal of all the evidence in this case, we are of the opinion that there is none here that would sustain a verdict that this company or the foreman was guilty of any negligence that a man of ordinary prudence could have reasonably anticipated would result in this injury. The judgment below is affirmed, with costs.

CALDWELL, Circuit Judge (dissenting). The majority opinion does not question the fact that Talbert, the foreman of the mine, was a vice principal of the mining company, and upon that question, therefore, there is no difference of opinion.

The first question to be decided is: What duty does a mining company owe its employes who are engaged in carrying on the work of mining, underground? This is not a new question in this court. In the case of *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, a miner was injured by the fall of a rock from the roof of the mine, and, in affirming judgment he had recovered for the injury he received, this court, in defining the duty of a mining company to its employes, said:

"It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employe may perform his service. It is his duty to use diligence to keep this place in a reasonably safe condition, so that his servant may not be exposed to unnecessary and unreasonable risks. The care and diligence required of the master is such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. It must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath overhanging masses of rock and earth in a mine than of him who places his employe on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and, throughout all the varied occupations of mankind, the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of the servant. For a failure to exercise this care, resulting in the injury of the employe, the employer is liable; and this duty and liability extend, not only to the unreasonable and unnecessary risks that are known to the employer, but to such as a reasonably prudent man in the exercise of ordinary diligence—diligence proportionate to the occasion—would have known and apprehended. *Cook v. Railroad Co.*, 34 Minn. 45, 24 N. W. 311; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Noyes v. Smith*, 28 Vt. 59; *Gibson v. Railroad*

Co., 46 Mo. 163; *Nadau v. Lumber Co.* (Wis.) 43 N. W. 1135, 1137; *Hutchinson v. Railroad Co.*, 5 Exch. 343; *Huddleston v. Machine Shop*, 106 Mass. 282; *Snow v. Railroad Co.*, 8 Allen, 441; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Ryan v. Fowler*, 24 N. Y. 410; *Patterson v. Railway Co.*, 76 Pa. St. 389; *Swoboda v. Ward*, 40 Mich. 420."

And after stating that it is the duty of the servant to exercise that degree of care which a reasonably prudent person would employ under like circumstances in order to protect himself from injury, the opinion proceeds:

"But the degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe if placed in the position of the master who furnishes it than if placed in that of the servant who occupies it. Of the master is required a care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the slopes through which and in which the servants work as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man, in the performance of his work as a miner, would have learned facts from which he would have apprehended danger to himself. *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *Hutchinson v. Railroad Co.*, 5 Exch. 343; *Gibson v. Railroad Co.*, 46 Mo. 163; *Cook v. Railroad Co.*, 34 Minn. 47, 24 N. W. 311."

The sound doctrine on this subject is comprehensively and forcibly stated by Mr. Justice Field in delivering the unanimous judgment of the supreme court in the recent case of *Mather v. Rillston*, 15 Sup. Ct. 464. That was an action to recover damages for injuries sustained by the plaintiff from the explosion of powder and caps in an iron mine at Ironwood in Michigan, stored in a room in which the plaintiff was working. Expressing the duties and obligations that mine owners owed their employés, the court said:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof, and the employers of others thereon, to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution; and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such

dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced."

The doctrine that a mining company can send its employes into the bowels of the earth to conduct its mining operations without making any provision for the proper supervision and inspection of the mine for the security and protection of the miners and the mine is unsupported by authority, is opposed to sound public policy, and is cruel and inhuman. Miners do undoubtedly take upon themselves all the usual and ordinary risks of the business; but what are these ordinary risks? They are the risks incident to the business when it is conducted by the mine owner according to the customary and approved methods and with due regard to the safety of the miners. The neglect of the mine owner to discharge his duty in this regard is not one of the risks assumed by the miner, but is a negligent act on the part of the mine owner which renders him liable in damages to any miner injured thereby. It is the duty of the mine owner to provide a competent foreman or inspector to superintend the working of the mine; it is the duty of this foreman to direct the miners when and where to work; and it is particularly his duty to make timely inspection of the timbers and walls and roof of the mine in order that no harm may come to the miners from causes which a capable and diligent inspector would discover, and, when discovered, remove or cause to be removed. Where blasts are used in a mine, it is the imperative duty of the foreman to be diligent in discovering the effect of the blast upon the timbers, walls, and roof of the mine, and to point out to the miners any dangerous conditions resulting from the blast, and to cause these conditions to be removed without delay, by proper appliances and with as little danger to the men as practicable. Mining is a necessary and permanent business, and must be conducted in an intelligent, orderly, and systematic manner, not alone for the protection of the miners, but for the preservation of the mine itself. For these reasons, the business must have an intelligent and competent head. The necessity for this is imperative. When properly conducted, there is no pursuit in the country carried on with greater regularity, system, and order, and with a stricter observance of rules intended to se-



cure employes against accidents and property from loss or damage. The conditions confronting the miners from day to day, as a rule, are neither unexpected nor unusual. They are the common and expected incidents of mining, and when the foreman does his duty they are provided for and met without accident or any special danger. There is nothing hasty or haphazard about the business. In the *Encyclopedia Britannica* (9th Ed.) tit. "Mining," it is said:

"In spite, however, of all the dangers to which miners are exposed, they are less likely to be the victims of accident than railway servants, among whom the rate of fatal accidents varies from 2.5 per 1,000 on passenger traffic lines, to 3.5 per 1,000 on lines possessing a heavy goods traffic."

The error of the majority of the court in likening the customary work in a mine to the sudden calling out of men to work after night on the brink of a rapidly rising river, whose bank is caving, to save property from destruction by the flood (*Railway Co. v. Jackson*, 12 C. C. A. 507, 65 Fed. 48), and other like cases, is too obvious to require discussion. Upon the law applicable to this case the majority opinion is in direct and palpable conflict with the opinion of this court in the case of *Railway Co. v. Jarvi*, supra, and of the supreme court in the case of *Mather v. Rillston*, supra, both of which were mining cases, and which lay down the rules applicable to the case at bar. In the case of *Railway Co. v. Jarvi*, supra, the plaintiff was injured by the fall of a rock from the roof of a mine, and this court held it was a question for the jury to determine whether the company was negligent in not discovering by timely inspection the dangerous character of this rock, and removing same, and the jury found a verdict for the plaintiff, and this court refused to disturb that verdict.

The facts of this case disclosed by the record, and material to its decision, are not very voluminous, and the material parts of the testimony will be fully set out in the very language of the only witness who was called to testify to the transaction. This is rendered necessary to correct what I conceive to be a total misconception of the facts in the opinion of the majority of the court. At the time and place of the accident there were present only three persons, namely: Finalyson, who was fatally injured by the accident, the miner Austin, and the defendant's foreman, John Talbert. Finalyson's voice is hushed in death, and the defendant declined to put its foreman on the stand, so that on the question of the defendant's negligence, the case rests solely on the testimony of the witness Austin and the attendant circumstances. In his examination in chief Austin testifies as follows:

"Q. You may state what you were doing in that level just the day of the accident. A. Well, in the forenoon I was drilling a hole, and shot it at dinner time. After I come back after dinner, it opened up some gouge. That left it on the footwall, and it remained there that I could not pull it down. Mr. Talbert came along after I had just all my stuff, the quartz, picked down, he come along. I was just about going to get my drills and hammer for to put in a hole in this gouge, when he come along. I says to him, 'That is a treacherous looking chunk, Jack.' John was his name. And I was going to put the hole in, and he says, 'You get that down.' I told him— Took the pick, tried it; could not get it down. Well, he says, if we would shoot this down, we would lose this smelting ore; that was

above it. I said no more. So within about twenty minutes, I judge, Mr. Finalyson came along, and he says, 'John, where am I going to cut this hitch, set it along, so as to leave those stulls level with the rest of the level?' and he says, finally, 'On the footwall, just about there.' Mr. Finalyson went to work, and he scraped down off of this pile of dirt I had shot down, and he made a kind of a seat for himself so as to sit down to cut this hitch. He was working there, and I was sacking up ore, and Mr. Talbert was standing in between the two of us. I was sitting down, and Mr. Finalyson was sitting down, and Mr. Talbert was standing up in between us, pulling the chunks of ore in with his candlestick. I was sitting down at the time the chunk fell on Mr. Finalyson,—the body of it,—and one end of it fell on my knee; hurt me three or four days. The other end he got most of the weight. He got it all; bruised him right down on his knees; and Mr. Finalyson, all he said was, 'Take me out of here.' He says, 'I am killed.' Q. Who is this Mr. Talbert, or Jack, you refer to? A. That is the foreman,—underground foreman. Q. How long had Finalyson been at the point where the fall occurred before the gouge fell? A. He was about half an hour,—twenty minutes,—when the chunk fell on his back. Q. When you spoke of putting in a hole there— In the first place, what do you put a hole in for? A. I put it in to take this chunk down. Q. What is the practical use of this hole? What is it for? A. To shoot; in order to take this chunk down, to make himself safe. Q. You put in powder in the hole, is that the idea? A. Yes, sir; after I get it drilled. Q. Why did you want to put in this hole in this particular place? A. Because it was a chunk of gouge on the footwall. A chunk of gouge, as I was standing on this below, might catch my feet, and as it was liable to smash my legs from my knees down. I thought it might let go, and roll on to my limbs, and break them. Q. At what time would you say that day had this gouge been disclosed; what hour of the day had this gouge shown up? A. Well, it showed up— I shot at dinner, and tallied, as we all do; and after dinner I came down, and this gouge was shown up on the footwall. I picked all down but this gouge that was on the footwall. I could not get it down with a pick. I was going to shoot it down. Q. And when did you call Mr. Talbert's attention to it? A. I would judge it would be about two o'clock, as near as I can judge. Q. What was this gouge? A. Well, it was part of the vein filling. Q. What was it composed of? A. It was composed of soft, sticky mud, and little bits of quartz, and in among it, mixed in among it, they claim it was good mill ore. Q. Why didn't he (Finalyson) jump out of the way? A. He had his back to it; he didn't see it come until it fell on him. Q. Was it necessary for him, in order to cut that hitch? A. He had either to sit down or kneel; he could not stand up. Q. What was the purpose of cutting that hitch? A. For to put in the stull for to lag over; so as to lag the drift over. Q. What do you mean by lagging over? A. I mean for to cover the drift closed in. Q. Why did they want to lag it over? A. For to make it safe for men to come along in the drift. Q. I will ask you then what he said, if you recall,—what Talbert said to Finalyson when he came there. A. The words he said—Mr. Finalyson says to Mr. Talbert, 'Where do you want that hitch cut?' Mr. Talbert sighted along from the rest of the stulls, so as to get a level for to have this stull level with the rest of the stulls that he had put in. He showed him the spot on the footwall, where he had to cut this hitch. That left Mr. Finalyson with his back against this chunk. Q. I understood you to say that he showed him the spot to cut this hitch? A. Yes, sir." On the cross-examination he testified as follows: "Q. And when you went back at noon after firing out the shot, you observed this gouge, as you called it, of clay? A. Yes, sir. Q. Was it clay or ore, or clay mixed with ore? A. It was part of the vein. Q. Part of the vein? A. Yes, sir. Q. When you came back there did you examine to see what the effect of that shot was? A. Yes, sir. Q. What did you observe in respect to that gouge? A. I observed that it was a chunk that might drop away from the rest of the body of ore, any minute, and fall on the— Q. What did you do in respect to it? A. I was going to put in a hole only for Mr. Talbert coming along. Q. I asked you if you did anything in respect to it? A. I tried to take it down, and I could not. Q. What did you try to take it down with? A. A pick. Q. It would not

come down? A. No, sir. Q. Did you observe any seams in it? A. I did not, any more than it was a heavy chunk; it might let go any minute. Q. Your idea being of the chunk that it might let go any minute, you were going to shoot it down? A. Yes, sir. Q. Who came there first, Mr. Finalyson or Talbert? A. Mr. Talbert. Q. What did you say to him, and what did he say to you? A. I says to Mr. Talbert, 'That is a treacherous looking chunk, and I was thinking about putting a hole to shoot it down'; showed him where I put the hole. Q. What did Mr. Talbert say in reply? A. He says, 'You can get that down.' I told him I could not, and he tried. 'Well,' he says, and he tried it; he could not get it down. Q. Did he try it? A. He tried it. Q. How did he try it? A. Tried it with a pick. Q. Did he try it with anything else? A. No, sir. Q. How long did he work at it to get it down? How long did you work at it? A. I worked quite a little while; got a bit of the corner off myself. Mr. Talbert had not tried very long. He says to me then, 'There is lots of time.' Q. How long did Mr. Talbert work at it trying to get it down? A. A minute or so. Q. And could not get it down? A. No, sir. Q. What did Mr. Talbert say about it now? A. He says, 'There is lots of time; if we shoot that, we lose this smelting ore that is alongside of it.' Q. After you had tried in that way, you were both satisfied it was not likely to fall, was not you? A. No, sir; I was not satisfied, because I thought it might fall any time. Q. Did you think it was dangerous and likely to fall then? A. Yes, sir; if I did not, I would not want to put this hole in. Q. Finalyson went and sat down? A. Finalyson didn't try it at all, to my knowledge. Q. How long had he been at work when he was hurt? A. You mean right there? Q. Yes. A. About half an hour. Q. Where was Mr. Talbert all the time? A. Standing right beside of us. Q. Did he stay there the half hour while he was at work? A. Yes, sir. Q. Do you know whether Mr. Finalyson examined for himself that chunk before he commenced to work? A. No, sir. Q. Do you know whether he and Mr. Talbert discussed the question of the safety before he commenced to work? A. I don't think they did. Q. I didn't ask you what you thought; I asked you whether you knew whether they did or not? A. I didn't hear it."

It will be observed that the witness testifies positively, and repeats the statement three different times, that he told the foreman that this gouge was a dangerous chunk, and likely to fall at any time, and should be taken down, and wanted to shoot it down, and would have done so but for the foreman's interference and orders. The witness says, "I says to him, 'that's a treacherous looking chunk.'" Again he says, "I called Mr. Talbert's attention to it about two o'clock, as near as I can judge"; and a third time he says, "I says to Mr. Talbert, 'That's a treacherous looking chunk, and I was thinking about putting a hole to shoot it down.'" In the light of this testimony, it is not perceived where the majority of the court finds any sanction for the statement that, while Austin testified he thought the gouge "might fall at any time," "he testifies that he did not at the time make this statement to the foreman." That is precisely what he did do, and he testifies to the fact three times over. He did not make the statement to Finalyson because he came up after Austin and the foreman had their conversation on the subject. It is established by the testimony of an unimpeached witness that this gouge was a treacherous looking chunk, and likely to fall any minute; that this fact was communicated to the foreman; and we have, in addition, the indisputable fact that it did fall in a few minutes. The summary and extraordinary way in which the majority of the court seek to avoid the force and effect of Austin's testimony is without precedent in an appellate court: "Actions," say the majority of the

court, "speak louder and more truthfully than words, and the actions of Austin and the foreman conclusively prove to our minds that they did not anticipate any such result as the fall of this mass of earth." From the beginning to the end of his testimony, the witness Austin testifies with the utmost fairness and candor, and the assault of the majority of the court on his veracity is without any grounds whatever to support it. But, if one thing is better settled than another in our system of jurisprudence, it is that the jury, and not the judge, are the exclusive judges of the credibility of the witnesses. Another rule equally well settled is that a court cannot withdraw a case from the consideration of the jury if, by giving full faith and credit to the plaintiff's testimony, it fairly tends to support his cause of action. Never before in the history of jurisprudence in this country has an appellate court refused to give effect to these two fundamental rules, when the question was whether the cause should be withdrawn from the consideration of the jury. But the statement of the opinion is as false in logic as it is unsound in law. The indifference of a master to his own safety gives him no right to negligently endanger the lives of his servants. If, therefore, the foreman did negligently place himself in a position of danger, that was no excuse or justification for negligently placing Finalyson in a like position of danger. Finalyson not having heard the conversation between Austin and Talbert, and not knowing the danger, was put to work by Talbert in a position where he must inevitably be crushed, if the "treacherous chunk" fell; but Austin and Talbert took care to occupy positions where, if it did fall, they could escape from injury, as they did, Austin escaping with a slight bruise on his knee, and Talbert without a scratch. It is manifest from the evidence that, if the foreman had exhibited the same regard for the safety of Finalyson that he did for himself, Finalyson would not have been injured. If it be true, as asserted by the majority of the court and the defendant company, that the foreman "did not anticipate any such result," why was he not called as a witness to testify to that fact? The fact that he was not called justifies the presumption that, if he had been, his testimony would not have supported the present contention of the majority of the court and the defendant, but would have corroborated the plaintiff's witness, Austin. *Railway Co. v. Ellis*, 4 C. C. A. 454, 54 Fed. 481; 1 Starkie, Ev. 54; *Com. v. Webster*, 5 Cush. 295, 316; *People v. McWhorter*, 4 Barb. 438.

The majority of the court deny that it is a question of fact for the jury, and lay it down as a rule of law that the foreman of a mine, having knowledge of a gouge or threatening mass protruding from the wall of a mine, brought out by a blast, is not required to resort to any other tool or agency than a "pick" to dislodge such threatening mass, and that, if it cannot be dislodged with a pick, then he is not guilty of any negligence by suffering it to remain at a place where the miners are liable to be injured or killed by its fall. Fortunately for humanity and for miners, this rule of the majority of the court will not be observed by any prudent foreman. A pick is but one, and the least, and most inefficient, of the many agencies and instruments that may be brought into requisition on such occasions. En-

cyclopedia Britannica (9th Ed.) tit. "Mining." When the foreman's attention was called to this "treacherous chunk" on the wall, it was therefore plainly his duty to use reasonable care and diligence to remove it before setting men to do other work in its vicinity, and who would be injured by its fall. Whether he did exercise such care was a question of fact for the jury to determine. It is said in the majority opinion that he tested it with a pick, and it did not fall. When the pick proved insufficient to remove this treacherous mass, then it became his duty to shoot it down, as Austin was preparing to do when he stopped him, or to resort to some other adequate means for the purpose. He contemplated removing it some time, for, when urged by Austin to shoot it down then, he replied, "There is lots of time; if we shoot that we lose the smelting ore that is alongside of it"; but the trifling amount of ore was not saved, and Finalyson's life was sacrificed. It is said in the majority opinion that "the complaint in this case is that the master was negligent because it did not, before Finalyson commenced to timber, safely timber and make safe a place necessarily made dangerous by the progress of the work which it had employed Finalyson himself and his fellow servants to make safe." This is a cogent statement of a purely imaginative case. It certainly is not a statement of what the plaintiff claims or what the proof establishes. What the plaintiff claims is that it was the foreman's duty, after the explosion of the blast, to ascertain, by an intelligent and careful inspection, the condition of the walls and roof of the mine where the explosion took place, and to "shoot down" or otherwise remove any gouges or lumps on the walls or roof brought into view by the explosion, which were likely to fall and injure the miners; that this treacherous looking lump was brought into view by the explosion; that the foreman saw it, and his attention was specially called to its dangerous character by Austin, who would have shot it down but for the foreman's interference. Upon these indisputable facts, the plaintiff's claim is that a reasonably careful and prudent foreman would have caused this dangerous gouge to be removed before putting Finalyson, who was ignorant of the danger, at other work near enough to the gouge to be injured by its fall. No one was working to get this gouge down at the time it fell, nor preparing to guard against danger from it by timbering or otherwise, for the foreman intended to take it down when he got ready. All efforts to get it down for the time being had been stopped by the direction of the foreman who set Finalyson at his accustomed work of timbering the mine and Austin to picking up and sacking ore. The work Finalyson was doing had no relation whatever to the gouge, which the foreman had simply postponed taking down until the ore was picked up. If Finalyson had been injured in the act of removing or assisting in removing the gouge itself, the case would have presented an entirely different question. But no one would have been injured in the work of removing the gouge, because the testimony shows conclusively that it could have been shot down with perfect ease and safety and without danger to any one. Lumps of the character of that which killed Finalyson are always removed before the timbering or other work begins, and that is what the foreman contemplated doing a little later.

Further consideration of the evidence is unnecessary. Enough has been disclosed to show without doubt that the lower court should have submitted the question of negligence to the jury. The question of negligence is one of fact, and must be referred to the jury for determination. It would be profitless to cite authorities on this point. It is enough to refer to two or three judgments of the supreme court of the United States. In the case of *Railroad Co. v. Stout*, 17 Wall. 657, the court said:

"\* \* \* Although the facts are undisputed, it is for the jury, and not for the judges, to determine whether proper care was given, or whether they establish negligence."

In the case of *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118, the circuit court instructed the jury to render a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, but the supreme court reversed the judgment. The court, speaking by Mr. Justice Miller, said:

"But we think these questions (of negligence) are for the jury to determine. We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as this as well as others. \* \* \* Instead of the course here pursued, a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In the case of *Railway Co. v. Ives*, 144 U. S. 409, 417, 12 Sup. Ct. 679, the court said:

"It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court."

See *Railroad Co. v. Foley*, 3 C. C. A. 589, 53 Fed. 459.

On the question of the defendant's negligence the opinion of a majority of the court does not, in my judgment, express the conclusion "all reasonable men," or any considerable number of such men, would draw from the evidence in the case. The question is one of fact, which neither the majority nor the minority of this court is empowered to decide. The constitutional mode of ascertaining the sense of reasonable men on disputed questions of fact in common-law actions is by the verdict of 12 jurymen, and not by the opinions of the judges. In their deliberations the jury exercise their common sense, and bring to the solution of the questions submitted to them their practical experience and knowledge of human affairs which afford a much better guaranty of a sound conclusion than the technical, subtle, and hair-splitting methods, that not unfrequently creep into the administration of the law by the judges. It was because the people knew the judges were poor judges of the facts that they committed their decision to a jury, and every day's experience confirms the wisdom of their action. The plaintiff has a constitutional right to have the facts of her case tried by a jury. The judgment of the circuit court should be reversed, and the cause remanded, with directions to grant a new trial.

**CONDHAN v. CHICAGO, M. & ST. P. RY. CO.**

(Circuit Court of Appeals, Eighth Circuit. April 1, 1895.)

No. 487.

**1. RAILROADS—FRAUDULENT EVASION OF FARE—IOWA STATUTE.**

One who fraudulently evades the payment of his fare upon a railway train is not a passenger, and the railway company owes him no duty, except to abstain from willful or reckless injury to him; and this rule is not abrogated by the Iowa statute (McClain's Ann. Code, § 2002) providing that railway companies shall be liable for damages sustained by "any person" through negligence of its agents.

**2. PRACTICE—APPEAL—MOTION FOR NEW TRIAL.**

The overruling of a motion for a new trial cannot be assigned for error. Nor does the making and overruling of such a motion serve to bring before the appellate court any of the grounds assigned for a new trial not otherwise properly saved and assigned as errors.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action by Margaret Condhan, as administratrix of Henry Condhan, deceased, against the Chicago, Milwaukee & St. Paul Railway Company to recover damages for the death of the intestate. In the circuit court judgment was rendered for the defendant. Plaintiff brings error.

John Shortley and James G. Day, for plaintiff in error.

Charles B. Keeler, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**CALDWELL, Circuit Judge.** The case is stated by Judge Shiras, who tried it in the circuit court, in his charge to the jury as follows:

"In the case now on trial before you it appears from the undisputed evidence in the case that on the evening of June 16, 1891, a passenger train on the defendant's line of railway was derailed at or near a bridge crossing the Coon river, not far from the town of Coon Rapids, in this state; that Henry Condhan was on the train when it was derailed, and was instantly killed; that the plaintiff is the administratrix of his estate, and that she brings this suit to recover the damages caused to the estate of Henry Condhan by his death, claiming that the said Henry Condhan was a passenger on defendant's train, and that the derailment of the train, and consequent death of said Henry Condhan, was caused by the negligence of the railway company. On part of the defendant it is denied that said Henry Condhan was a passenger on the train at the time of the accident, or that the accident was due to negligence in any particular on the part of the company. Under the issues thus presented, the question you are to consider and determine is that touching the relation existing between the railway company and the deceased at the time the accident happened. It is not questioned that he was upon the train, but the point in dispute is whether he occupied the relation of a passenger to the company, so as to impose upon the latter the duties and obligations resting upon a carrier of passengers, and which I have already defined to you. On part of the plaintiff it is claimed that the deceased was in fact a passenger, whether he had paid his fare or not, and upon the part of the defendant it is claimed that the conductor permitted him to remain upon the train without paying his fare, in consequence of the statements made by the deceased; that these statements were untrue; that thereby a fraud was committed by the deceased upon the company, and that the deceased could not, by fraudulent mis-

statements, obtain a free ride upon defendant's train, and then hold the company responsible to him the same as though he was a passenger paying fare. If the deceased in fact had money with him, with which he could have paid his fare, but, instead of paying the same, he intentionally misstated his situation to the conductor, and by false representation induced the latter to allow him to remain on the train, then it could not be said that he was rightfully upon the train, but he would be there in fraud of the rights of the company, and the legal relation of carrier and passenger would not in such case exist between him and the company. The company would then owe him no other duty than not to willfully or recklessly injure him, and, as there is no evidence in this case which would justify you in holding that the accident and consequent death of Henry Condhan was due to recklessness or willfulness on part of the company, it follows that in case you find that said Condhan fraudulently misstated the facts of his situation to the conductor, and as a consequence was allowed to remain on the train without paying his fare, then your verdict must be for the defendant. On the other hand, if the deceased had in fact paid his fare, or if, being without means, he fairly stated his condition and situation to the conductor, and the latter, in consideration of the statements made him, permitted Condhan to remain on the train, then the relation existing between Condhan and the company would be that of passenger and carrier."

The only assignments of error which this court can notice are those which challenge the soundness of this charge. The overruling of the motion for a new trial cannot be assigned for error. Nor does the making and overruling of such a motion serve to bring to the attention of this court any of the grounds assigned for a new trial not otherwise properly saved and assigned as errors.

The rule is well settled that where one gets on a passenger train with the deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on the train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to the conductor that he is without means to pay his fare, and by means of such false representations induces the conductor to permit him to remain on the train without paying his fare, the relation of carrier and passenger and the obligations resulting from that relation are not thereby established between him and the company, and the company owes him no other duty than not to willfully or recklessly injure him. *Railway Co. v. Brooks*, 81 Ill. 250; *Railroad Co. v. Michie*, 83 Ill. 431; *Railway Co. v. Beggs*, 85 Ill. 84; *Railroad Co. v. Mehlsack*, 131 Ill. 64, 22 N. E. 812; *McVeety v. Railway Co.*, 45 Minn. 269, 47 N. W. 809; *Robertson v. Railway Co.*, 22 Barb. 91; *Railway Co. v. Nichols*, 8 Kan. 505; *Prince v. Railroad Co.*, 64 Tex. 146; *Railway Co. v. Campbell*, 76 Tex. 175, 13 S. W. 19; *Way v. Railway Co.*, 64 Iowa, 48, 19 N. W. 528; *Id.*, 73 Iowa, 463, 35 N. W. 525. The law will do nothing to stimulate and encourage fraud and dishonesty, and that would be the effect of holding that a railroad company owed to one riding on its train under the conditions named the duties and obligations it owes to a passenger who has honestly paid his fare. Railroad companies are as much entitled to protection against fraud as natural persons. It is a matter of common knowledge, of which the court will take judicial notice, and of which the public are bound to take notice, that railroad passenger trains are operated to carry passengers for hire. They are not eleemosynary agencies. It is equally well known that the authority of a railroad conductor does not extend to the carrying of passengers without the payment of



the regular fare. But, if he had such authority, his assent obtained by the fraudulent means mentioned would confer no rights. One riding on a train by fraud or stealth, without the payment of fare, takes upon himself all the risk of the ride, and if injured by an accident happening to the train, not due to recklessness or willfulness on the part of the company, he cannot recover. It is contended by counsel for the plaintiff in error that this rule has been modified or abrogated by section 2002 of McClain's Annotated Code of Iowa, which reads as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

We have examined the Iowa cases to which we were cited by counsel (*Rose v. Railroad Co.*, 39 Iowa, 246; *Way v. Railway Co.*, 64 Iowa, 48, 19 N. W. 828; *Id.*, 73 Iowa, 463, 35 N. W. 525); and, also, the cases of *McAllister v. Railway Co.*, 64 Iowa, 395, 20 N. W. 488; *Masser v. Railroad Co.*, 68 Iowa, 602, 27 N. W. 776; and *Richards v. Railway Co.*, 81 Iowa, 426, 47 N. W. 63,—and, without going into an extended statement or analysis of these cases, we will say that we think they establish the doctrine that this statute has made no modification of the rule as we have stated it, and as it was given to the jury by the learned judge who tried the case in the circuit court. The judgment of the circuit court is affirmed.

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TEXAS & P. RY. CO. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1895.)

No. 264.

1. NEGLIGENCE—RISKS OF EMPLOYMENT.

S. was a civil engineer, in the employ of defendant railway company, charged with the duty of looking after the buildings and maintenance of bridges, trestles, etc. While traveling on the road, S. was killed in an accident, caused by the collapse of a burning bridge, at a part of the track where no track walker or watchman was employed. *Held*, that S. assumed the risk arising from the absence of watchmen, and that there could be no recovery by his representatives for his death. Toulmin, District Judge, dissenting.

2. SAME—CONTRIBUTORY NEGLIGENCE.

It seems that S., having been particularly charged with the care of bridges, was guilty of contributory negligence in failing to provide a sufficient watch at the point where the accident occurred. Toulmin, District Judge, dissenting.

3. MASTER AND SERVANT—DUTY OF MASTER.

It seems that it is error to charge a jury that a master contracts not to expose his servant to other and greater risks than those necessarily incident to his employment, the true rule being that the servant assumes all ordinary risks. Per Toulmin, District Judge.

**4 SAME—RAILROAD COMPANIES.**

It seems that it is error to charge a jury, without qualification, that a railroad company is bound to furnish its employes safe cars and a safe track. Per Toulmin, District Judge.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

W. W. Howe and S. S. Prentiss, for plaintiff in error.

B. F. Jonas and J. H. Hall, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE and TOULMIN, District Judges.

BRUCE, District Judge. This suit was brought in the court below by Mrs. Gessner T. Smith, widow of the late Paoli A. Smith, suing in her own behalf and also as guardian and in behalf of her minor child, Paoli Smith, to recover damages from the Texas & Pacific Railway Company for the death of her husband. Paoli A. Smith was at the time of his death, and for some time preceding had been, resident engineer for the Texas & Pacific Railway Company, residing at Marshall, Tex., and on the 30th day of January, 1892, he started on a passenger train of the railroad company from Marshall, Tex., to New Orleans, under orders from his company, for duty in his position as engineer. On the trip, at a point on the road near the village of Robeline, in Louisiana, on the 30th day of January, 1892, the train on which he was traveling ran upon a burning bridge, which gave way, and precipitated the train to the ground below. The car on which he was traveling was telescoped with another car of the same train, and his leg was caught between the two cars and the broken timbers, and crushed and mangled. The car took fire, and he was dragged violently from under the timbers, to save him from being burned to death, and in consequence of which injury it was found necessary to amputate his leg above the knee, and from the injuries received he died February 7, 1892. The petition in the court below charged negligence upon the company, its officers and employes, and specifies the following:

"Petitioner alleges that there was no guard or watchman at said burning bridge, as there should have been; that it had been burning for hours, and, as petitioner believes, and expects to prove, was fired by sparks from the engine of another train of the said company, which passed some hours before; and petitioner alleges that there were no track walkers or watchers upon said railway at or in the vicinity of said bridge, or on said section of said railway, and none of the vigilance, watchfulness, or care was exercised by said company, its officers, agents, or employes, such as is required by law and custom for the protection of the lives and safety of railway passengers, and through the proper presence and exercise of which the said accident could and would have been averted."

To this the defendant company, plaintiff in error, answered by a general denial, and, further answering, respondent avers that, even if said deceased was injured through any fault, negligence, or want of care on the part of respondent, its officers, agents, or employes, or those for whom it was responsible (all of which is denied), yet,

even in such case, plaintiff cannot recover, because said deceased, Paoli A. Smith, was careless and negligent in said premises, and by his fault and negligence contributed to the accident complained of, and the results; that just before the said accident, he, said Smith, negligently and without necessity left the car, and, while the train was in motion, went out on the platform between two cars,—a place which was dangerous, and where he had no right to be; and he, said Smith, was injured because he was on said platform, as aforesaid, and he would not have been injured had he remained in the car; and said Smith in other ways contributed, by his fault and negligence, to said accident and its results. Or, respondent avers, said accident and its results were caused by the fault and negligence of fellow servants of said P. A. Smith, engaged in a common employment. Respondent further avers that said Paoli A. Smith was not a passenger on said train, but was traveling on a pass, under which he assumed all risks of accident and damages to his person or property, whether caused by the negligence of the railway company, its agents or servants, or otherwise. Respondent further avers that said P. A. Smith assumed all risks of his employment; and further shows that at the time of said accident, and for some time prior thereto, said P. A. Smith, as resident engineer aforesaid, had full charge and direct control and supervision of the bridges and buildings on said railroad in Louisiana, etc., including the trestle or bridge mentioned in the petition which was burned; and said P. A. Smith was superintendent of the bridges and buildings department, and responsible for the condition of said bridge last named, and for the inspection, guarding, and watching the same; and it was his duty to decide on what bridges watchmen should be stationed, and he was aware of all the facts connected with the said bridge or trestle, and assumed all the risks of his employment.

There is really little dispute about the facts in the case, and, in the view taken of it, we need not dwell upon them. The main question is the relation of the deceased to the company at the time of the accident when he received the injury which resulted in his death. He was civil engineer of the appellant company, residing at Marshall, on the line of the railroad, and was traveling on duty for his company at the time of the accident. The fact that he was traveling on the train and in a sleeping car did not make him any less the engineer of the company, charged with the duties and responsibilities of his position. It was doubtless contemplated in his contract of employment that he would be required, in the discharge of his duties, frequently to pass over the line of the railroad. Passengers ordinarily, at least, pay fare for their transportation, but the deceased was at the time traveling upon a pass, such as was usual for employes to travel on over the line of the road, which it may be noted had in it an exemption from liability for injuries to person or property; and the conductor, knowing, as he testifies, the deceased, and knowing his relation to the road, did not call for and did not see the pass. Witness Grant, vice president, general manager, and chief engineer of the railroad company,

says: He (the deceased) was, first, assistant civil engineer; after that, resident engineer. The duties of his position were to "look after the buildings and maintenance of bridges, water tanks, and trestles of the railroad company." An employé is one whose time and skill are occupied in the business of his employer, and we think that the deceased was an employé of the appellant company, and not a passenger on the train of the company at the time of the injury which resulted in his death. In the case of *Railway Co. v. Minnick*, decided by this court, and reported 10 C. C. A. 1, 61 Fed. 635, a case growing out of the same accident as this case, which resulted there in the death of the locomotive engineer, this court held:

"An employé assumes the risks ordinarily incidental to his employer's business, and to the employer's known manner of having it performed, when there is no unknown defect of the machinery or other unknown hazards,"—citing authority. The court continues: "He [Minnick] knew, or with the exercise of the ordinary care incumbent on him in his employment would have known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no track walker kept on that part of the track, or watchman kept at this bridge. He knew and understood the features and working of the engines, and the character and extent of the watch that was kept on this bridge. He therefore, according to the settled rule just given, assumed the risk of being injured by the use of such machinery on the track and bridges thus watched."

This rule, applied in that case, seems to be equally applicable in the case now before the court, and finds support in many decided cases both in federal and state courts. In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, the court say:

"The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow servant in a common employment is well settled. When several persons are thus employed, there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: 'He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid,'"—citing *Railway Co. v. Ross*, 112 U. S. 377-383, 5 Sup. Ct. 184.

There is another suggestion which seems proper to be considered in this connection. Deceased, as we hold, was an employé of the appellant company, and the grade and character of his employment may properly have some influence on the question under consideration. He was an official of his company, occupying a position of high responsibility in connection with the operation of the railroad, and was particularly charged with the care and maintenance of the bridges upon the line of the railroad. If there was negligence in the watch that was kept at this burned bridge, and if the bridge was of such magnitude and character as, in the judgment of prudent and experienced railroad men, required more than the daily watch which was kept, then the inference would be no more than fair that he and his company were at fault in the matter of the watch which should have been, but was not, maintained at that bridge at the time of the accident; and that for that reason neither he, if he had survived, nor his representatives, can recover

under the admitted facts of the case. It is claimed that the evidence tending to show negligence in the watch of the bridge in question and the alleged defective character of the appliance used upon defendant's trains to prevent escape of sparks and fire from the locomotive was proper matter to be left to the jury, and from which the jury might infer negligence on the part of the railroad company. That would be of force if the case turned upon the question of negligence as shown or not shown by the proof. This evidence, however, with all the inferences which the jury could fairly draw from it, leaves us in doubt, at least, if it was sufficient to justify the verdict for the plaintiffs; but, however that might be held, the general charge for the defendant should have been given in the court below, and the judgment below is reversed, and the cause remanded for proceedings in accordance with the views expressed in this opinion.

TOULMIN, District Judge (dissenting). I concur with the court in the conclusion that this cause should be reversed and remanded, but I do not concur in the opinion that the court below erred in not giving the peremptory charge for the defendant. I think there was sufficient evidence as to negligence *vel non* on the part of the defendant, and as to contributory negligence on the part of deceased, to require the case to be sent to the jury. But I think that the court erred in giving the charges noticed in the fourth and fifth assignments of error. These charges are as follows: "While it is true that the employé assumes risks incident to the service, the employer contracts with him not to expose him to other and greater risks than those necessarily incident to the service in which he was engaged;" and "that it was the duty of the defendant to furnish adequate material and resources for the work, and that a part of this duty was, when the plaintiff's husband was traveling upon the cars of the defendant, engaged in its service, to furnish him with safe cars and a safe track." Those charges were erroneous, as applicable to the case, and were calculated to mislead the jury. While they recognize the relation of employer and employé as existing between the company and the deceased, they declare a rule too strict and arbitrary in such case. The first charge, in effect, asserts that the employé assumes only such risks as are unavoidable, and that the employer contracts not to expose him to greater risks than those unavoidably incident to the particular service. The correct rule, as I understand it, is that the employé assumes all ordinary risks incident to the service in which he is engaged, and that the employer contracts with him not to expose him to greater risks than those ordinarily incident to such service. *Minnick Case*, 6 C. C. A. 387, 57 Fed. 362; *Hough Case*, 100 U. S. 213; *Ross Case*, 112 U. S. 382, 5 Sup. Ct. 184; *Baugh Case*, 149 U. S. 381, 13 Sup. Ct. 914. The second charge referred to is, in effect, that the company was bound to furnish the deceased, its employé, with cars and track absolutely safe. The rule is that the company is not an insurer or guarantor, but that it is required to take reasonable care and precaution to provide reasonably and ade-

quately safe cars and track for the use of its employes. *Baugh Case*, 149 U. S. 386, 387, 13 Sup. Ct. 914. For the reasons stated, the judgment should be reversed, and cause remanded.

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CHURCHILL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 15, 1895.)

No. 468.

UNITED STATES COMMISSIONERS—FEES—DISTRICT OF WYOMING.

United States commissioners in the district of Wyoming are not entitled to double fees for services for which their compensation is made by Rev. St. § 847, the same as that allowed to clerks, although the clerks of the United States courts in Wyoming are allowed double fees by the act admitting that state (26 Stat. c. 664, § 16).

In Error to the District Court of the United States for the District of Wyoming.

This was an action by Edmund J. Churchill, United States commissioner, against the United States, for fees. The district court gave judgment for the defendant. Plaintiff brings error.

Edmund J. Churchill, for plaintiff in error.

Edward C. Stringer, for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought by the plaintiff in error, Edmund J. Churchill, against the United States, the defendant in error, to recover double fees for certain services performed by the plaintiff in error as commissioner of the circuit court of the United States for the district of Wyoming. The fees of commissioners of the circuit courts for the most of the services they are authorized to perform are specifically expressed by section 847 of the Revised Statutes of the United States. That section, however, contains this provision: "For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services." The plaintiff in error in his brief says: "As to fees expressly fixed by this statute, the plaintiff concedes that he may not charge more; but as to fees for services for which he is authorized to charge the same fee that is allowed to clerks for like services," he contends that the fees chargeable by the clerk of the United States district court for the district of Wyoming furnishes the rule, and that, as that clerk is entitled to double fees for his services, the plaintiff is entitled to double fees for his services as commissioner. The contention is not well founded. The act admitting Wyoming into the Union provides:

"The marshal, district attorney and clerk of the circuit and district courts of said district, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall for the services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the state of Oregon." 26 Stat. 225, c. 664, § 16.

At the date of the passage of this act there was no statute in force giving commissioners of circuit courts for the state of Oregon any

greater compensation than was given by law to commissioners in other states. There was such an act in force at one time, but it expired by its own limitation in 1857, and for that reason was not carried into the Revised Statutes. 10 Stat. 169, c. 80, § 3. Section 837, Rev. St. U. S., provides that the district attorneys and marshals for the districts of Oregon and Nevada shall receive for their services double the fees established by the fee bill; and section 840 provides that the clerks of the several circuit and district courts in California, Oregon, and Nevada shall be entitled to receive double the fees allowed to clerks by the fee bill. It will be observed that commissioners of the circuit courts are not included in the enumeration of the officers favored with double fees. The double compensation which inures to the district attorney, marshal, and clerk in Wyoming under the provisions contained in the act approved July 10, 1890, and sections 837 and 840 of the Revised Statutes, does not extend to commissioners. The office of the commissioner of the circuit court in Wyoming is similar to the like offices in Oregon, and is dissimilar to the office of district attorney, marshal, or clerk. It results that commissioners in Wyoming are entitled to receive the same fees that commissioners in Oregon receive, and that is single, and not double, fees. The judgment of the district court of the United States for the district of Wyoming is affirmed.

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UNITED STATES v. CUTAJAR et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

**CUSTOMS DUTIES—ACT OF JUNE 10, 1890—BOND FOR PRODUCTION OF INVOICE.**

The bond required by section 4 of the customs administrative act of June 10, 1890, to be given on the entry of merchandise without a duly-certified invoice, is not intended to secure a penalty for a breach of duty, but only such damages as actually result from the absence of such invoice, and the sureties on such a bond can only be called upon to respond for those damages.

In Error to the District Court of the United States for the Southern District of New York.

This was an action by the United States against William Cutajar and another upon a bond for \$800 given pursuant to section 4 of the customs administrative act of June 10, 1890. In the district court, judgment was given for the plaintiff for \$263.93. Plaintiff brings error. Affirmed.

James L. Van Renssler, Asst. U. S. Atty.

Hess, Townsend & McClelland, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The customs administrative act of June 10, 1890, provides, in section 4 (26 Stat. 131, 132), for the entry of merchandise in the absence of a duly-certified invoice, and sets forth in detail the facts required to be stated upon affidavit to procure such entry. The section concludes with the provision:

"And when entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice, the collector shall require a bond for the production of a duly certified invoice."

On November 24, 1891, defendants, doing business in New York under the firm name of William Cutajar & Co., imported and entered at the port of New York, from Genoa, Italy, 150 bags of rice, a variety of merchandise subject to a tariff duty of two cents a pound. Not being able at the time of such entry to produce a duly-authenticated invoice, he presented a statement, in the form of an invoice, giving the weight of the rice as 19,400 pounds. The bond sued upon was at the same time executed in conformity with the requirements of the section of the customs administrative act above quoted. At the time of entry, Cutajar paid duties on the 19,400 pounds, amounting to \$388. Thereafter the said 150 bags were duly weighed and tared by the United States weigher, and the total weight was found to be 32,700 pounds. A further payment of \$67.40 was made on 38 of the bags, and at the time of the bringing of the suit the amount still due for duties was \$198.60. It was for this sum, with interest, that the district court gave judgment. The plaintiff in error contended that judgment should have been rendered for the full penalty named in the bond, viz. \$800. At the trial, defendants endeavored to show that the condition of the bond had been complied with, and a duly-authenticated invoice produced and given to the collector within the six months allowed for such production by the terms of the bond. Most of the assignments of error are to the admission of testimony by which defendants sought to establish this defense, but inasmuch as the district court held that defendants were in default for not having produced the invoice required by the bond, and defendants have not sought to review that decision, such assignments of error need not be considered.

The only question in the case is whether the sum named in the bond is to be treated as a penalty, or as liquidated damages. The bond is in a form prescribed by treasury regulations (article 16, regulation 326), which provides that bonds given on pro forma invoices shall be "form No. 79 and the penalty named in the bond shall be double the amount of duties apparently due, and in the case of free goods the sum of one hundred dollars." It is conditioned that the obligors "shall and do, within six months from the date hereof, produce to the collector of the customs for the district of New York a duly-authenticated invoice of the said goods, wares, and merchandise, and shall pay to the said collector the amount of duty to which it shall appear by such invoice the said goods, wares, or merchandise are subject, over and above the amount of duties estimated on the appraisement of said goods, wares, and merchandise." The damages resulting from the failure of the importer to furnish the collector with a true certified invoice showing the character and value, and also quantity and weight, of the articles imported, so that the collector may have the assistance of such invoice in making his own classification and appraisement, and in passing upon the returns of the weighers, are readily and exactly ascertainable. The bond is expressed in language which leaves no doubt that it was intended to provide security for the payment of such damages, and, under the familiar rule in such cases, the amount named in the bond is to be regarded as a penalty, and not



as liquidated damages. The case at bar is not within the authorities cited on the brief of plaintiffs in error, which hold that, where the sum named in the bond is a fixed penalty imposed by law as a punishment for a breach of duty enjoined by law, the court will not undertake to alter or reduce the penalty which the legislature has fixed for the nonperformance of a statutory duty. Congress has not fixed the penalty. It has only provided that the collector shall require a bond for the production of a duly-certified invoice, and the bond required in this case manifestly contemplated that the sureties should respond only for the damages resulting to the government from the fact that its officers undertook, at the importers' request, and under the authority conferred by the above-quoted section of the act, to assess the duty without waiting till a duly-certified invoice should be laid before them. The judgment of the district court is affirmed.

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In re GLAENZER.

(Circuit Court, S. D. New York. April 25, 1894.)

No. 599.

1. CUSTOMS DUTIES—CLASSIFICATION—FREE LIST—CABINETS AND COLLECTIONS OF ANTIQUITIES.

The "collections of antiquities" which are made free of duty by paragraph 524 of the act of October 1, 1890, include only collections of such antique articles as are commonly recognized to be suitable for "cabinet collections" according to the taste and usage of collectors of antiquarian and artistic curiosities,—that is, suitable to be assembled together in boxes, drawers, or like receptacles, or in any small apartment where articles of vertu, coins, and other bric-a-brac are usually deposited for exhibition, study, the gratification of personal taste, or other like purpose.

2. SAME—ANTIQUE TAPESTRIES.

Antique tapestries produced prior to the year 1700, imported by dealers in antiquities, to be placed among like articles owned and kept by them in their trade, or for sale, *held* to be dutiable at 44 cents per pound and 50 per cent. ad valorem, under paragraph 392 (woolen schedule) of the act of October 1, 1890, and not entitled to free entry under paragraph 524, as a collection of antiquities.

3. SAME—ORIENTAL RUGS.

An antique Oriental rug, owned by a third person, but imported by a dealer in antiquities, together with certain antique tapestries owned by himself, *held* to be free of duty, under paragraph 524 of the act of 1890. In re Glaenzer, 5 C. C. A. 225, 55 Fed. 642, followed.

4. SAME—PAINTINGS.

A painting on canvas, nine by three feet in dimensions, representing a mythological subject, and produced prior to the year 1700, which was imported, together with certain antique tapestries, by a dealer in antiquities, *held* to be dutiable at 15 per cent., under paragraph 465 of the act of 1890, as a painting, and not to be entitled to free entry, under paragraph 524, as part of a collection of antiquities.

This was an application by George A. Glaenzer, the importer of certain tapestries and paintings, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on said merchandise. Upon the tapestries the collector imposed a duty of 44 cents per

pound and 50 per cent. ad valorem, under paragraph 392 of the tariff act of October 1, 1890. Upon the paintings he imposed a duty of 15 per cent. ad valorem, under paragraph 465 of said act. His action, in respect to both classes of articles, was sustained by the board of appraisers.

The opinion of the board of general appraisers was as follows:

We find the following conclusions of fact in these cases: (1) The articles covered by the protest in case No. 10,909a were imported December 1, 1890, and consist of two pieces of antique tapestry, worth respectively 1,500 and 500 francs, and so invoiced, and composed of the material of worsted. (2) The articles embraced in case No. 10,985 consist of (1) one piece of tapestry, of Flemish production, a manufacture of wool and silk, the latter chief value, costing about 450 francs; and (2) one painting, on canvas, about nine by three feet in dimensions, representing some mythological subject, and costing 500 francs, both imported October 13, 1890, on the same vessel. (3) All of these articles we find were produced at a period prior to the year 1700. (4) They were imported by Messrs. Glaenzer & Co., who are decorators and dealers in antique articles, to be placed among like articles owned and kept by them in their trade, or for sale.

We further find from these premises, and from the evidence in the case, that the articles are not collections of antiquities, suitable for souvenirs or cabinet collections within the meaning of paragraph 524 of the new tariff act and consequently are not free of duty. This paragraph reads as follows: "Cabinets of old coins and medals, and other collections of antiquities, but the term 'antiquities' as used in this act shall include only such articles as are suitable for souvenirs or cabinet collections, and which shall have been produced at any period prior to the year seventeen hundred." The corresponding paragraph (669) in the act of 1883 reads: "Cabinets of coins, medals, and all other collections of antiquities." The present law has amended this paragraph by expunging the word "all," inserting the word "old" before "coins and medals," and by defining the word "antiquities," so as to make it embrace "only such articles as are suitable for souvenirs or cabinet collections" and antedate the year 1700. In addition to this requirement as to suitability there must be a "collection" or assemblage of such articles, so as to "make them attractive, or useful, or valuable, or otherwise desirable." *Baumgarten v. Magone*, 41 Fed. 770. A "souvenir" is a keepsake, or remembrance. A "cabinet" is defined by Worcester to be "a set of boxes or drawers for curiosities"; "any place in which things of value are hidden"; "a closet; a small room." The word is used, we think, in either of these significations, as indicated by the context of the paragraph in which it appears. The amendment effects quite a change in the meaning of the law as it formerly stood. Cabinets of old coins and medals are made free by name. Other collections of antique articles, that is of those produced prior to the year 1700, are also exempt from duty, if of a kind such as are commonly recognized as suitable to be presented by one person to another as a keepsake, or in token of remembrance, and intended to be kept for the sake of the giver. So the law makes free of duty such "collections" of articles as are commonly recognized to be suitable for "cabinet collections" according to the tastes and usage of collectors of antiquarian or artistic curiosities, that is, suitable to be assembled together in boxes, drawers, or like receptacles, or in any small apartment where articles of vertu, coins, and other bric-a-brac are usually deposited for exhibition, study, the gratification of personal taste or other like purpose. We adopt this construction of the new tariff law, for the reason that it seems to be demanded by the application of established canons of statutory construction. The word "cabinet" is twice used in the paragraph (524) under consideration. When the legislature uses the same word twice in the same law, and especially in one section or paragraph, the presumption is that they intend to use it in the same sense in each instance, unless there be something in the context to repel this inference. The law, in effect, exempts from duty "cabinets of old coins and medals" and other "cabinet collections" of the kind described. This means, we think, other cabinet col-

lections of a kindred kind to cabinets "of old coins and medals" under the principle of ejusdem generis, which restricts a general word following particular words in a statute to the same genus as those words.

This view is corroborated by the manifest meaning of the word "cabinet" as it is found in paragraph 712 of the free list, which reads as follows: "Specimens of natural history, botany and mineralogy, when imported for cabinets, or as objects of science, and not for sale." This construction moreover was given to paragraph 669 of the act of 1883, in *U. S. v. Sixty-five Terra Cotta Vases* (Cir. Ct. South. Dist. N. Y.) 18 Fed. 508. In the Case of Robert Garrett, involving an antique oil painting, G. A. 185, and affirmed on appeal to the United States circuit court of Maryland, this board, following other authorities, rejected this rule of construction as applicable to the old law. But, in our opinion, the amendment to the law indicates a legislative intention to curtail the vast flood of importations which have been made under the designation of antiquities during the past decade, embracing, as they did, valuable pictures, tapestries, furniture and other articles, each often being worth many thousands of dollars, and used for furnishing the houses of those most able to pay a just revenue on them. Applying these principles, we are of the opinion that the articles in question are not free from duty as claimed, but are subject to the duty imposed by the collector. His decision in each case is accordingly affirmed.

In the foregoing cases the importers had due notice of the hearing, and appeared in person before the board.

[Signed]

[Signed]

[Signed]

Henderson M. Somerville,

George C. Tichenor,

Wilbur F. Lunt,

Board of United States General Appraisers.

Stephen G. Clarke, for importer.

Thomas Greenwood, Asst. Dist. Atty., for collector.

COXE, District Judge (orally). The decision of the board of general appraisers is affirmed as to each of these importations, except the antique Oriental rug owned by and imported for Mr. George F. Baker, by the "La Champagne," December 30, 1890. As to this importation the decision of the board is reversed in accordance with the decision of the United States circuit court of appeals in *Re Glaenger*, 5 C. C. A. 225, 55 Fed. 642.

#### GENESEE SALT CO. v. BURNAP et al.

(Circuit Court, N. D. Ohio, W. D. April 11, 1895.)

##### TRADE-MARKS—WHAT WILL BE PROTECTED—GEOGRAPHICAL NAMES.

A manufacturer of salt in the Genesee Valley cannot be prevented from using the word "Genesee" in connection therewith; but he may be enjoined from using it in any color, style, or form of letters, or in combination with other words, so as to imitate a combination previously used by another.

In Equity. Bill by the Genesee Salt Company against Burnap & Burnap for an injunction.

George H. Beckwith, for plaintiff.

John F. Kumler, for defendants.

RICKS, District Judge. Two forms of decree are presented, and the court is called upon to decide which would be in accordance with the opinion filed March 19, 1895. In that opinion the court held that plaintiff was entitled to an injunction "on the theory that defendants were trying to imitate the inscription upon their product,—palm it off

upon the public as the plaintiff's." This the court intended to prevent, and held that the defendants could not combine the words "Genesee Salt Co. Factory Filled" in such a way as to imitate the plaintiff's description of its product, and thereby deceive the public. Plaintiff's counsel seeks to give a broader construction to this opinion than the court intended it should have, and asks that defendants be enjoined from using the word "Genesee" as describing their salt. I do not think this can be done. A court will not enjoin from telling the truth. The facts in this case show that defendants are manufacturing their salt in the Genesee Valley, and to prevent them from using the word "Genesee" as descriptive of their salt would be to give the plaintiff a monopoly of that word, which the law does not intend to give. The case was practically decided on the authority of *Canal Co. v. Clark*, 13 Wall. 311, from which the court quoted as follows:

"He has no right to appropriate a sign or a symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. And it is obvious that the same reason which forbids the exclusive appropriation of generic names, or of those merely descriptive of the article manufactured, and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the article of trade to which they may be applied. They point only at the place of production, not to the producer; and, could they be appropriated exclusively, the appropriation would result in mischievous monopolies."

Injunction denied beyond restraining defendants from combining the words "Genesee," "Salt," "Co.," and "Factory Filled," to resemble plaintiff's combination. Defendants are entitled to use the name "Genesee," representing the locality of the manufacture of the salt, but not to use it in any color, style, or form of letters or in combination so as to imitate plaintiff's combination.

#### RING REFRIGERATOR & ICE-MACHINE CO. v. ST. LOUIS ICE MANUFACTURING & COLD-STORAGE CO.

(Circuit Court, E. D. Missouri, E. D. January 3, 1895.)

#### 1. PARTIES TO PATENT SUITS—SUIT AGAINST USER—RIGHT OF MANUFACTURER TO BE MADE DEFENDANT.

A manufacturer is not entitled to intervene in an infringement suit brought against a purchaser of his machine, after a decree has been rendered therein sustaining the patent sued on and declaring infringement, for the purpose of having the decree set aside, merely because he has an indirect interest in the result arising from his possible liability to indemnify other purchasers of like machines against damages which might be adjudged against them in future actions upon the same patent.

#### 2. SAME—ESTOPPEL.

A manufacturer, upon being invited to assume the defense of an infringement suit brought against the purchaser of one of his machines, declined to do so, except to the extent of paying part of the expenses thereof, and by his vacillating course evinced a purpose to take advantage of the judgment if favorable, and escape responsibility if adverse. Held, that he was precluded, after the entry of a final decree, from intervening in the suit for the purpose of having the decree set aside.

This was a suit in equity by the Ring Refrigerator & Ice-Machine Company against the St. Louis Ice Manufacturing & Cold-Storage Company for alleged infringement of a patent relating to gas pumps. A decree having been rendered sustaining the patent, and declaring infringement, an application has now been made by Arthur St. John Newberry, trustee, who is a stranger to the record, to have the decree set aside, as having been entered by collusion.

Chester H. Krum and Frank K. Ryan, for complainant.

Mills & Flitcraft and Phillips, Stewart, Cunningham & Elliott, for defendant.

**PRIEST**, District Judge. An application is made in this case by Arthur St. John Newberry, as trustee of the Arctic Ice-Machine Manufacturing Company, and who is not a party to the record, to set aside the final decree rendered herein on May 1, 1894, upon the ground that it was entered pursuant to a collusive arrangement between the plaintiff and the defendant. The decree adjudged complainant's patent to a gas pump valid, and the one used by defendant in its plant for the manufacture of ice, which had been erected for it by the Arctic Ice-Machine Manufacturing Company, an infringement thereof. When the suit was first brought, the defendant addressed a letter to the Arctic Ice-Machine Manufacturing Company at Cleveland, Ohio, notifying it of the claim set forth in complainant's bill, and requested, inasmuch as the plant had been constructed by it, that it should undertake the defense of the suit. It also asked an early reply, to be addressed to the defendant's attorneys, Mills & Flitcraft, and suggesting that satisfactory arrangements might be made with the attorneys named for the management of the defense on its part. This letter was dated November 7, 1892, and fell into the hands of the petitioner, who had been appointed trustee of the Arctic Ice-Machine Manufacturing Company under insolvency proceedings. If any direct reply was made to this letter, it has not been produced. On the 16th of January, 1893, Sherman, Hoyt & Dustin, petitioner's attorneys at Cleveland, wrote Mills & Flitcraft concerning this case, and, among other things, said:

"And Mr. Newberry, the assignee of the Arctic Ice-Machine Manufacturing Company is not willing to assume the burden of all of the defense. The company is insolvent, and has made an assignment to him for the benefit of creditors, and has entirely gone out of business. He wants, however, to do what is right for the St. Louis Ice Manufacturing Company, and would be willing to bear say half of the expense of conducting a litigation, if that will be satisfactory to your clients. \* \* \* If this is satisfactory to you, we will prepare an answer in the suit, and send it to you to be filed, and we will, in connection with yourselves, conduct the defense. We feel sure we will be able to defeat the complainants."

It would seem, from a subsequent letter, that at the time this demand was made upon the Arctic Ice-Machine Manufacturing Company, and at the time petitioner undertook the defense to the extent expressed in the foregoing letter, both parties were under an impression that the Arctic Company had, by the terms of the contract under which the defendant's works were built, agreed to indem-

nify it against any damages for infringements; but this assumption was dispelled when the contract was found just before the trial of the cause. In reply to the letter of the 16th of January, 1893, Mills & Flitcraft said, among other things not material to be considered now:

"We will confer with the officers of the ice company about sharing the expense. We are certain that they would be pleased to have Mr. Newberry pay your expense, and that the ice company would pay ours."

There is no exhibit of the correspondence from that time until January 29, 1894. In the meantime an amended answer had been filed and evidence had been taken, and the case was nearing a trial. On that day, January 29, 1894, the petitioner's attorneys at Cleveland wrote Mills & Flitcraft as follows:

"We wish you would procure the agreement mentioned as soon as possible, as there are some costs connected with the taking of the depositions in this case which ought to be paid, and, if it is the duty of the assignee to pay them, he, of course, wants to. If it is not his duty, the St. Louis Company should provide for them. Mr. Newberry, as assignee of the Arctic Company, while he is favorably inclined to the St. Louis Company, and wishes to see it prevail in its action, cannot assume the burden of this litigation, unless the contract between the Arctic Company and the St. Louis Company requires him to do so, his relation being that of a trustee for the benefit of the creditors of the Arctic Company. You will readily appreciate this, and therefore the importance of knowing just what Mr. Newberry's legal status is in relation to this litigation. Please give this matter your immediate attention, and oblige."

The case was tried and submitted on April 12, 1894, and the decree entered upon the finding of the court on May 1, 1894. On April 13, 1894, Mills & Flitcraft wrote to Mr. Newberry as follows:

"Yesterday we submitted the above to Judge Thayer, we taking five days to file brief. Plaintiff's brief was filed yesterday, so that we had no opportunity to examine the matter. Mr. Morris and Mr. Ring had a considerable talk together. We understand from the attorneys for plaintiff that they had made some kind of an arrangement of settlement. Of this we have not been advised. Our impression is that Ring would like to have some kind of a judgment, and Mr. Morris would like to get out of the matter as easily as he can. We have never understood positively that you, as trustee, had agreed to protect Morris, and pay the amount for any judgment which might be obtained on account of infringement of patent. Of course, if you propose to pay the amount of any judgment without litigation, in your capacity as trustee, you would have a right to insist that we go ahead and fight the case. However, if you are going to compel us to go to a lawsuit to try to collect from you after we have paid on a final judgment which Ring may obtain, we might be inclined to buy our peace for a small sum of money. We are not in fact using the device, and have only used it for a very short time."

Replying to this letter, the petitioner's attorneys, on April 17th, said:

"You of course know Mr. Newberry's relationship to this matter is that of trustee. Mr. Newberry has no desire to avoid any legal obligation of the company, nor to dispute any valid claim against the company. When originally he started in to assist you in your controversy with Ring, he did it upon the assumption that your clients had from his assignor a valid agreement to indemnify them against any damages for infringement. As this litigation has progressed several times, your people have been called upon to furnish a copy of this contract, but up to the present time they have not done so. If there is no valid subsisting obligation, Mr. Newberry could not make any agreement to pay anything. If there is such a binding

obligation, he would be willing to pay some small sum, if thereby he could obtain, not only a release for this particular machine, but a release of any claim for all other machines that were sold by the assignor, as well as for all machines that have been sold by him since the assignment. He does not believe that plaintiff Ring has any valid claim, but he might be willing to pay a small sum for peace if thereby he could save any possible litigation on account of other machines. It may be that Mr. Ring wants a consent decree against your clients in order to enable him to more successfully maintain actions against others who have bought machines. If that be so, Ring would probably not want to give a release, and it would be folly in Mr. Newberry to make a settlement, as we have no doubt that you will succeed in defeating Ring in this case, and a settlement will simply invite other litigation."

To this letter Mills & Flitcraft, on April 19th, replied as follows:

"Gentlemen: Your favor of the 17th received. The St. Louis Ice Company only used the device for a short time, and ceased using, and are not using, Ring's device. At the time this litigation was started, we understood that the contract for the erection of the first machine contained a provision that the Arctic Company would indemnify for any damages for infringement, and we were so informed by Mr. Morris. The contract was called to our attention a day or two ago, just about the time of the submission of this case, and in it there is no expressed provision about indemnifying for infringement. The question, of course, is whether or not the seller of a patent article does not, by the sale of the same, make himself liable for any damages that may be obtained against the buyer. Mr. Morris is using two of your machines, also, we believe, using one or two at Kansas City, and he has always stood by the Arctic machines. Mr. Ring offers to let him off very easy in this matter, and, if he was to go on and take the chances of litigation, he would, of course, prefer to take the economical course of making a cheap settlement. We certainly should have obtained a release from Ring of all the claims for damages that he might have, and we do not intend to use his device. This case is in shape for you to obtain a judgment establishing the validity of the patent. We had prepared our brief almost complete in this matter when the matter of compromise came up by some outside talk between Mr. Ring and Mr. Morris. We have intended all the time, in good faith, to go on and contest the case, supposing that it would ultimately appear that there was a contract of indemnity. If you wish to go on, we will go on and finish our brief, and have the matter disposed of. If not, we are inclined to make a settlement. You will get this letter some time to-morrow, and, if there is a desire for the litigation to go on, we will finish our brief, and submit the case, and we shall understand that you would indemnify us for any money judgment that would be obtained against us. If you will not do this, we will make a settlement. Please let us hear from you promptly, and oblige."

To this letter, on April 24th, Mr. Dustin addressed the following reply:

"We have your favor of the 19th inst., and this day have gone over the matter with Mr. Newberry, assignee of the Arctic Company. Mr. Newberry has no desire to establish the validity or invalidity of the Arctic patents, as he has sold the plant, with all the letters patent. He is desirous of simply avoiding litigation in the cheapest way possible. If, therefore, Ring would give him and the old Arctic Company, as well as the purchasers of machines from it and from him, an absolute release and discharge of all claims for damages because of any alleged infringement, Mr. Newberry would pay a small sum in settlement. If, on the other hand, Ring will not do this, Mr. Newberry, as assignee, authorizes us to say that if you will go on with the litigation, in case it should result adversely to the St. Louis Ice Company, he will pay the judgment. If, however, it should result adversely to your client, we would want immediate notice, because we would certainly take an appeal. We believe that you have evidence sufficient to defeat Ring's patent, and, if he is going to annoy us, we might just as well contest it in the present suit as in any other."

We presume the Mr. Ring and Mr. Morris referred to in this correspondence were, respectively, presidents or managers of the plaintiff and defendant companies. Mr. Mills, in his affidavit filed upon this application, said that the letter of petitioner's attorneys, of April 17, 1894, was read to Mr. Morris, and that thereupon, without consultation with him, Mr. Morris had an interview with Ring, the nature and extent of which the affiant did not know; and that, after he had been engaged in the preparation of the brief in the case, he was notified that further argument would be unnecessary, and thereupon he addressed to Judge Thayer, who had the case under advisement, the following letter, dated April 27, 1894:

"On behalf of the defendant, we have concluded not to file any brief. The defendant ceased using the device as soon as notified, and does not propose resuming the use of it. The delay in coming to this conclusion has been caused by correspondence with the parties from whom the machine was bought. The case can, therefore, be considered as submitted on our part."

It appears that at the time of the submission an oral argument was made by counsel for complainant, and briefs also filed, to answer which defendant's counsel took a few days' time by leave of court. No complaint is made that any testimony material to the cause was withheld, or that there was any omission on the part of counsel representing the real defendant to do anything to further the success of the defendant's cause, except that of failing to file a brief. Has the petitioner the right to be made a party defendant upon the record, and contest the complainant's bill? He contends he has, because, while not directly interested in the immediate consequences of this suit, if the decree sustaining complainant's patent should stand, it will be used injuriously to him in other litigation which may be inaugurated by the complainant. A complainant has the undoubted right to choose whom of several wrongdoers he will prosecute, and those not brought into the litigation at the suitor's instance cannot officiously intrude themselves upon the mere ground that the results of the litigation might establish a precedent which, when their rights shall be drawn in question, would impose the task of overcoming the persuasive influence of the adjudication. If the petitioner were not a party to this suit, or had not undertaken to ally himself with the defendant in the defense of it, whatever decree might be entered as to the validity of the complainant's patent would be as to him *res inter alios acta*; and the mere fact that this decree might hereafter in some manner affect his interest does not except it from this general rule. There are many cases which rightly hold that a stranger to the record, who stands in such legal or contractual relation to a defendant as to be liable over to him, may, by notification to come in and defend, be bound, so far as the defendant is concerned, by any judgment which may be rendered. But this grows out of a contractual or legal privity between the defendant and such stranger. *Ford v. O'Donnell*, 40 Mo. App. 51. "While the court may in this suit construe the complainant's patent, and such construction may be adhered to in subsequent suits against other persons, that would not determine against petitioner the fact of infringe-



ment, which would be, after all, the main question in the subsequent suit, if one should be brought against the present petitioner," is an observation made by Judge Blodgett in *Thomas Huston Electric Co. v. Sperry Electric Co.*, 46 Fed. 75, which is peculiarly applicable in this case. Of course, there are cases in which a court of equity would be justified, exercising a sound discretion, in permitting other persons than those made defendants by the complainants to come in and defend, but in such cases they are admitted by favor, and not by right, and must make it appear that their interest in the result of the litigation is immediate, certain, and direct. *Curran v. Car Co.*, 32 Fed. 835; *Standard Oil Co. v. Southern Pac. Co.*, 4 C. C. A. 491, 54 Fed. 521.

Such conditions, however, do not exist in the petitioner's application. By the express admissions contained in the correspondence, the petitioner is not concerned with the validity of the complainant's patent. He parted with the plant and patents of the Arctic Company. In the event his vendees were sued by the complainant for infringement, he might be called upon to protect them. Whether he is under an obligation to do so does not appear from this application. The petitioner is precluded upon another ground. He had an opportunity to defend. A duty to do so was urged upon him by the defendant. He declined the full responsibility of such a requirement. Acting, however, upon the suggestion of defendant that the contract between his assignor and it contained a covenant of indemnity, he, to a qualified extent, as indicated by his letter of January 16, 1893, agreed to bear a certain part of the expense of the defense. Of this, however, he repented, and on January 29, 1894, wrote the attorneys of defendant, in whose engagement he declined to participate, in effect that, unless bound to do so by covenants of indemnity in the contract between his assignor and the defendant, he would not be troubled with the litigation. After being advised that the case had been submitted, and urged to make a decisive answer whether he proposed to indemnify the defendant against the damages for infringement in the event the defense failed, he, through his attorneys, again, on April 17, 1894, emphasized the position which he had taken as early as January 29, 1894.

It is true that on the 21st of April, after endeavoring to impose conditions upon the defendant's attorneys, looking solely to his interest aside from this litigation, and which he had no right to ask them to undertake, he does again recall his decision of January 29th and April 17th, and ask them if they cannot accomplish the compromise which he desires made with the complainant, looking to his interest elsewhere, to go on and defend the suit, agreeing to indemnify the defendant. But this letter came too late. Mr. Morris took the petitioner at his word, as expressed in his letter of April 17th, and proceeded to make, so far as the damages were concerned, an exhibit to the complainant which justified it in withdrawing against the defendant a claim for damages. But the course of the petitioner had been so vacillating that the defendant's attorneys were perfectly justifiable in refusing to act upon the expressions

contained in his letter of the 21st. His whole conduct in this matter with the defendant and defendant's counsel bears unmistakable evidence of an effort on his part to play fast and loose,—to take advantage of the judgment if favorable to the defendant, and to escape all responsibility if it should be adverse. When he might, by a decisive election, have stepped in and defended, to the extent of assuming absolute control over the defendant's case, he declined to do so. It is now too late after the decree has been entered for him to interpose with any defense he may have had, however meritorious. We do not decide whether the decree entered would be a bar or not, because of the part which he took in the litigation between January, 1893, and January, 1894. If it should be held to be a bar, then the petitioner alone is responsible for this condition. The petitioner asks that the decree be set aside, and the suit dismissed because it is collusive. We find nothing to justify this charge; indeed, under the circumstances made apparent by the affidavits and correspondence in this case, it is an ungenerous and ungracious charge. The suit originated in a genuine contest. Its bringing was not contrived between the plaintiff and the defendant. The defense was fairly and earnestly conducted upon the real issues. The mere fact that a party, in prudent apprehension of an adverse decree, makes terms upon one feature of the controversy, does not characterize the suit as an imposition upon the jurisdiction of the court. The very terms which the petitioner in this case points out as evidence of collusion he sought to import into the case for his own benefit. There are numerous expressions in his letters and the letters of his counsel to the effect that, if the complainant would relieve him and his assignor of damages on account of machines constructed and sold to other parties, the decree might go. How, then, can he complain that the defendant accepted such a relief? It does not appear that there was any compromise of the case, even upon the feature of damages, between the complainant and the defendant. It only appears that the defendant succeeded in impressing upon the mind of complainant such facts in the case as, if true, would relieve it from a judgment for damages, and, under this conviction, the complainant waived that part of the relief which it sought. Where parties plaintiff and defendant, desiring to accomplish a common purpose for their mutual benefit, contrive and bring, the one against the other, an apparent hostile action, courts will welcome a stranger to reveal the fact that it has been imposed upon by such moot litigation, and, being convinced that the suit was a confederation of such purposes, as above indicated, would dismiss the bill. This case wears not the slightest color of such a transaction. It results that the petition to be made a party, etc., will be denied.

## HOLMES et al. v. TRUMAN et al.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1895.)

No. 176.

## 1. PATENTS—WHAT CONSTITUTES INVENTION—FINDING OF JURY.

Where the record shows that plaintiff's device was novel in construction, that it was useful, and that it went into immediate and general use, the appellate court cannot hold that the jury should have been instructed that there was no invention therein.

## 2. SAME—CONSTRUCTION OF CLAIM—INFRINGEMENT.

A claim for metal straps having their ends secured to the shafts of a cart, and extending underneath the axle so as to support a footboard, should be construed as covering straps which are attached to the cross-bar connecting the shafts, instead of the shafts themselves, and which are made of two pieces fastened together, instead of in one continuous piece.

## 3. SAME—MECHANICAL EQUIVALENTS.

The use of a metal strap composed of two pieces, joined together by bolt and screw, is not the substitution of a mechanical equivalent, but is merely a change in the form of the strap.

## 4. SAME—INFRINGEMENT—MEASURE OF DAMAGES.

Where a patent for an improvement in carts was limited merely to a device for sustaining the footboard, but the invention practically introduced a new cart, for which a demand at once arose, *held* that, in the absence of any proof that any carts of this form were ever constructed without the patented feature, the measure of damages for infringement was complainants' entire loss, it being impossible to separate the value of the patented cart from a cart which did not contain the invention.

## 5. TRIAL—INSTRUCTIONS—OFFER OF COMPROMISE.

In a suit for infringement of a patent, defendant, while testifying, volunteered the statement that, after the action was commenced, he had offered \$250 in settlement; and that plaintiffs demanded \$350, and required that defendant should agree to pay a royalty, and to sell no carts below a certain price. *Held*, that the court properly refused defendants' request to charge that this offer of compromise should not be construed as an admission of any right in plaintiffs; for, while correct as a proposition of law, it was misleading, because it ignored the evidence relating to plaintiffs' proposition in response to that of defendants.

## 6. PATENTS—BREAKING CARTS.

The Putnam patent, No. 232,207, for an improvement in breaking carts, *held* valid and infringed, sustaining the verdict of a jury.

Error from the Circuit Court of the United States for the Northern District of California.

This was an action at law by Irwin J. Truman and C. Osgood Hooker against Henry E. Holmes and M. P. Holmes for infringement of a patent relating to breaking carts. The circuit court entered a judgment for plaintiffs upon the verdict of a jury. Defendants brought error.

Wheaton, Kalloch & Kierce, for plaintiffs in error.

John L. Boone, for defendants in error.

Before GILBERT, Circuit Judge, and HAWLEY and HANFORD, District Judges.

GILBERT, Circuit Judge. The plaintiffs in error were the defendants in an action in the circuit court, brought against them on

account of the alleged infringement of United States letters patent No. 232,207, dated September 14, 1880, and issued to T. De Witt C. Putnam, for "an improved breaking cart." The trial resulted in a judgment for the plaintiffs in the action for the sum of \$150, and costs.

Upon the writ of error, it is contended that the court erred in refusing, at the conclusion of the testimony in the case, to instruct the jury to return a verdict for the defendants in the action, for the reason that it was conclusively shown that the plaintiffs' improvement was without invention, and that the defendants had not infringed the same. The breaking cart which is the subject of the plaintiffs' patent is a low-bodied cart, in which the springs are supported directly upon the axle, with the shafts placed directly upon the springs. These shafts support the seat or cart body, and a footboard, upon which the driver rests his feet, is fastened to and supported by a metal strap on each side, which is attached to the shafts in front of the axle, extends downward at an angle, and is then bent so as to pass back underneath the axle, parallel with the shaft, and is then bent upward, and its rear end is fastened to the shafts behind the axle. By this construction the footboard moves vertically in unison with the seat and shafts. The advantage of this construction is that the seat is low with reference to the axle, and the driver sits easily and quietly, without deranging motion to his body, since the footboard and the seat move in unison. With reference to this advantage, the evidence is that there were before the plaintiffs' invention but two classes of two-wheeled vehicles. One was the common butcher's cart, in which the seat is built high above the shafts, so that the feet of the driver rest on a floor which is entirely above the springs. It was obviously impossible to construct a low cart in this manner. The other class was one in which the footrest was secured upon the axle or the shafts, while the seat was supported upon the springs. In this class of carts the body of the driver would move with the springs, while his feet would remain stationary. The patentee conceived the idea of making a low-seated cart, with the footrest supported below the shafts, and the axle between the springs and the seat, so that the axle was placed above the footrest, but beneath the springs and the seat. He placed the shafts on the springs, and the seat on the shafts, and supported the footrest underneath the axle by his metal straps.

The claim of the patent is as follows:

"The brace or straps, F, having their ends secured to the shafts before and behind the axle, while the central portion extends beneath the axle, and parallel with the shafts, and is adapted to support the transverse footboard, E, substantially as and for the purpose herein described."

It is impossible for the court to say, with reference to the testimony, that the jury should have been instructed that there was no invention in the plaintiffs' cart. The record shows that the cart was novel in construction, that it was useful, and that it went into immediate and general use. Counsel for the plaintiffs in error contend that there was nothing novel in the idea of suspending a foot-

board in such a way that its vertical movement would be common to that of the seat, and that a particular and specific improvement in the means of suspension was all that the patentee could claim; and they argue that the iron strap of the patent as a device for holding the footboard was not an invention, that the idea of such a strap was old, and that it was well known that two such straps, when hung parallel, would sustain anything laid across them. This view of the patent leaves entirely out of sight the essence of the plaintiffs' invention, which is not merely the fact that the footboard was hung beneath the shafts by iron braces, but that a cart was constructed with the seat directly above the springs and axle, thereby securing a low seat, with its advantages in connection with a breaking cart, and a footrest which should move in unison with the same. In other words, it was the arrangement of the footboard with reference to the other parts which was new.

Nor can we see that the court would have been warranted in taking the case from the jury on the ground that the plaintiffs failed to prove an infringement by the defendants. The bill of exceptions shows distinctly that one of the witnesses testified that the defendants had made and sold carts such as those made under the patent. There is other testimony to the same effect, from which the jury might reasonably infer that the carts built by the defendants were the same as those made by the plaintiffs. The defendants admit that they constructed a cart differing from that of the plaintiffs only in the fact that the forward ends of the straps, instead of being attached directly to the shafts, are attached to a crosspiece which connects the two shafts in front of the seat, and that, instead of being continuous straps, they were formed of two pieces, fastened together by nut and screw at the angle underneath and behind the axle; but they claim that the plaintiffs must be held to the specific construction described in their letters patent. We do not so construe the patent. The crossbar between the shafts is substantially a part of the shafts. It makes no difference, so far as the function of the straps is concerned, whether they are attached to the shafts or attached to a crossbar which connects the shafts; and it makes no difference whether the straps are one continuous piece or composed of two. It is true that the plaintiffs' patent does not cover any arrangement by which the seat and the footboard may be made to move in unison. Those results were obtained in the butcher's cart. But it is a fair interpretation of the plaintiffs' patent to say that they are protected in the use of a cart in which the shafts are placed directly upon the springs, and the footboard is sustained beneath the axle by straps, and it is unimportant whether the straps are attached to any particular place along the shafts or to a crossbar between the shafts, or whether they are made of one piece or of two or three pieces.

It is assigned as error that the court refused to instruct the jury that:

"No testimony has been introduced in this case to separate the value of patented from the unpatented parts of the cart, or to show what the value of the alleged invention was."

This instruction was properly refused. It would be impossible in the case of a patent such as this to introduce testimony to separate the value of the patented from the unpatented parts. The plaintiffs' invention practically introduced a new cart,—a cart for which a demand at once arose. There is no evidence that at any time carts were constructed after the manner of the plaintiffs', but with the patented feature omitted. There would be no demand for such a cart. It was impossible, therefore, to compare the value of the patented cart with a cart which did not contain the invention. There was in the case the admission of the defendants that they had constructed 150 carts in the year 1893. The testimony of the plaintiffs was that, by reason of the competition of infringers, the price of their cart, which was originally \$35, had been reduced to \$22.50. The measure of their damages was their entire loss. *Fitch v. Bragg*, 21 Blatchf. 302, 16 Fed. 243; *Manufacturing Co. v. Sargent*, 117 U. S. 536, 6 Sup. Ct. 934.

It is assigned as error that the court instructed the jury that it was not material that the strap should be one continuous piece. It is urged that in giving this instruction the court usurped the function of the jury, whose province it was to say whether one thing was the mechanical equivalent of another. It was the duty of the court to define the patented invention as the same was expressed in the language of the claim. 3 Rob. Pat. p. 378. The instruction which is complained of was a portion of the charge upon that subject. The court said:

"It is proper at this point to explain the claim because upon its meaning depends this question of infringement. I do not think it is material whether the strap is fastened directly to the shaft, but it must go under the axle; nor do I think it is material that the strap should be one continuous piece."

There is no reference in these words to a mechanical equivalent of one of the parts of a patented invention. To use a strap composed of two pieces joined together by bolt and screw, instead of a continuous strap, was not to substitute a mechanical equivalent. It was but to change the form of the strap. It was proper for the court to instruct the jury that the plaintiffs' patent secured to them the exclusive right to use in their cart the footboard suspended by a strap substantially as in the claim described, and that to make the strap in two pieces was a mere change in form, which would not relieve the defendants from the charge of infringement. The straps had no function except to support the footboard beneath the axle. It is true that in the claim they are described as "braces or straps"; but in the specification they are nowhere referred to as braces, and nothing is claimed for them as such. It is apparent that they could serve no purpose as braces, or otherwise than as supports to the footboard. But, if we were to concede that the question whether the supports made by the defendants were the equivalents of the plaintiffs' straps was properly one for the jury, there was no error in the instruction which would justify a reversal of the judgment, for the straps used by both the plaintiffs and the defendants were so obviously the same that the court would have been obliged to

have set aside the verdict of the jury had they found otherwise.

It is assigned as error that the court refused to instruct the jury concerning the effect of the defendants' offer to compromise. Upon the trial, one of the defendants, while testifying, volunteered the statement that, after the action was commenced, he had made the plaintiffs an offer of settlement, which was, in substance, that he had offered to pay \$250 if they would dismiss the suit, but that the plaintiffs had demanded \$350, and that the defendants should agree to pay a royalty upon all carts they should manufacture, and to sell no carts below a certain price; that, in answer to this, he had told the plaintiffs that the defendants would do no more than pay \$250, upon the condition that the suit should be dismissed, and that the defendants would continue building the carts. He also said in explanation of the offer:

"That was after the suit was commenced, and before we had employed our present attorneys. Our object in offering the compromise was to get rid of the expense of a suit. We thought we could compromise it for less money than we could continue the suit, but we would not consent to stop manufacturing the vehicles."

The instruction requested by the defendant and refused by the court was the following:

"You are instructed that it is the right and privilege of any person to buy exemption from the expense and annoyance of litigation, and the fact, if it be a fact, that the defendants in this case offered to compromise their differences with plaintiffs, must not be construed to be an admission or recognition by defendants of any right whatever in the plaintiffs."

The proposition made by the defendants was purely and simply an offer of compromise. It was not an admission of any fact involved in the litigation. If evidence of the proposition had been offered by the plaintiffs upon the trial in the court below, it clearly would have been inadmissible, against the defendants' objection; for the law is well settled that the offer of settlement made by a party to a suit with a view to a compromise or an amicable adjustment of the matter in dispute is not admissible against him. 9 Am. & Eng. Enc. Law, 353; *Stanford v. Bates*, 22 Vt. 546; *West v. Smith*, 101 U. S. 263; *Gerrish v. Sweetser*, 4 Pick. 374. But this testimony was not offered by the party to whom the proposition was made. It was volunteered by the defendants themselves. It was not only in the case with their consent, but it remained in evidence without objection upon their part, or motion to strike out. It contained evidence not only of their offer to compromise, but also evidence of a counter proposition from the plaintiffs,—an offer to accept \$350 in settlement of damages, which in the complaint were laid at \$20,000. The instruction which was asked for, while it was a correct exposition of the law, ignored this feature of the evidence. The plaintiffs were as much entitled to an instruction concerning their offer of settlement as were the defendants to one concerning theirs. The evidence had been offered by the defendants for purposes of their own, presumably for the purpose of showing how small a sum the plaintiffs had offered to settle. The offer of the plain-

tiffs was calculated to influence the jury's verdict. That of the defendants was not necessarily so. The effect of the instruction which was requested would have been to inform the jury that the defendants' offer of compromise must not be construed as an admission of any right in the plaintiffs. But this was made sufficiently clear in the defendant's testimony. He informed the jury that the proposition was made by him after the commencement of the suit, and before the defendants had employed counsel, and that its object was to obviate the expense of the suit, since it was his belief that the suit could be settled for less than it would cost to employ counsel to defend it. He was careful to say that he coupled his proposition to pay \$250 with a declaration of the defendants' intention to continue manufacturing carts, which meant, of course, that they would do so without payment of royalty or becoming subject to further demands from the plaintiffs. The jury could see from the terms of the offer that it involved no recognition of any right in the plaintiffs, but that, on the contrary, it was an express denial of their right. Nothing the court could have said would have made it plainer. We find no error, therefore, in the refusal of the court to charge the jury upon the subject.

The judgment is affirmed, with costs to the defendants in error.

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BERNHEIM v. BOEHME.

(Circuit Court, D. New Jersey. May 1, 1895.)

PATENTS—INVENTION—CATCHES FOR SATCHELS.

The Lieb patent, No. 242,944, and the Flocke patent, No. 303,716, for catches for traveling bags and satchels, *held* void for want of invention, in view of the prior state of the art, as shown by the Lagowitz spring catch and the Taylor trunk fastener.

This was a bill by Gustav Bernheim against Albert Boehme for infringement of two patents relating to catches for traveling bags and satchels.

Louis C. Raegener, for complainant.  
Jonathan Marshall, for defendant.

GREEN, District Judge. The bill in this case is filed to enjoin the defendant from infringing two patents for "catches for traveling bags and satchels," one of which is numbered 242,944, and was granted to John W. Lieb, June 14, 1881. The other is numbered 303,716, and was granted to Robert Flocke, August 19, 1884. Both have been duly assigned to the complainant, who now owns them. The specification of the Lieb patent declares that the invention protected by it "relates to that class of swinging or rocking devices which are applied to the outside of bag frames, and adapted to straddle or embrace the same in order to hold them shut; and the improvement consists in a spring combined therewith, in order to hold the device in the locked and unlocked positions, as hereinafter described." And the first claim is as follows:



"(1) In a fastening for traveling bags, the rock shaft provided with the flattened faces, c' and d, and suitable locking device, in combination with the spring bearing against the side of the shaft, as shown."

The other claim is not in controversy.

The specification of the Flocke patent says:

"This invention relates to certain improvements in that class of fastenings for traveling bags, having two arms arranged at the ends of a rock shaft, adapted to hold the sections of the bag frame together there between, said shaft having a spring bearing thereon to hold the arms into either a locked or an unlocked position. Heretofore, in the fastenings referred to, the said shaft had angular stops or projecting flanged collars formed on the shaft at each side of the spring, which limited the movement of the said shaft, allowing the same a reciprocating movement only from a locked to an unlocked position, and vice versa, and preventing a free or continuous revolution of the shaft and the arms thereon. By this construction it became necessary, to gain a uniform movement of the catches on each side of the bag, to have a right and left hand fastening; but this is found objectionable, in that it necessitates an increased expense in manufacture, compels those handling the goods to keep a larger stock, and is oftentimes the occasion of mistakes and consequent delays in applying the device to the bag. These objections it is the object of this invention to overcome."

And the only claim of the patent is the following:

"The improved spring catch or fastener for a bag frame, the same consisting of a box, a, having therein a spring, c, and a pivotal shaft, with ears at each end thereof, adapted to hold the sections of the bag frame together, and having three cam projections disposed at equal distances apart around the said shaft, to engage the spring, whereby the ears may be turned to a catching relation to the said frame or to either a right or left outwardly projecting position from the frame, substantially as set forth."

It appears, then, that the devices in controversy are "fastenings for holding together the hinged frame of a traveling bag." They consist of three parts or elements: (a) A catch, being a shaft flattened on two sides, forming a cam, and having at either end two projecting arms; (b) a spring adapted to pass upon the cam; (c) a box containing a spring, which, pressing upon the cam, tends to hold the shaft stationary.

It is admitted that these elements of the combination are all old. It is insisted by the defendant that the combination is, as well, old, and wholly wanting in novelty. To justify such insistence, the defendant offers, first, the testimony of certain witnesses, who testify that prior to 1880 they saw and had in their possession a "bag catch," precisely like those now in litigation; that it was exhibited to several manufacturers of bags, and samples left with them in the city of Newark. There is no evidence that it was adopted by those to whom it was exhibited, nor was it ever heard of again, by any one, until the present suit was commenced. This testimony is far from satisfactory. It can hardly be believed that a "catch" which, after being patented by Flocke, seems to have gone into universal use as meeting an existing want, should have attracted to itself no attention whatever by manufacturers on the critical watch for just such devices, and was treated with absolute indifference and neglect. Apparently the "catch" exhibited by the unknown person in the city of Newark, in 1880, did not receive the dubious honor of even an experimental trial. It was contemptu-

ously rejected by practical men who knew the art well; while, on the other hand, the Flocke "catch" was accepted with avidity to the number of thousands of dozens within a given twelvemonth. Certainly the unsuccessful catch of 1880, if it existed anywhere outside the imagination of one or two witnesses, must have been, in the very nature of things, a very different device from the successful catch patented in 1884 by Flocke.

But it is further insisted that the state of the art clearly deprives these alleged inventions of Lieb and Flocke of any patentable novelty, and this presents, really, the one difficult question in the case. It is not denied that in 1868 one Jacob Lagowitz devised a fastening for traveling bags in which he combined a "spring with a catch, so arranged as to bear on the shaft, and to hold the catch in any position desired, by friction. He also partly flattened the shaft to enable the spring, by pressure thereon, the more readily to hold the catch in place." This invention was followed in 1875 by one made by Charles A. Taylor, which related to "catches" or "fastenings" for trunks; its use being to fasten, together and securely, the lid and the body of a trunk. In this device the fastening proper is secured permanently to the body of the trunk, and it consists in a "shaft having two arms at the opposite ends, having a flattened face, and a spring, which, in operation, presses against the flattened face of the shaft, that thereby the fastener may be the more securely held in the locked position." It seems impossible to differentiate the devices of Lieb and Flocke from these. It cannot be denied that the same elementary parts appear in the several mechanisms. In each are found the "rock shaft" with the "flattened surface" or "cam," the "box bearing" for the shaft, and the "spring." Nor is the operation of the elements in the combination different in any material respect, while the result achieved by the joint operation of the combined parts seems to be identical in all particulars. It is quite true that there are minor differences. The Lagowitz device is said to relate to a "new manner of preventing the ends of traveling bags from getting loose, and consists in attaching, to each of the links by which the ends of the handle are connected with the bag, two arms, which, when the bag is suspended from the handle, fit over and around the sides of the frame, holding the same together, and relieving the lock." The pressure or strain upon the handle of the bag causes the arms to fall over and around the sides of the bag, and so far the catch may be said to be "automatic," as it is described in the claim. But, if the handle be disconnected from the catching device, there is left "a rock shaft," "two arms," a "box-bearing support," and a "spring" acting upon the "flattened sides" of the shaft, which is, in effect, the Lieb and the Flocke invention. And so with the Taylor trunk fastener. The same elementary parts appear in combination, having precisely the same operative action, and producing the same result. Here, too, there are differences, but they are immaterial. Taylor provides but one flattened surface to his shaft, upon which the spring is to play. Lieb's device has two such surfaces, while Flocke's has three. But the purpose of flattening the surface of the rock shaft is to provide

a larger area of surface for the compressive action of the spring. One flat side is an improvement upon the cylindrical surface, and much better results are obtained thereby from the action of the spring upon it. It is a matter of mere mechanical calculation and skill to double or treble the flattened surfaces, to obtain double or treble the result which one flattened surface gives. It is not necessary to make any further analysis or comparison of these anticipating devices. It seems clear that they deprive the Lieb and the Flocke devices of patentable novelty. The simple fact is that at the date of these alleged inventions the "bag catch," consisting of a rock shaft, with box bearings and two arms, was old. The difficulty in its use arose from an inability to fix temporarily in a permanent position the arms. These revolving easily were in some degree unmanageable, and quite as often placed themselves between the jaws of the frame of the bag as around them; thus hindering the closing of the bag, rather than making it more certain and secure. The introduction of the spring, in connection with the catch, by Lagowitz, solved the difficulty. He was a pioneer. The rest simply improved, by the exercise of mechanical skill, what he devised. Neither in the Lieb nor in the Flocke device can be found that creative work of the inventive faculty, which it is the purpose of the law to reward and protect. As was fitly said by Mr. Justice Bradley in *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225: "The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trial and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle, and injurious in its consequences." For the reasons stated the bill of complaint must be dismissed.

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TRAUT & HINE MANUF'G CO. et al. v. WATERBURY BUCKLE CO.

(Circuit Court, D. Connecticut. March 7, 1895.)

No. 820.

PATENTS—INFRINGEMENT—INJUNCTION—GARMENT SUPPORTERS.

The Adams patent, No. 487,689, for improvements in garment supporters, construed as to claim 2, and a preliminary injunction denied, on the ground that infringement did not clearly appear. 64 Fed. 492, modified.

This was a bill by the Traut & Hine Manufacturing Company and George E. Adams against the Waterbury Buckle Company for infringement of letters patent No. 487,689, issued to said Adams December 6, 1892, for an improvement in garment supporters. A preliminary injunction was heretofore granted, together with an order suspending its operation until the case could be heard by

the circuit court of appeals. 64 Fed. 492. Defendant now moves for a rehearing, upon the ground of newly-discovered evidence.

Mitchell, Hungerford & Bartlett, for complainants.  
George E. Terry, for defendant.

TOWNSEND, District Judge. This is a motion for a rehearing, upon the ground of newly-discovered evidence, which, it is alleged, shows lack of novelty, in view of the prior art, and raises a question of doubt as to whether the patentee was the first to conceive the invention of the patent. On the former hearing, the court decided that the second claim of the patent in suit was infringed, and ordered a preliminary injunction, but granted, also, an order suspending its operation until the case could be heard by the circuit court of appeals. Under the general claim of lack of novelty, three patents were introduced on this hearing, namely: Patent No. 300,430, dated June 17, 1884, granted to Benjamin F. Archer; British patent No. 9,617, dated July 3, 1888, granted to Charles N. Fyland; and British patent No. 2,150, dated May 26, 1880, granted to George Walker. One of the drawings of the Fyland patent shows or suggests the downward curve of the patented cast-off. Another shows two catches at the side of the front plate. The curve at the lower end of the back plate is practically the same as that of defendant's buckle. It may be true, as urged by complainants, that said patent does not show the precise latch for positively locking the members together, as described in the patent in suit, and covered by the first claim, nor such coacting members for jointly supporting the cord when it is subjected to stress. But, in order to sustain the second claim of the patent, and to find infringement upon the evidence presented at the former hearing, it seemed necessary to hold that the location of the catch was not a special feature of the patented invention, and that the only object of the patent was to so arrange it that it might be readily engaged and disengaged. The feature of joint support by coacting members was considered, and it was thought that, as the downward pull was entirely upon defendant's back plate, the arrangement of said catch and of the two members for joint support was not an essential element of the second claim. Under no other construction did the order for a temporary injunction seem to be justified, and this construction was adopted, with some hesitation, in order to permit the question involved to be raised by appeal. The additional evidence introduced so strongly confirms the doubts originally entertained that I think the orders already made should be vacated, and the motion for a preliminary injunction should be denied. Let an order be entered accordingly.

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TAGLIABUE v. SONDERMANN.

(Circuit Court, E. D. New York. May 15, 1895.)

PATENTS—ANTICIPATION—SYRINGE.

The Tagliabue patent, No. 325,132, for a syringe in which the piston is made expansible without being removed, by having a threaded piston

rod working in a jam nut, which is held stationary for tightening the screw by being drawn into and held by a socket in the cylinder head, is void because of anticipation by the Myers patent, No. 261,026, which shows the same elements, working together in the same way, in a pump, which is a closely analogous use.

This was a suit in equity by Charles J. Tagliabue against Hermann Sondermann for infringement of a patent for a syringe.

John Henry Hull, for plaintiff.

Arthur v. Briesen, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 325,132, dated August 25, 1885, and granted to the plaintiff for a syringe, in which the piston is made expansible without being removed by having the piston rod threaded and working in a jam nut, which is held stationary for tightening the screw and expanding the piston by being drawn into and held by a socket in the cylinder head. The claims are for:

"(1) In combination with the screw-threaded piston rod, the expansible piston, and the jam nut fitted on the piston rod to act on the piston, the cylinder head having the axial passage for the piston rod provided with a socket to receive the jam nut, and hold it stationary in the rotation of the piston rod, substantially as shown and described.

"(2) The screw-threaded piston rod, the expansible piston, and the jam nut arranged on the piston rod to act on the piston, and constructed in form of a tapering polygon, in combination with the cylinder head having the axial passage for the piston rod, provided with a socket of corresponding form to the jam nut to receive the latter, and hold it stationary in the rotation of the piston rod, substantially as described."

Among others, patent No. 261,026, dated July 11, 1882, and granted to Philip A. Myers, for a piston packing for pumps, is set up as an anticipation. In it the patentee describes the operation of these parts thus:

"In pumps of this class it is inconvenient to take out the piston from the cylinder when it needs readjustment. I have therefore devised simple means for effecting this adjustment while the piston remains in the cylinder. This I accomplish by forming on the upper end of the cylinder in which the piston works a socket in line with the piston rod, this socket being polygonal or otherwise shaped to fit the upper nut when the piston is drawn up. In order, therefore, to tighten the nuts and increase the pressure upon the rubber or other expansible disk, it is only necessary to draw up the piston till the upper nut enters the cavity or recess or socket, when it is held while the piston rod is turned. As the piston rod is turned, it passes through the upper nut, all below said upper nut turning with the rod. This forces down the upper nut, and presses the lower into the rubber disk, thereby expanding the rubber and the bushing or packing without removing the piston from the cylinder."

The second claim is for:

"(2) The combination of the cylinder, the piston rod and piston, the packing, and the expansible disk within the packing, and the socket fixed to the upper end of the cylinder, adapted to receive the upper nut, and to turn it down to compress said packing, as set forth."

Here are all the elements of the plaintiff's claims, operating together in a pump in the same way as in his syringe, and for the same purpose. A syringe is a kind of pump, and these uses are not only analogous, but closely so, for the expansible piston is expanded in each, and works precisely as in the other. The difference, if any,

is only in size; but this does not affect the relation or operation of the parts. As machines they appear to be the same. The plaintiff seems to have been an original, but not the first, inventor of this invention. For want of that priority, his patent fails.

Let a decree be entered dismissing the bill.

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THE COLUMBUS.

THE SCOWS NOS. 6, 8, 11, and 12.

MUNN v. GARVER.

(Circuit Court of Appeals, Third Circuit. May 3, 1895.)

No. 9.

1. MARITIME LIENS—TOWAGE SERVICES RENDERED UNDER CONTRACT—EXISTENCE OF LIEN.

Where a libel against certain scows and dredges, constituting together a dredging plant, to recover for towage services rendered during the operation of the plant, showed that the services were rendered under contract made with a person with whom the libellant dealt as agent for the owners or users of the plant, without any agreement for a lien, *held*, that an averment in the libel that the services were rendered on the credit of the plant, and not upon the credit of the owners, was insufficient in law, because the material inquiry was, not whether the libellant himself contemplated a lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance of it; and *held*, further, that, as the services were not alleged to have been rendered upon the request of the master, but under contract with an agent of the owners, it was immaterial, under the circumstances, whether or not the owners were known to libellant.

2. SAME.

Where special and unusual towage services, such as conveying the scows of a dredging plant back and forth from the dredges to the dumping place, and moving the dredges from time to time, are rendered pursuant to a contract, any intention to create a lien for the services should be clearly expressed.

3. SAME.

Dredges and scows used together upon a dredging contract, both being necessary to the operation of the dredging plant, are not to be considered as one thing, in such sense that a lien will attach to all for services rendered in towing some of the scows back and forth from the dredges to the dumping place, and in moving the dredges from time to time. 65 Fed. 430, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by Frank W. Munn, managing owner of the tugboats Philadelphia and Alert, against the dredge Columbus and the scows Nos. 6, 8, 11, and 12, of which John A. Garver was claimant, as agent for the owners. In the district court the libel was dismissed. 65 Fed. 430. The libellant appeals.

Horace L. Cheyney and John F. Lewis, for appellant.

J. Rodman Paul, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

**DALLAS, Circuit Judge.** This is an appeal from a decree in admiralty. The libel was filed against three dredges and twelve mud scows, characterized as "forming together a mud-dredging plant"; and of these there were attached one dredge and four scows. The libellant sought to hold the latter jointly liable for towage rendered by two tugs to any and all the scows and dredges, upon the ground "that the services of the said tugs were rendered to all the dredges and scows constituting the plant of said dredging company as such services were needed by those operating the plant, and that the services were rendered to the plant as a whole, and were necessary for operating the same properly, and that the services were rendered on the credit of said plant, and not on the credit of the owners thereof, who are unknown to the libellant," etc.

The case was heard below and in this court upon an agreed statement of facts, as follows:

"The libellant is part owner and managing owner of the tugs Philadelphia and Alert. In the year 1891, James A. Mundy & Co. entered into a contract with the United States for the removal of Windmill and other islands in the Delaware river, opposite Philadelphia, and for the deposit of the material removed therefrom upon League Island. To carry out this work, James A. Mundy and others organized under the laws of the state of New Jersey a corporation known as the 'Philadelphia Dredging Company,' and this dredging company, or James A. Mundy and others associated with him, purchased and secured a dredging plant,—i. e. a number of dredges, scows, and towboats,—to be used in the same operation of dredging for the prosecution of the work of the removal of these islands. This plant was made up of two dredging plants, one known as the 'Philadelphia Plant,' and the other as the 'Thompson Plant.' The Philadelphia dredging plant consisted of the dredge Starbuck and three bottom-dumping scows, Nos. 13, 14, and 15. The Thompson plant consisted of the dredges Columbus, America, and Norwalk, and the tug Bowen, and the scows Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. These two plants were used and operated as one by the Philadelphia Dredging Company. The dredges above mentioned were anchored at the islands which were to be removed, and, as the earth was excavated, it was deposited upon the scows by the dredges in the manner usual in dredging operations. By the contract with the United States government, the material excavated from the islands was required to be deposited upon League Island, at a distance of about six miles from the scene of the dredging operation, and, to receive the excavated material, the above-mentioned scows were employed. They were bottom-dumping scows, constructed in the usual manner, and lacked any facilities whatever for propulsion, either steam or sail, or for steering, and it therefore became necessary to supply additional tugboats to tow the loaded scows down the river to League Island, and the empty scows back to the dredges to be refilled. In 1892 the Philadelphia Dredging Company, or James A. Mundy and those operating and owning the said plants, entered into an arrangement with libellant for the towage of the scows from the dredges to League Island and back, and for such moving of the dredges as might be necessary, and agreed to pay the sum of \$26 per day for the tug Philadelphia, and \$30 per day for the tug Alert. During the months of July and August, 1892, the tug Philadelphia rendered said towage service properly for 30 days,—during November 26 days, and during December 20 days,—for which the sum of \$2,054 became due to libellant. During July, 1892, the tug Alert rendered said towage services properly for 4 nights, at \$30 per night, and 4½ hours' time, at \$4 per hour, for which the sum of \$138 became due to libellant. The dredges above named were not supplied with any mud pockets or dumps except the said scows, and had no means of propulsion, and, in order to be used as dredges, were required to be operated in conjunction with one or more scows, as was done in this case to receive the mud dredges, and were required to be advanced or moved from time to

time as the dredging work progressed. The dredges excavated the earth, and deposited it on the bottom-dumping scows. After the scows were loaded, they were, either singly or more usually in a tow consisting of several, towed down the river to League Island, and were there dumped over the receiver of the mud pump, the light scows being towed back to the dredge to be reloaded, the round trip occupying about three-quarters of a day. The said towage services were necessary to enable the work of dredging to be carried on, as without the use of the scows to carry the excavated material the dredges would have been useless for this work, and the scows would have been of no use for this work without the services of the dredges. The scows bore no name, but were known by numbers only. When brought back empty, the various scows were towed to the dredges to be filled, in accordance with the directions of the superintendents in charge of the dredging work. No itemized account of the towing of the dredges or of each scow to and from each dredge or the towage of the dredges was kept by the tugs. This suit was brought by libelant against the dredges Columbus, America, and Star-buck and the scows Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, and 14, and of these the marshal attached the dredge Columbus and scows 6, 8, 11, and 12. The dredges and scows against which the suit was brought were the only ones within the jurisdiction of the court at that time."

Two questions are presented by the pleadings and the statement of facts:

1. The libel states that the dredges and scows constituted the plant of the Philadelphia Dredging Company, and alleges that that company used them, and that "the libelant, at the request of the agent of said company, furnished the tugboats." It is also alleged "that the said services were rendered on the credit of said plant, and not on the credit of the owners thereof, who are unknown to the libelant," etc. But this latter averment is, in our opinion, when considered in connection with the specific statements to which we have referred, insufficient in law; for the material inquiry is, not whether the libelant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties and the services rendered in pursuance of it. Nor is it of legal consequence that the libelant does not now know who are the owners of the dredges and scows; for he does not assert that the services were rendered upon the order of the master, but admits that they were rendered under contract with a person with whom he dealt as agent for the owners or users of the vessels, and with whom he made no agreement for lien. If, however, it could be conceded that the libel sufficiently alleged that credit had been given to the vessels, and not to the owners or users thereof, still the issue raised by the answer would have to be determined in favor of the respondents. The admitted fact is that "the Philadelphia Dredging Company, or James A. Mundy and those operating and owning the said plants, entered into an arrangement with the libelant for the towage of the scows from the dredges to League Island and back"; and this admission, we think, constrains the conclusion, not only that the arrangement was made on behalf of owners, and not of vessels, but also that, as matter of fact, the libelant entered into and acted upon it in exclusive reliance on the credit of the owners. The contract was not for ordinary towage, but for special and unusual towage; and we believe that, if it had been intended to create a lien, that intention not only should have been, but, under the circumstances, would have



been, expressed. *Stephenson v. The Frances*, 21 Fed. 715; *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396; *The Now Then*, 5 C. C. A. 206, 55 Fed. 523; *The Stroma*, 3 C. C. A. 530, 53 Fed. 281; *The Advance*, 60 Fed. 766.

2. To sustain this libel would be to apply the law of admiralty lien in a manner for which there is no precedent. The cases cited for the appellant do not support his contention. The *Alabama*, 22 Fed. 449, decided nothing but that a dredge which is used in connection with a scow is itself a vessel within the maritime law; but, conceding this, it does not follow that several dredges and several scows, even when used together, constitute but a single vessel; and the cases which hold that the wrecking apparatus of a wrecking schooner (*The Edwin Post*, 11 Fed. 602), the whaling boats of a whaling ship (*Hoskins v. Pickersgill*, 3 Doug. 222), and the boats carried on deck or towed astern a fishing schooner (*The Merrimac*, 29 Fed. 157), may be regarded as part of the craft to which they respectively belong, are not authority for the proposition that a number of distinct vessels are to be treated as one thing, merely because they happen to be associated in the same enterprise.

The decree is affirmed.

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#### THE NUTMEG STATE.

#### THE MONITOR.

HARRIS et al. v. TRACY et al.

SAME v. BRIDGEPORT STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

#### **COLLISION—STEAMER WITH TUG AND TOWS—SIGNALS.**

A tug, with barges lashed on each side, coming down the middle of the East river, perceived a steamer just leaving her berth at a pier on the New York shore, and turning to go up the river. The tug blew two whistles, indicating an intention to pass starboard to starboard, which was immediately assented to by the steamer; but immediately afterwards the tug slowed her engines to one bell, and a collision ensued. Had she maintained her speed, it was apparent that she would have passed the point of intersection before the steamer reached the same. *Held* that, for this violation of her agreement, the tug was alone liable for injuries to her barges. 62 Fed. 847, affirmed.

This was a libel by Joseph S. Harris, Edward M. Paxson, and John Lowber Walsh, as receivers of the barge *Guy* and the barge No. 75, against the steamer *Nutmeg State* (the Bridgeport Steamboat Company, claimant), to recover damages resulting from a collision which occurred while the barges were being towed by the tug *Monitor*, of which the libelants were also receivers. A libel was also filed by Michael Tracy and John Tracy, owners of the barge *Dickerson*, which was also in tow of the tug, and was injured at the same time, against the *Nutmeg State*. To this libel the tug herself was subsequently made a party upon petition under the rules. In the district court the tug was held solely liable, and the *Nutmeg State* was

discharged. 62 Fed. 847. From these decrees the receivers of the tug have appealed.

James Armstrong, for libelant Harris.

Anson B. Stewart, for libelant Tracy.

Samuel Park, for claimant the Nutmeg State.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The collision occurred at 2:35 p. m. on December 26, 1893, under the following circumstances: The Monitor was coming down the East river, about in midstream, having three barges on each side; the Dickerson being outside, on the starboard side. The tide was ebb, and the wind northwest and strong. She had reached a point about opposite pier 39, when the Nutmeg State was perceived just starting from her berth at pier 35, and turning to go up the river. Two whistles were blown by the tug, indicating her intention to pass starboard to starboard. They were promptly responded to by the Nutmeg State. Had the navigation thus agreed upon been persisted in, there would undoubtedly have been no collision, because the Monitor would have passed the point of intersection before the steamer, on her turn to port,—necessarily a long one, because of her own length and the ebb tide,—reached the middle of the river. But the tug failed to conform her navigation to her signal. She starboarded, it is true, but, immediately after giving her signal, slowed her engines down to one bell. We concur with the district judge that this failure to keep the promise of her signal was the proximate cause of the collision. The Nutmeg State had no reason to anticipate such a violation of the agreement that the tug would keep on, and, when it was perceived that she had slowed, it was too late to avoid the catastrophe. It is unnecessary to add anything to the discussion of the facts by the district judge. Decrees are affirmed, with interest and costs, and with costs, respectively.

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#### THE PRINCETON.

#### HOBOKEN FERRY CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. April 24, 1895.)

No. 115.

#### 1. COLLISION OF FERRYBOATS IN NEW YORK HARBOR—FOG SIGNALS.

The statutory rule requiring steam vessels under way in a fog to sound steam whistles at intervals of not less than a minute, applies to all such vessels moving in waters which they have not the exclusive right to occupy, and in which other vessels may be met. *Held*, therefore, that a ferryboat, which was moving about in a dense fog, part of the time within and part of the time without the line of the piers, attempting to find her slip, was in fault for ceasing to sound the signals. Distinguishing *The Shady Side*, 17 Blatchf. 132, Fed. Cas. No. 12,692. Reversing 61 Fed. 116.

#### 2. SAME—RIGHTS OF FERRYBOAT INSIDE OF PIERS.

A ferryboat has not the exclusive right to occupy the water lying within the ends of the piers above and below her slip; and, although

vessels passing up and down the river would not ordinarily enter the same, they would not be trespassers there, as they might unintentionally get inside the line in a fog.

**8. SAME.**

Vessels passing up and down the Hudson river unduly encroach upon the rights of ferryboats when they keep so near the ends of the piers as to unnecessarily embarrass the latter in their movements in entering or leaving their slips. *Held*, therefore, that a ferryboat which had crossed from Hoboken to the New York shore, and was slowly feeling her way down the river in a dense fog, near to or within the ends of the piers which were located above and below the slip of another ferryboat, was in fault for collision with the latter.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the Hoboken Ferry Company, owner of the ferryboat Orange, against the ferryboat Princeton, the Pennsylvania Railroad Company, claimant, to recover damages occasioned by a collision between the two vessels. In the district court the libel was dismissed. 61 Fed. 116. The libellant appeals.

Stewart & Macklin, for appellant.

Robinson, Biddle & Ward, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The collision which is the subject of controversy in this cause took place in the Hudson river, in the early morning, in a heavy fog, between two ferryboats, the Orange and the Princeton. The Orange was upon one of her regular trips from Hoboken, bound for her slip at the foot of Barclay street; and the Princeton had come from Jersey City on one of her regular trips, bound for her slip at the foot of Desbrosses street. Owing to the heavy fog, the Orange, instead of proceeding on her usual course, had been brought over near the New York shore, somewhat above the ferry slip of the Princeton, and was slowly feeling her way down the river near the ends of the piers, sounding her fog signals at proper intervals, and had got nearly opposite the slip of the Princeton, when she heard the paddlewheels of the Princeton, a short distance off on her port bow. She immediately reversed her engines, and sounded alarm whistles, but instantly the Princeton became visible, and struck the Orange on the latter's port bow. The Princeton, while opposite her slip, had been obliged to wait for a tow which passed between her and the ends of the piers, and had drifted with the flood tide somewhat above her slip. She then went forward, and attempted to make her slip, but failed to do so; and, intending to make a second attempt, backed out and up the river a distance of about 200 feet, and had ordered her engines ahead, but was still moving backward when the collision took place. She had been sounding her fog signals at proper intervals up to the time when the tow passed in front of her; but at that time, being so near her slip, she stopped sounding them, and from that time until the collision, an interval which occupied two or three minutes, she omitted to give any signals. The ferryboats of the several lines had distinctive

fog signals, and each vessel on this occasion had heard and recognized the signals of the other; but when the Princeton stopped giving signals the pilot of the Orange assumed that she had entered her slip, and until her paddlewheels were heard supposed she was out of the way of the Orange.

It is quite difficult, if not impossible, in view of the density of the fog, to locate the precise spot of the collision, and the contradiction in the testimony of the witnesses need not be ascribed to any intentional misrepresentation on the part of any of them. The district judge was of the opinion that it was inside of a line drawn from the end of pier 41 to the end of the first pier below the slip of the Princeton, and the weight of testimony would seem to favor that conclusion. Both piers projected into the river beyond the entrance of the ferry slip, pier 41 about 300 feet and the lower pier about 200 feet. As these piers were about 600 feet apart, there was a very considerable area of water between a line extending from their ends and the entrance to the ferry slip. The pilot of the Orange had discovered that his vessel was near the piers when some little distance above pier 41. His vessel at that time was then heading a little west of south, and he testifies that he thereupon headed her more to the south, and kept her on that course until the collision occurred, a period of three or four minutes. This change must have brought the Orange quite close to the end of pier 41 as she came opposite to it, and by the time she was opposite the ferry slip it is probable she was inside of the line of the pier ends.

Upon these facts we think both vessels should be held in fault. The Princeton violated the statutory rule which requires all steam vessels, when under way in a fog, to sound a steam whistle at intervals of not more than one minute. She had been under way, going forward and backward, part of the time outside and part of the time inside of the line of the pier ends, during a period in which she should have sounded her whistle two or three times. It is not necessary to hold that the rule applies to a ferryboat after she has entered her slip, although still under way, because the Princeton had not entered her slip; but, unless its language is ignored, it must apply whenever a vessel is under way in waters which she has not the exclusive right to occupy, and in which other vessels may be met. The Princeton did not have the exclusive right to the area between the ends of the piers, and, although vessels passing up and down the river would not ordinarily enter it, they would not be trespassers there. In a fog such vessels might find themselves unintentionally and excusably inside of the line of the pier ends. The case of *The Shady Side*, 17 Blatchf. 132, Fed. Cas. No. 12,692, is cited as an authority for the proposition that a vessel moving in a fog in a slip between the piers is not required to sound fog signals. In that case the vessel charged with violating the rule was so far inside the pier ends that her omission to give fog signals was harmless, and, as the court said, would have tended to mislead the other vessel if they had been given. We fully acquiesce in the judgment in that case,

and in the cautious language of the opinion that the rule is only intended to apply to vessels moored or moving in the way of commerce, and not to those lying at docks, or, ordinarily, to those moving in slips. In the present case the pilot of the *Orange* was actually misled by the omission of the *Princeton* to continue sounding signals. He knew of the proximity of his vessel to the slip of the *Princeton*; knew that the *Princeton* had been approaching her slip on a course crossing the course of his own vessel, and was led to assume, as he reasonably might, when the signals of the *Princeton* stopped, that the latter had actually entered her slip, and was beyond the path of the *Orange*. He was thus lulled into a mistaken sense of security by her conduct.

The *Orange* must be condemned because she was navigating unjustifiably near the entrance to the ferry slip of the *Princeton*. Vessels passing up and down the Hudson river unduly encroach upon the rights of ferryboats when they keep so near the ends of the piers as to unnecessarily embarrass the latter in their movements in entering or leaving their slips. This proposition has recently been reiterated in *The Breakwater*, 155 U. S. 252, 15 Sup. Ct. 99. The exigencies of navigation frequently compel ferryboats to make maneuvers similar to those which the *Princeton* was making, and no other vessel is justified in unnecessarily encroaching upon the room required for executing them. The *Orange* was off her usual route, and was not in the vicinity of her own slip. If a course near the ends of the piers was safer or more convenient for her because of the dense fog, it was for the same reason more hazardous to the ferryboats whose slips lay along that course, and whose entrance or exit from them might be intercepted by her presence. Doubtless the master of the *Orange* did not intend to allow his vessel to come so near the entrance of the ferry slip, but he had ample warning of her proximity to it; and when he discovered the situation, and changed her course more to the southerly, he should have changed it more to the westerly, so as to keep a reasonable distance away.

Both vessels having been in fault, the presumption is that the fault of each contributed to the collision. If those in charge of the *Princeton* had expected that another ferryboat would be navigating between the ends of the piers, they probably would not have omitted the precaution of giving the fog signals. If these signals had not been omitted, the *Orange* would probably not have been misled, and could have taken necessary precautions to avoid collision. The case is one where each vessel has been guilty of a breach of duty, and it is impossible to say that the fault of one did not influence the conduct of the other.

We conclude that the decree of the district court should be reversed, and a recovery awarded to the libellant for half its damages. It is therefore ordered that the cause be remitted, with instructions to the district court to decree for the libellant conformably with this opinion, with the costs of this appeal.

ILLINOIS STEEL CO. v. SAN ANTONIO & G. S. RY. CO. et al.  
(Circuit Court, W. D. Texas, San Antonio Division. May 9, 1895.)

No. 556.

1. WRITS—SERVICE ON CORPORATION—RETURN.

Under Rev. St. Tex. art. 1223, authorizing the citation in a suit against an incorporated company to be served on the president, secretary, or treasurer, or on the local agent of such company, where the writ commands the marshal to summon a railroad company, but does not name the officer on whom it is to be served, a return showing service of the citation on the president, secretary, and local agent, respectively, in person, shows a valid service on the railroad company.

2. SAME—MOTION TO QUASH.

Where a return shows that a citation was served on the president, secretary, and local agent of a corporation defendant (Rev. St. Tex. art. 1223), naming them, the citation will not be quashed on motion of defendant, on the ground that the names of the officers served were not contained in the petition and writ, even conceding such omission to be material, where defendant does not deny under oath that the person served were its officers or agents.

Action by the Illinois Steel Company against the San Antonio & Gulf Shore Railway Company and others on a promissory note. Defendant railway company moves to quash the citation.

Suit is brought by plaintiff to recover of defendants the sum of \$27,903.99, evidenced by the promissory note executed by defendants to plaintiff on the 1st of November, 1894. The petition alleges that plaintiff is a corporation, created and existing under the laws of Illinois; and that the defendant railway company is a corporation created and existing under the laws of Texas, having its principal public office and place of business in the city of San Antonio, Bexar county, and Western district of Texas, and that its president, secretary, and treasurer reside in said county and district, and, further, that it has a local agent representing it therein. The petition prays that the defendants be cited "in the manner authorized and provided by law." As to the defendant railway company three citations were issued and served, respectively, upon G. G. Clifford, as president, R. E. Saddler, as secretary, and V. B. Colley, as local agent. The citations are similar, and are of the following form:

"United States of America, Western District of Texas, at San Antonio.  
Citation in Circuit Court.

"The President of the United States to the Marshal of the Western District of Texas, Greeting: You are hereby commanded to summon the San Antonio & Gulf Shore Railway Company, a resident of the county of Bexar, in the Western district of Texas, if to be found therein, to be and appear before the honorable circuit court of the United States, at a court to be holden in and for said district, at San Antonio, on the first Monday, being the 6th day, of May, A. D. 1895, and the first day of the regular term of said court in course, to answer a petition and complaint exhibited and filed in said court on the 18th day of March, A. D. 1895, in a suit numbered on the docket of said court No. 556, wherein the Illinois Steel Company is plaintiff, and the San Antonio & Gulf Shore Railway Company, Wm. Davis, John Ireland, H. O. Engelke, and George Dullnig are defendants. The nature of the plaintiff's demand is as follows, to wit: Praying judgment against each of said defendants for the sum of \$27,903.99, besides interest, costs, and \$6.62 protest fees, due upon a promissory note dated November 1, 1894, executed by said defendants, whereby said defendants, and each of them jointly and severally, for value received, promised to pay to the order of plaintiff at the Fifth National Bank of San Antonio, Texas, the said sum of \$27,903.99, in U. S. gold coin of standard weight and fineness, with interest

at the rate of 6 per cent. per annum, and as will more fully appear from copy of plaintiff's petition attached. And you will deliver to the defendant San Antonio & Gulf Shore Railway Company a true copy of this writ, and the accompanying certified copy of plaintiff's original petition."

The returns of the marshal are also similar, except as to the name and official designation of the party upon whom service was made, and are as follows:

"Came to hand on the 18th day of March, A. D. 1895, at 3:00 o'clock p. m., and executed on the 18th day of March, A. D. 1895, at 3:11 o'clock p. m., by delivering to G. G. Clifford, president of the San Antonio & Gulf Shore Railway Company, the within-named defendant, in person, in the county of Bexar, and Western district of Texas, a true copy of this citation, and the accompanying certified copy of plaintiff's petition.

"Richard C. Ware,  
"United States Marshal for the Western District of Texas,  
"By Addison Kilgore, Deputy."

The railway company, appearing for the purpose of quashing the citations, urges, in support of its motion, the following grounds: "First. The return of the citations served upon G. G. Clifford, V. B. Colley, and R. E. Saddler do not show that said company has been served with process. Second. Said returns of said citations show that Secretary R. E. Saddler has been served, and that Local Agent V. B. Colley has been served, and that President G. G. Clifford has been served, when said Saddler, Colley, and Clifford are not made parties to this suit in said petition, nor do their names appear anywhere in said petition. But neither of said returns shows that said company has been served by leaving a copy of citation at its principal office, or that there has been service upon said railway company by service upon any of its agents."

Baker, Botts, Baker & Lovett and Searcy & Garrett, for plaintiff.  
W. W. King, for defendant railway company.

MAXEY, District Judge, after stating the case, delivered the following opinion:

By article 1223, Rev. St. Tex., it is provided that:

"In suits against any incorporated company or joint-stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which the suit is brought, or by leaving a copy of the same at the principal office of the company during office hours."

The writ in this case commanded the marshal to "summon the San Antonio & Gulf Shore Railway Company," and the return shows that a copy of the citation, together with a certified copy of the petition, was delivered to the president, secretary, and local agent, respectively, in person. The argument of the railway company's counsel assumes the necessity of incorporating in the petition and citation the name of the president, secretary, or other officer or agent upon whom service of process is sought, in order to render the service effective as to the corporation. That such practice would be convenient to the officer making the service may be admitted. But no reason is perceived why the insertion of the officer's name in the petition and citation should be considered as a prerequisite to valid service. And this observation is especially applicable to those cases in which service is had upon the president, secretary, or other general officer or managing agent of the corporation. See *Railway Co. v. Wells*, 3 Tex. Civ. App. 307, 23 S.

W. 31. By the court of appeals of this state, a citation, similar in essential respects to the one now before the court, has been held sufficient. Thus, it is said in *Railway Co. v. Wise*, Judge Willson delivering the opinion, that:

"The citation commanded service thereof to be made upon the defendant, the Missouri Pacific Railway Company, and in other respects complied substantially with the requirements of the statute. It is not essential, though it is proper and the better practice, in a citation against an incorporated company, to name the local agent upon which the same is to be served. An omission to do so, as there was in this case, does not invalidate the citation. *Railway Co. v. Gage*, 63 Tex. 568; *Railroad Co. v. Sauls*, 2 Willson, Civ. Cas. Ct. App. § 242. The return upon the citation shows that it was served upon A. E. Davis, the local agent of defendant company, by delivering to him in person a true copy of the writ, stating the date of such service. This shows a legal service. Rev. St. arts. 1223-1225; *Insurance Co. v. Millikin*, 64 Tex. 46." 3 Willson, Civ. Cas. Ct. App. § 386.

But conceding the omission in the petition and citation to name the officer to be material, the important inquiry arises: Can such omission or defect be taken advantage of by a motion to quash? This question has been answered in the negative by the supreme court of this state. In *Railway Co. v. Gage*, 63 Tex. 568, neither the petition nor the citation gave the name of the person who was the local agent of the company; and while it is there held that if, in such cases, "there be no appearance for the defendant, the court ought to take no action until proof is made that the person served was really the local agent of the corporation sued, acting for it in the county in which the suit is brought," yet, at pages 573, 574, Mr. Chief Justice Stayton, as the organ of the court, further says:

"In the case before us, however, the defendant did appear, and for the purpose of abating the writ, a copy of which was left at its office in San Antonio, filed a sworn plea; but it filed no such plea in reference to the fact of agency or not of the person on whom the writ was served in the county in which the suit was brought, but sought simply to quash the writ and service, upon purely technical grounds, without in any manner denying that the person served was its local agent in the county of Uvalde at the time the writ was served. We are of the opinion that this was not the proper manner for raising the question of the sufficiency of the service, and that the court did not err in overruling the motion; hence the ruling on the exception to the sworn plea, raising an issue as to the locality of its principal office, although erroneous, becomes unimportant."

In the case at bar, the railway company, not denying under oath, as it should do, that the persons served were its officers or agents at the date of service, merely interposes a motion to quash upon purely technical grounds, and the court is of opinion that the question of sufficiency of the service cannot be raised in this manner. The motion should be overruled; and it is so ordered.

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LANE et al. v. ANDERSON et al.

(Circuit Court, D. Washington. April 22, 1895.)

No. 306.

EQUITY—INJUNCTION AGAINST GOVERNMENT OFFICERS.

By Act Cong. March 3, 1893 (27 Stat. 612), it was provided that a commission should be appointed by the president to select and appraise



certain portions of the reservation of the P. band of Indians, and, after obtaining the written consent of the individual Indians to whom certain parts of the land belonged, as to those lands, and of a majority of the band as to the remaining parts, to sell such lands for the benefit of the Indians. Certain Indians brought a suit to enjoin the commissioners from proceeding under the act, alleging that they had procured the required consents by fraud and intimidation. *Held*, that no injunction could be issued, the commissioners being officers of the government, exercising discretionary powers.

This was a suit by Thomas Lane and others against James J. Anderson and others to restrain them from acting as commissioners under the act of congress of March 3, 1893. Defendants demurred to the bill.

F. Campbell, for complainants.

F. C. Robertson, for defendants.

GILBERT, Circuit Judge. The complainants, who are Indians of the Puyallup tribe of the state of Washington, bring a bill for an injunction against the defendants, who are the commissioners appointed under the act of congress of March 3, 1893, to lay off and sell a tract of land, a portion of the Puyallup reservation, consisting of 598.81 acres adjoining the city of Tacoma. The act of congress of February 8, 1887 (24 Stat. 388), had provided for the allotment of lands in severalty to Indians upon certain reservations whenever, in the opinion of the president of the United States, the land of any reservation should be deemed advantageous for agricultural and grazing purposes, and authorized him to cause such reservation, or any part thereof, to be surveyed, and the lands allotted to the Indians located thereon. Under this law the lands of the Puyallup reservation were surveyed, and the greater portion thereof was allotted to the Indians of that tribe. Among the allottees were the complainants in this suit. The tract in controversy in this suit was not included in the allotment, but remained unpartitioned. On March 3, 1893 (27 Stat. 612), an act was passed making appropriation for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes, in which, on page 633, it was enacted:

"That the president of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one state, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes in the Puyallup reservation, in the state of Washington. And if the secretary of the interior shall approve the selections and appraisements made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the secretary of the interior may determine, to be secured by vendor's lien on the property sold. It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the secretary of the interior, which deeds shall operate as a complete conveyance of the

land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the commissioner of Indian affairs, with the approval of the secretary of the interior, shall direct: provided, that the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the city of Tacoma, and sold in separate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: and provided further, that the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the secretary of the interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions," etc.

The complainants allege that the defendants, in order to induce the requisite number of the members of the Puyallup tribe of Indians to consent to the sale of lands as contemplated in the act last quoted, falsely represented to them that the lands would be sold, and the proceeds thereof would be paid to them according to their respective interests therein; and that others of the tribe, who were unable to read and write the English language, were by the defendants induced to sign, and to allow their names to be signed to, a paper purporting to give their consent to the sale, by the use of money paid by defendants, and promises made by defendants that they would receive the money derived from the sale; and certain others were induced to consent by threats and intimidation. And they further allege that the defendants are surveying the tract in controversy, for the purpose of laying the same off into lots and blocks, and selling the same at public auction, in pursuance of the act, and that thereby clouds will be cast upon their title, and they will be involved in a multiplicity of suits; and they pray that the commissioners be enjoined from such proceeding.

The defendants demur to the bill for want of equity, and the question arises upon the demurrer whether an injunction will lie to restrain the defendants as prayed for in the bill. It is the general rule that, where national officers are vested with certain discretionary powers by virtue of their office, their discretion cannot be interfered with either by injunction or mandamus. It is otherwise where their duties are of a character purely ministerial. In *Marbury v. Madison*, 1 Cranch, 166, a citizen had been nominated, confirmed, and appointed a justice of the peace for the District of Columbia, and his commission had been made out, signed, and sealed. Nothing remained to be done except delivery, and that duty was imposed by law on the secretary of state. It was held that the performance of that duty might be enforced by mandamus.

The court, after a mature consideration of the questions involved, said:

"The conclusion from this reasoning is that, where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or, rather, to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable; but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy."

In *Kendall v. U. S.*, 12 Pet. 534, a suit had been brought in the circuit court of the District of Columbia to issue a writ of mandamus to the postmaster general to compel him to do a merely ministerial act, which the relator had the right to demand, and as to which the postmaster general had no discretion. The supreme court held that a mandamus was properly issued, since it did not seek to direct or control the postmaster general in the discharge of any official duty partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the president had any authority to deny or control. In the case of *Mississippi v. Johnson*, 4 Wall. 498, the court defined a ministerial duty as follows:

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law."

In *Gaines v. Thompson*, 7 Wall. 347, it was attempted to enjoin the secretary of the interior and the commissioner of the land office from canceling an entry upon land. The court, after quoting the definition of a ministerial duty from the decision last cited, proceeded in these words:

"The action of the officers of the land department with which we are asked to interfere in this case is clearly not of this character. The validity of plaintiff's entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of congress. It has been for a long time before the department, and has received the attention of successive secretaries of the interior, and has been found so difficult as to justify those officers in requiring the opinion of the attorney general. It is far from being a ministerial act under any definition given by this court."

In *Litchfield v. Register*, 9 Wall. 577, the complainant claimed to be the owner of land which the officers of the land department were treating as public lands, and he sought to enjoin them from entertaining applications and proofs of pre-emption thereon. Mr. Justice Miller, in denying the injunction, said:

"The principle has been so repeatedly decided in this court that the judiciary cannot interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here."

Applying the doctrine of these decisions to the case under consideration, it is clear that the injunction must be refused. The

commissioners are officers of the United States. They are acting under a statute of the United States which invests them with discretion to do the acts which are complained of. It may be that they are proceeding in an unlawful manner, as alleged in the bill, but it does not follow that the complainants may resort to the aid of another branch of the government to interfere with their action. If these lands shall be wrongfully sold, and the complainants have rights which shall thereby be invaded, they will undoubtedly be in a position to require that the grantees of the lands so sold shall be held to stand in such attitude to the title as shall conserve the rights of those justly entitled thereto. But they are not entitled to relief in this proceeding. The demurrer to the bill must be sustained.

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## WILDER et al. v. CITY OF NEW ORLEANS.

(Circuit Court, E. D. Louisiana. February 6, 1895.)

No. 11,380.

## MUNICIPAL CORPORATIONS—NEW ORLEANS DRAINAGE FUND—CITY AS TRUSTEE—RECEIVERS.

The city of New Orleans having been declared by the supreme court (11 Sup. Ct. 541) to be a mere compulsory trustee of the drainage fund, without any of the obligations of debtor and creditor as between the city and the fund, and a receiver of the fund having been subsequently appointed, *held*, that the receiver now stands in the place of the city, as between the fund and its creditors, and the city is no longer subject to be sued in regard thereto, but the suits should be brought against the receiver.

This was an action by Wilder and others, constituting the firm of Wilder & Co., against the city of New Orleans, to enforce a claim against the drainage fund or tax.

William Grant and Richard De Gray, for plaintiff.

E. A. O'Sullivan, City Atty., for defendant.

PARLANGE, District Judge. Heretofore, the city of New Orleans excepted "that this suit is improperly prosecuted against the said city, all powers and liabilities appertaining to the drainage fund or tax having been withdrawn from said city, and vested in a receiver, by decree of this court in a suit of J. W. Peake v. New Orleans, No. 12,008; that, since said decree, the city is without authority to stand in judgment, and this suit must be prosecuted against said receiver, and not against said city." The exception was overruled, and subsequently the cause was fixed for trial on the merits. It was taken up before a jury, and, the evidence on both sides being closed, the plaintiffs moved the court to direct a verdict in their favor; the defendant moving similarly for the direction of a verdict in its favor. Defendant's motion is virtually based on the same grounds upon which the exception was founded.

After having heard reargument of the matter set forth in the exception, and having consulted the authorities which the defendant's counsel now cites, I am clear that the exception should have been

sustained; and I am satisfied that in this cause there cannot be judgment, as prayed for, against the city of New Orleans. It results clearly from the case of *Peake v. New Orleans*, 139 U. S. 349, 11 Sup. Ct. 541, that, with regard to the drainage fund or tax, the city was merely a compulsory trustee or forced administrator, and that there was no obligation of debtor and creditor between the city and the fund or tax. The supreme court is emphatic in its statement that the responsibility of the city in the matter must be restricted to its narrowest limits, and that the only relation of the city to the matter was that of assessor or collector of the special assessments. After the decision of the *Peake Case* by the supreme court, a receiver was appointed by this court in that case "of all the property, equitable interests, things in action, and effects of the drainage fund held by the defendant, the city of New Orleans, in trust," and the receiver "was vested with all the rights and powers of a receiver in chancery, according to law and the rules and practice of this court, upon his filing \* \* \* a bond," etc. The order appointing the receiver further provided that the city should appear before a designated master in chancery, and should execute and deliver to the receiver "an assignment, assigning, transferring, and conveying to him all the aforesaid property, equitable interests, things in action, and effects, and all books, papers, and vouchers relating thereto, and that the city appear before such master from time to time, as said master shall require, and submit to such examination as said master shall direct in relation to said property and effects and the condition thereof." It is difficult to see how the order could have been made broader, or how the receiver could have been given larger powers. The city, far from resisting the appointment of the receiver, submitted the matter to the decision of the court, through its counsel, thereto authorized by the city council. The receiver entered upon the discharge of his duties. Pursuant to orders of this court in the matter of the receivership, the city, by an act before J. D. Taylor, of February 11, 1892, transferred to the receiver, who accepted the transfer, all the rights, title, and interest of the city, in its character of trustee, in all the property described in the act, and more especially all such rights as the city had derived from the commissioners of the First and Second drainage districts under act of the legislature No. 30 of 1871. The act describes at great length and in detail the property transferred, being the books, records, assessment tableaux, in the matter of the drainage fund or tax, and a large number of pieces of real estate held by the city as trustee for the drainage fund. The receivership is still in progress. When the *Peake Case* was before the supreme court, no receiver had been appointed, and the court said that the judgment upon which the bill in equity in the *Peake Case* was based "was unquestionably correct." It was a judgment against the city, but payable only out of the drainage fund. The supreme court said that the judgment "absolved the defendant [the city] from any primary obligation of creditor to debtor. It left it [the city] chargeable only as a trustee of a fund out of which plaintiff's claim was to be paid. It was like a judgment which, in fact

against an estate, is nominally entered against the administrator thereof, to be satisfied out of the property of the estate, and not of the individual property of the executor." But, by reason of the subsequent appointment of the receiver, the matter presents now a totally different aspect from that which it presented when the Peake Case was before the supreme court. It being determined by the supreme court that the only relation which the city bore to the fund is that of a forced administrator or trustee, and that relation having ceased by virtue of the appointment of a receiver, a judgment against the city now would be absolutely illogical. It would be utterly unreasonable to condemn the city to pay a judgment out of a fund which this court has withdrawn from its control or supervision, and no part of which the city could touch without committing contempt of the authority of this court.

Counsel for plaintiffs cite *Bank of Bethel Case*, 14 Wall. 383; *High, Rec.* §§ 258, 260; *Mercantile Trust Co. v. Pittsburg & W. R. Co.*, 29 Fed. 732; *Tracy v. Bank*, 37 N. Y. 523. These authorities have no bearing on the matter in hand. They simply declare that actions may be instituted against a debtor, although a receiver has been appointed over him, where the rights and remedies of the plaintiff terminate with the original debtor, and when the receiver is not to be adjudged to do anything for plaintiff's benefit. But the suit at bar is not a suit against a debtor over whom a receiver has been appointed. No receiver has been appointed to the defendant, and the highest authority has declared that the city is not a debtor in this matter. This is a suit against the city as administrator or collector of a fund. Plaintiffs pray to be paid out of that fund, and this court has heretofore taken away from the city any right to touch it. Defendant's counsel now cites Justice Bradley's opinion in *Vose v. Reed*, 1 Woods, 650, Fed. Cas. No. 17,011; also, 20 Am. & Eng. Enc. Law, 304, and the cases cited in the notes.

It is perfectly clear that there must be judgment in favor of the city of New Orleans. However, as plaintiffs may properly plead surprise, a mistrial or continuance will be entered, if they so desire.

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ATCHISON, T. & S. F. R. CO. v. MULLIGAN.

(Circuit Court of Appeals, Seventh Circuit. May 8, 1895.)

No. 183.

1. APPEAL—ASSIGNMENT OF ERROR.

An assignment of error which states that "the court erred in giving to the jury the following instructions," enumerating several distinct propositions, is not in conformity with a rule requiring that the assignments "shall set out separately and particularly each error asserted." Jenkins, Circuit Judge, dissenting.

2. SAME—TECHNICAL ERRORS.

A court will not disregard a departure from strict compliance with its rules as to the assignment of errors, in order to notice an error which is technical and probably immaterial.

**3. MASTER AND SERVANT—QUESTION FOR JURY.**

In an action for damages, brought by an employé of a railway company, who had been injured by falling from the footboard of an engine, the plaintiff testified that the board gave way under him, and it appeared that after the accident the board was found to be broken. *Held*, that it was a question for the jury to determine whether the board was unsound or insecurely fastened, or was broken by plaintiff's fall.

**4. SAME—FELLOW SERVANTS.**

A locomotive engineer, charged with the duty of inspecting his engine, is not, in respect to the duty of such inspection, a fellow servant of a hostler's helper engaged in switching engines in the railroad yard.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was an action by Patrick Mulligan, alias Patrick Guiver, against the Atchison, Topeka & Santa Fé Railroad Company for personal injuries. The plaintiff recovered judgment in the circuit court. Defendant brings error. Affirmed.

E. A. Bancroft, Charles S. Holt, and Eldon J. Cassoday (George R. Peck, of counsel), for plaintiff in error.

Albert S. Thompson and John F. Waters, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This was an action in the nature of trespass upon the case for a personal injury received by the appellee, Patrick Mulligan, alias Patrick Guiver, while in the employ of the appellant, the Atchison, Topeka & Santa Fé Railroad Company, as a hostler's helper, his duty being to assist in the switching of engines in the yards of the company near Chicago. It is alleged that the footboard on the front of the engine about which the plaintiff was engaged when hurt was defective, unsound, unsafe, unsuitably and improperly constructed, adjusted, and secured, and that while the plaintiff in the performance of his duty was attempting to get upon the same it gave way, and caused him to fall under the engine, whereby he was injured. Negligence in other respects is averred, but the court by its first, second, fourth, and fifth instructions, which are set out in the margin,<sup>1</sup> restricted the jury to the ques-

<sup>1</sup> (1) Among other duties averred in the declaration to have been imposed upon the defendant by the contract of employment, was to furnish plaintiff, for the performance of his labors in that behalf, an engine, upon and around which to work, safe, sound, properly constructed and equipped with fenders or guards, and with sound, safe, and suitable footboards, and in every way suitable for plaintiff's work upon and around the same. Several breaches of these alleged duties are assigned, but that to which the evidence has been particularly directed is the one alleging that the footboard on said engine was defective, unsound, unsafe, unsuitably and improperly constructed, adjusted, and secured, and that while plaintiff in the performance of his duty was attempting to get upon the same it gave way, causing plaintiff to fall, and the engine injured him, etc.; and the plaintiff's testimony was by the court substantially limited to this averment as to the character and condition of the footboard and the connection between the same and plaintiff's injury.

(2) The general issue was pleaded by the defendant, and this threw the burden upon the plaintiff to establish by the weight or preponderance of the

tion of the plaintiff's right to recover on account of the defective construction and condition of the footboard. This being so, the objections made to testimony which was admitted concerning negligence in other particulars are immaterial, and need not be considered. The evidence concerning the push pole, which at the time of the accident was upon the front of the engine when its proper place was elsewhere, was admissible to show the circumstances of the injury; and under the court's charge the jury could not reasonably have regarded it as more than an incidental matter.

The third and fourth specifications of error, which relate to the giving and refusing of instructions, do not conform to the requirement of our rule 11, that the assignment "shall set out separately and particularly each error asserted and intended to be urged." The third assignment is that "the court erred in giving to the jury the following instructions," and there follow portions of the instructions given to the number of five, some of which certainly are free from essential fault. The fourth assignment is that "the court erred in refusing to give to the jury the following charges, which were severally requested and severally refused"; and there follows a series of twelve requests for instructions, some of which it was not error to refuse, because they were embraced in the charge given, and some of which it would probably have been error to give. It has been often decided that a general exception to the giving or refusing of a series of instructions is insufficient. *Vider v. O'Brien*, 18 U. S. App. —, 10 C. C. A. 385, 62 Fed. 326, and cases cited; and even though, as in this case, the exceptions be properly taken, an assignment of error in respect to instructions will not be good which does not specify separately each error relied on. In addition to the words quoted, the third assignment contains the statement that counsel for the defendant excepted to each portion of the charge complained of, but, while that statement or the substance of it is essential to the bill of exceptions, as a part of the specification of error it is irrelevant

evidence that, while in the exercise of due care and diligence, he, the plaintiff, while attempting the performance of the duties he had undertaken to perform for the defendant, was injured by reason of the unsafe, unsound, or improperly constructed footboard attached to defendant's engine.

(4) Under the rules of law, the plaintiff, at the time he entered the service of the defendant, assumed all the ordinary risks incident to the business or employment he undertook to perform, and the undertaking of the defendant was to furnish reasonably safe machinery and appliances for the service in which the plaintiff was engaged. An accidental injury sustained by the plaintiff while engaged in defendant's service of itself creates no liability against defendant, but, in order to fix such liability, the weight of the testimony must show or satisfy you that plaintiff, while using due care, was injured by means or reason of the improper construction or unsafe and unsound condition of the footboard, and that the defendant either had notice of such defective footboard, if it existed, in time to repair it before the injury, or could or should have known of such defects had reasonable care been taken to properly inspect and keep and maintain the same in repair.

(5) You are the peculiar judges of the evidence on the questions of whether plaintiff was exercising ordinary care at the time of the injury, and also as to whether defendant was negligent in not furnishing an engine equipped with proper and safe footboard, or in failing to maintain the same in repair, and also as to whether plaintiff's injury resulted from defendant's negligence with reference to such footboard.



and serves no purpose. As stated in *Vider v. O'Brien*, there must be a separate assignment in respect to each part of the charge which is alleged to be erroneous, or, at least, it must be distinctly alleged that there was error in giving or refusing each severally of the propositions which it is intended to challenge. In short, the same rule governs the saving of exceptions and the assigning of errors, and upon reason it should be so.

In some respects the instructions given are objectionable, and some of the requests which were refused ought perhaps to have been given, but the errors are technical, and probably did not affect the result. For instance, the court instructed that "the undertaking of the defendant was to furnish reasonably safe machinery and appliances for the service in which the plaintiff was engaged," when the instruction should have been to the effect that the defendant was bound to use reasonable diligence to furnish safe machinery and appliances. This, besides not having been made the subject either of an exception or an assignment of error separately from other distinct propositions in the charge, is, so far as it goes, the same as an instruction which the appellant asked to be given. Again, the third instruction asked and refused was to the effect that the plaintiff could not recover on account of the manner in which the footboard was constructed. The board was made of oak, was about two inches thick and ten or twelve inches wide. There was certainly no danger that jurors could be made to think such a board, if securely fastened, unsafe merely because the stirrups on which it rested did not by two or three inches extend entirely to its outer edge. The plaintiff's theory of the case as developed at the trial and insisted upon was that the accident was caused by a crack in the board, which, beginning at the end, ran lengthwise on a line about three inches from the front edge, and had negligently been permitted to remain. The jury had a right to consider the manifest fact that the danger from such a defect in the footboard was enhanced by reason of the shortness of the stirrups, but that it was necessary to instruct against a finding of negligence in the manner of original construction alone can hardly be believed without attributing to the jury a want of ordinary intelligence.

If it were apparent that either in giving or refusing instructions the court had committed an essential error, to the probable injury of the appellant, we should not be inclined to insist upon a strict compliance with our rule in respect to the assignment of errors, though it is expressed in very clear terms, and need not be misunderstood. By the last clause of the rule, "the court at its option may notice a plain error not assigned," or, of course, one defectively assigned; but when, as in this case, the error itself is technical, and it can be said, not with certainty but with great probability, that it did not affect the verdict, the rule may well be applied with strictness. It is always a matter of regret when a judgment or decree must be reversed for errors which may or may not have affected the result, and we deem it a sound public and judicial policy to hold in such cases that a technical error must be technically well assigned.

The fifth and sixth assignments are not insisted upon, and it remains to consider only the first, which is to the effect that the court erred in refusing to direct a verdict for the defendant. Four reasons are assigned why that should have been done, namely: (1) That there was no evidence fairly tending to show negligence of the defendant causing the injury; (2) that the accident was the result of the usual hazards of the employment which the plaintiff assumed; (3) that the plaintiff had the same opportunity for discovering the condition of the footboard that the defendant had, and it was equally his duty to discover defects which were obvious; and (4) that, if there was negligence in failing to discover the defective condition of the footboard, it was the negligence of the engineer, whose duty it was to make the inspection, and who was a fellow servant of the plaintiff.

We are not able to say that the evidence did not justify the submission of the question of negligence to the jury. From the mere fact that the footboard gave way under the appellee, as he testified and presumably the jury found that it did, the natural, if not necessary, inference would be either that the board had become unsound, or was insecurely fastened; and the inference that it had become unsound is supported by the evidence offered of the condition of the board after the accident. That condition, it is true, might be accounted for on the supposition of the appellant that the board was split by reason of its contact with the appellee after his fall, but that would be inconsistent with the testimony of the appellee that his fall was caused by the board's giving way. Between the conflicting theories of the accident it was the province of the jury to decide, though it could be done only by inference. There is in the case no question of notice to the appellant of the defective condition of the footboard. The duty of inspection, it is conceded, was intrusted to the engineer, who had daily charge of the engine, and without fault could not have failed to discover the condition of the footboard if it had become so unsound as to give way in the manner asserted. The contention of the appellant that the split in the board, which was discovered after the accident, was caused by contact with the appellee after he had fallen, as already stated, is inconsistent with the testimony of the appellee that it gave way when he stepped upon it. If the jury believed that testimony, as it had a right to do, it must have rejected the theory of the appellant, and have adopted that of the appellee that the board was defective when he stepped upon it, either by reason of long use and decay or of recent injury. This was a question for the jury, and, the judge below having given his sanction to their verdict, it is not our duty to set it aside. In respect to the duty of inspection the engineer represented the company, and was not a fellow servant of the appellee. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Ward*, 10 C. C. A. 166, 61 Fed. 927. While the appellee should be regarded as having assumed the ordinary hazards incident to his employment, and in emergencies perhaps was bound to protect himself against obvious dangers of whatever character, neither to himself nor to the company was he under a duty to inspect

the engines, about which he worked, in search of hidden and unapprehended sources of danger. That was the duty of the company. *Railroad Co. v. Kelly*, 11 C. C. A. 260, 63 Fed. 407. Whether or not the unsound condition of the footboard was obvious, and should have been perceived by the appellee, was a question of contributory negligence, in respect to which the appellant had the burden of proof, and consequently could not ask that it be withdrawn from the jury. The judgment below is affirmed, at the costs of the appellant.

JENKINS, Circuit Judge (dissenting). I am constrained to dissent from the judgment of the court. The rule invoked to prevent the consideration of the errors assigned requires that an assignment of errors "shall set out separately and particularly each error asserted and intended to be urged." The third assignment alleged that the "court erred in giving to the jury the following instructions." Then follow, properly numbered and in numerical order, five specific instructions, separately stated. The bill of exceptions declares that each of these instructions was given, and that the plaintiff in error specifically excepted to the giving of each of them. The fourth assignment declares that the "court erred in refusing to give to the jury the following charges, which were severally requested by the defendant and severally refused by the court." Then follow, properly numbered and in numerical order, twelve specific instructions requested to be given, which are separately stated. The bill of exceptions declares that the "court refused to give said instructions, or to give any or either of them, to which refusal as to each of said instructions the defendant then and there duly excepted." I am of opinion that the errors asserted are "separately and particularly stated," within the true intent and meaning of the rule. I am able to perceive no possible good to result from the requirement that each particular instruction or request shall be prefaced with the formal assertion of error in giving or refusing. Such requirement would only incumber the record with useless repetition. It is, to my thinking, much more orderly to assert the errors by classes, as here was done; the errors of admission of evidence, the errors of exclusion of evidence, the errors in refusing requests to charge, and the errors in the charge being assembled in separate classes, each error within its class being separately stated and particularly numbered. The court cannot then be misled or confused. Such presentation of errors, in my judgment, accords both with the spirit and the letter of the requirement. The purpose of the rule is to obtain an orderly presentation of the errors relied upon, that the court may at a glance, and without laborious search, ascertain the precise grounds asserted against the integrity of the judgment. The rules are rules of order and of convenience. They are not designed to prevent the correction of obvious errors. They are not traps for the unwary, not "springes to catch woodcocks." The rule itself expressly reserves to the court the right at its option to notice a plain error not assigned. The rule is a counterpart of a like provision in the rules of the supreme court. I find, in the opinions

of that court construing the rule, no suggestion of a construction of it so technical as that declared in the opinion of the court. I cannot but think that the ruling of the court in this regard is a sacrifice of substance to form. If I am correct, the errors assigned are before us for review.

I agree that the plaintiff in error cannot be heard to object to the instruction with respect to the duty of the company in the matter of furnishing reasonably safe machinery and appliances. And this because—First, the charge in the respect complained of was substantially in the language of the twelfth request tendered by the plaintiff in error, and it does not appear that the attention of the court was directed to the particular language employed; and, second, the portion of the charge excepted to embraces an instruction respecting the assumption of risk by the defendant in error which is not complained of and which was correct. The exception was single to the charge embracing both the correct and erroneous instruction. It is well settled that in such case, if any part of the charge within the exception be correct, the exception is unavailing. The same observations, in my judgment, hold good with respect to the other parts of the charge presented as erroneous. I think, however, that certain of the instructions requested, and not covered by the charge, should have been given. The second request was as follows: "No recovery can be had by the plaintiff in this case on account of the position of the push pole upon the locomotive at the time of the accident." The declaration originally filed had but one count, and asserted the accident to have been caused solely by reason of the presence of the push pole. That count asserts that the defendant in error stepped upon the footboard of the engine; that almost immediately thereafter he brushed against and felt a rod or pole, which he afterwards learned was a push pole for pushing cars in the railroad yards, projecting from the front part of the engine; that he grasped hold of it for support, whereupon, being unsecured, it suddenly gave way, and caused the plaintiff to fall, and he was with great violence thrown to the ground, etc. The declaration originally filed avers the negligence of the company causing the injury to consist in allowing the push pole to be placed on the front part of the engine in an unsafe and insecure manner, where it improperly belonged. Upon his examination the defendant in error stated that this pole was in common use about the engine by the switchmen, and was usually placed on the tank, where it could be most conveniently obtained for use. Under objection and exception, he was permitted to testify that it was not customary for the employes to place the push pole in front of the engine. The evidence at the trial disclosed, according to the theory of the defendant in error, that the injury resulted from the breaking of the footboard, and that as the board broke the defendant in error reached out for support, and grasped the push pole lying unfastened upon the front part of the engine. It is entirely clear that the injury was in no respect caused by the presence of the push pole, and the instruction should have been given. The original declaration asserted the presence of the push pole as the principal inducing cause of the

injury. It was not so in fact. Its presence upon the engine did not tend to establish negligence on the part of the company. It was placed there by some employé, and, if it was negligently and improperly so placed, it was so done through the negligence of a fellow servant, and was one of the risks of service assumed by the defendant in error. It is true that the court in its charge states that the evidence had been particularly directed to the defective footboard, and that the testimony on the part of the plaintiff had been by the court substantially limited to the averment respecting the character and condition of the footboard and the connection between the same and the plaintiff's injury. But this did not exclude from the consideration of the jury the evidence with respect to the presence of the push pole upon the engine, or its alleged connection with the injury. The court should have withdrawn that matter wholly from the consideration of the jury. It cannot be safely affirmed that the evidence concerning the push pole and the refusal of the court to give the instruction requested did not influence the jury to the injury of the plaintiff in error. I conceive it to be the duty of the trial court, in cases of this character especially, to eliminate from the case, so far as possible, all extraneous considerations, and all irrelevant testimony, and to specifically charge the jury, when so requested, that particular evidence which has been improvidently admitted, or a particular fact asserted in the declaration as the moving cause of the injury but which has no legitimate connection with it, should be disregarded by the jury.

I am also of opinion that the third instruction requested should have been given. That instruction was as follows:

"The plaintiff has alleged in his declaration that the defendant was negligent in the manner of the construction of the footboard of the locomotive from which the plaintiff fell. The only fact appearing in evidence relied upon to sustain this charge is that the iron hangers or stirrups upon which the footboard rested did not extend entirely to the outer edge of the board. This fact is admitted, and it further indisputably appears from the evidence, that other locomotives of the defendant were constructed in the same manner, and that this locomotive, so constructed, had been in use by the plaintiff for several months prior to the accident. Upon these facts you are instructed that the plaintiff cannot recover in this case on account of the manner in which such footboard was constructed."

The declaration had been enlarged by the addition of two counts; the one asserting failure of duty in respect of construction, and the other in respect of repair of the footboard. This footboard was an oak plank some two inches in thickness. It appeared in evidence that most, if not all, of the locomotives in use by the company were constructed in like manner with this one. It also appeared that such was the general manner of construction, and that it was safe if the board were sound. It also appeared that the defendant in error had been accustomed to ride upon this footboard for some four months prior to the injury. The manner of its construction was open and notorious. It seems to me to be a great stretching of the rule of liability to say that, under such circumstances, the jury may declare that there was improper construction or original failure of duty by the company with respect to this appliance.

Upon the theory of the defendant in error as developed at the trial, the accident was occasioned by reason of the crack in the footboard negligently permitted to remain in that condition. The fault of the company, if any, was in this, and not in the manner of construction of the footboard. It may be true, as asserted in the opinion of the court, that the manner of its construction was a fact proper to be considered by the jury in connection with the alleged defect in the footboard, because enhancing the danger from the defect and emphasizing the duty to repair. The error, however, is in this: That not only was there no instruction against liability in respect to the original construction, but there was express submission of the case upon that ground. If an instruction against such liability would have been—as asserted by the court—impeachment of the intelligence of the jury, what shall be said of a charge which expressly submitted the question of failure of duty in respect of construction as ground of liability? The court failed to discriminate between liability for failure of duty in the original construction of the footboard, and negligence in respect of its repair. The case was submitted with sanction to the jury to declare liability upon either or both hypotheses. It may well be that under such charge the jury arrived at their verdict upon the conclusion that the company should have provided hangers or stirrups extending entirely to the outer edge of the board, and not upon any supposed negligence with respect to keeping the board in repair. I think it was clearly erroneous for the court to refuse the instruction requested. These errors are not technical, but substantial, and should, I think, operate to the granting of a new trial.

I agree with the court that there was evidence in respect to keeping the footboard in repair sufficient to carry the case to the jury; but I think that the submission of the case should have been limited to that ground, the only one upon which a verdict could be sustained.

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#### HARRISON v. GERMAN-AMERICAN FIRE INS. CO.

(Circuit Court, S. D. Iowa, E. D. April 25, 1895.)

##### 1. INSURANCE—PROOFS OF LOSS—WAIVER.

Defendant's adjuster was sent to adjust and settle the loss on plaintiff's house and its contents. Plaintiff furnished him with a list of the personal property in the house at the time of the fire, showing the property saved, and that lost. The adjuster told plaintiff that he only wanted to know what property was gone, and, with list in hand, made a personal examination of the property. Defendant intimated for the first time at the trial that it would insist upon more formal proofs of loss. *Held*, that the right to formal proofs of loss was waived.

##### 2. SAME—CONDITION OF POLICY—ARBITRATION—WAIVER.

A policy provided that, unless the loss thereunder was agreed upon, it should, at the written request of either party, be arbitrated, and an award obtained in the manner provided by the policy was made a condition precedent to any action thereon. After loss, without any written request therefor by either party, and before any agreement as to the amount of the loss was even attempted, plaintiff and the adjusters of the companies interested signed a joint agreement for the appraisal of the property cov-

ered by defendant's policies, as well as property not so covered, but included in policies of another company. No award was made, owing to the failure of the appraisers to agree. *Held*, that the arbitration attempted was not such as was contemplated in the policy, which was waived by the attempted arbitration, and that the "condition precedent" clause did not apply thereto.

3. SAME—AUTHORITY OF AGENTS—WAIVER OF CONDITIONS.

A stipulation that no agent shall be held to have waived any of the conditions of the policy, unless such waiver shall be indorsed thereon in writing, does not apply to conditions to be performed after the loss is incurred; and therefore an adjuster can waive a provision making arbitration in accordance with the terms of the policy a condition precedent to suit, by making a different agreement for arbitration.

4. SAME—CONDITIONS OF POLICY—ARBITRATION.

McClain's Code Iowa, § 1734, provides that the amount stated in the policy shall be prima facie evidence of the value of the property, and that, to maintain an action on the policy, it shall only be necessary to prove loss of the building insured, and notice thereof to the company, accompanied with affidavit showing the manner and extent of loss, anything in the policy to the contrary notwithstanding. *Quaere*, whether an arbitration relating solely to the value of the buildings insured can be made a condition precedent to an action on the policy.

5. SAME—ABANDONMENT OF ARBITRATION.

Where appraisal by arbitrators has been entered upon, and the arbitration fails because the arbitrators cannot agree on an umpire to decide between them, according to the terms of the arbitration, and defendant and its arbitrator fail to make any further effort to come to an agreement, though notified to do so, plaintiff may consider the arbitration abandoned, and sue on the policy.

Action by George D. Harrison against the German-American Fire Insurance Company on a policy of insurance.

D. N. Sprague and A. H. Stutsman, for plaintiff.

McVey & Cheshire, for defendant.

WOOLSON, District Judge. This action was commenced in the district court of Louisa county, Iowa; the petition having been filed January 28, 1893. On application of defendant, the action was removed to this court. The petition exhibits two policies, of the form provided by the New York statute, against fire,—the one covering plaintiff's dwelling house, situated in Louisa county, Iowa (amount of insurance, \$2,000); the other covering also such house, with an additional insurance of \$1,000, and also insurance for \$800 on certain personal property therein described, and contained in said house. The petition alleges that said property was destroyed and injured by fire on October 4, 1893, and that plaintiff was thereby injured in the sum of \$8,000. The petition also avers that plaintiff did not make formal proofs of loss, because of defendant having waived the same, and that, plaintiff having given to defendant immediate notice of the fire, defendant, to wit, on October 20, 1892, by its agent, agreed to arbitrate the loss and damage, and each party chose one arbitrator, but said parties did not appraise or fix the loss to plaintiff, although plaintiff has been willing and anxious to have them do so. The "amended and substituted answer," filed herein July 5, 1894, after pleading a general denial, specifically pleads, in substance, that this action is

premature, and cannot be maintained, because of noncompliance by plaintiff with the arbitration clauses (hereinafter set out) of said policies, and clause as to proofs of loss, which are claimed to be by said policies made conditions precedent to institution of suit thereon, and that this action was prematurely commenced within 90 days from any attempts at proofs of loss. Plaintiff on July 5, 1894, filed his replication, denying that any arbitration was ever attempted or made under or by virtue of the terms of said policy; alleging that there was no disagreement of the parties, and no attempt to agree, as to loss, before the appraisement agreement was signed, no written demand for appraisal was made by either party, and, through no fault of plaintiff, the appraisers appointed have not agreed, but have failed to appraise said loss, though plaintiff had, by written notice, requested defendant and said appraisers to proceed to the completion of said appraisement; and that plaintiff had used all reasonable efforts to have said appraisement completed, and that such completion has been prevented because the appraiser selected by defendant, then unknown to plaintiff, is in some way interested in defendant's behalf, and not a disinterested person, and has absented himself from the state, and failed to communicate with the other appraiser. The cause was tried to the court July, 1894, a jury having been waived. The policies in evidence are identical in their terms and conditions, only the written portions differing, and these written portions relate to premium paid, amount and duration of insurance, and property insured.

It is conceded that, by the terms of the policy contract, plaintiff was bound to furnish proofs of loss. Defendant claims that these proofs have never been furnished. Plaintiff concedes that formal proofs were not furnished, but claims such proofs were waived by defendant. The burden is on plaintiff to substantiate his allegation of waiver.

The evidence shows that plaintiff is a citizen of the state of Iowa, and defendant is a citizen of the state of New York. The fire occurred on October 4, 1892. About October 14th the local agent of defendant who had issued to plaintiff the policies in suit informed plaintiff that defendant's adjuster would be present on October 20th with an appraiser, and requested plaintiff to have an appraiser ready. On October 20th defendant's adjuster, Rodger Swire, came, accompanied by C. H. Turner, who was the adjuster of another company in which plaintiff held insurance. Plaintiff had made out a list of the personal property which was in his house at the time of the fire. Mr. Swire, with the associate adjuster, examined the burned premises, and also the personal property which had been saved from the fire. Of the \$2,800 loss on personal property, but \$800 was covered by insurance. At this examination they had a specific list of the personal property which was in the house at the time of the fire, showing the property saved and that lost, which plaintiff had furnished them. This list was used by the adjusters in their examination. Plaintiff testifies that the adjusters told him that all



they wanted a list for was to know about the property which had been burned. This list appears to have been satisfactory to the adjusters at that time, as the personal property was not thereafter investigated, or included in the appraisal, nor has any difficulty or contention arisen on the trial with reference to the personal property destroyed. Some of the articles in this list did not have the prices carried out. As to these, plaintiff and the adjusters procured prices from the business houses in that community. Plaintiff claims that these facts constitute a waiver of proofs of loss, or, rather, of formal proofs or further proofs, while defendant disputes this claim. That the policy contract requires such proof, unless the same is waived by the defendant, is conceded. The office to be performed by proof of loss is to advise the defendant with regard to the fire, the property insured, and the property lost or damaged by the fire. Such proofs are entirely for the advantage of the insurer. And the courts may well hold that anything which, when presented, is satisfactory on these points to the insurer should be equally satisfactory to the court. On this principle, the decisions, with marked unanimity, hold that whenever the insured furnishes the insurer with a list or statement which is intended as proofs of loss, to provide the information for which the contract calls, and no objections are made thereto by the insurer within such reasonable time thereafter as to afford the insured opportunity to remedy or supply the defects therein, the insured has waived—or, as some courts have stated, is estopped from claiming—more specific or complete compliance. Mere silence on the part of the insurer, where no proofs whatever are offered, does not waive the contract agreement. The doctrine of such waiver is well stated in *Weidert v. Insurance Co.*, 19 Or. 261, 24 Pac. 242:

"The company must, by some act of an agent having real or apparent authority, have done or said something which induced the plaintiff to do or forbear to do something whereby he is prejudiced."

And in *Gould v. Insurance Co.*, 134 Pa. St. 570, 19 Atl. 793, the rule applying to waiver of proofs is thus stated:

"If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as of itself to be sufficient evidence of waiver by estoppel."

No claim upon the trial was made that the adjuster Swire was not fully authorized to perform the duties he assumed. He was sent by his company to settle and adjust the loss. His letter to the local agent who had issued to plaintiff the policies of insurance sued on announces that he will attend "to take up the losses on Mr. Harrison's property." As was said by Circuit Judge Lowell in *Perry v. Insurance Co.*, 11 Fed. 484, with reference to an adjuster for defendant in that case, wherein the defense here interposed was set up, "If [the adjuster] had authority to adjust and settle the loss, we think, as a matter of law, he could do so with or without proofs." Bearing in mind that policy conditions such as we

are now considering should be most strongly construed against the insurer, and with a view to avoid forfeitures, and that no question has been raised as to the good faith of plaintiff with regard to the list furnished to the adjuster, we may note that the undisputed evidence is that plaintiff was told by the adjusters (who are shown to have acted in concert and were together), at the time this list of property was furnished to them by plaintiff, "that all they wanted to know about was what [property] was gone." And thereupon, with list in hand, they made a personal examination of the property. There can be no question but that plaintiff intended the list furnished to be a compliance with the terms of the policy as to the statement of property lost, and there is no suggestion that the adjuster, or any one for the company, expressed any objection to the list, either as to incompleteness or informality of same. So far as the evidence shows, the first intimation that plaintiff had of any dissatisfaction on part of defendant with the list, as being incomplete or unsatisfactory, or that defendant would insist on more formal or other proofs of loss, was on the trial of this cause, in July, 1894. And there is no evidence that defendant has been in any wise prejudiced by the absence of more complete or formal proofs of loss. The list was at the time accepted by the adjusters as sufficient, and their actions and statements abundantly justified plaintiff in believing, and relying thereon, that defendant was satisfied therewith, and did not demand or desire other or further proofs. Defendant's attitude in this matter at that time is also shown by the fact that, in the appraisal entered into on October 20th, no part of the personal property was included. I therefore find established by the evidence that defendant waived any other or further proofs of loss than those plaintiff furnished to its adjuster on October 20, 1892, and as to this defense I find against defendant.

Defendant claims that the award of damages by appraisers is a condition precedent to suit, and no such award has been made. The contract as to appraisal is stated in the policy as follows:

"Loss or damage to property partially or totally destroyed, unless the amount of said loss or damage is agreed upon between the assured and company, shall, at the written request of either party, be appraised and determined by disinterested and competent persons, one to be selected by this company and one by the assured, and where either party demand it the two so chosen may select an umpire to act with them in case of disagreement, and if the said appraisers fail to agree they shall refer the difference to such umpire,—each party to pay their own appraiser and one-half the umpire's fee; and the award of any two, in writing, shall be binding and conclusive as to the amount of such loss or damage, but no appraisal, nor agreement for appraisal, shall be construed, under any circumstances, as evidence of the validity of said policy, or of the company's liability thereon."

The policy further provides:

"It is expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy

shall be sustainable in any court of law or chancery until after an award shall be obtained fixing the amount of such claim in the manner above provided."

The decision rendered in *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, settles beyond question the holding of the federal courts that, as said in *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 263:

"When the parties are found, upon a just and reasonable construction of their contract, to have stipulated that a matter preliminary to the obligation and the duty to pay shall be determined and fixed by arbitration, such stipulation shall be taken as a part of the contract, and enforced;" and that "the tendency of the courts is to regard them favorably, and not, by forced construction, to defeat their apparent purpose, conceiving it to be beneficial."

It is, however, recognized, as stated in *Insurance Co. v. Stocks* (Ill. Sup.) 36 N. E. 408, by the supreme court of Illinois:

"This and like clauses are inserted in the policy by the insurance company, however, without any special stipulation between the parties in reference thereto, and for the protection and benefit of the company. The insured must arbitrate, or offer to do so, unless the obligation is waived, while the company may or may not, at its option, the only effect of its neglect or refusal being to waive its right to insist upon the condition when sued upon the policy. Moreover, valuation of the property cannot increase the amount to be recovered by the assured, while the appraisement may diminish the amount to be paid by the company. The rule, therefore, so often announced by the courts, that, in construing these and like clauses, that construction is to be adopted which is most favorable to the insured, applies."

That that portion of the policy contract which makes arbitration of damage a condition precedent may be waived by the company is now the uniform holding of the courts. And the courts, in determining this question of waiver, hold the company to a strict compliance with the specific terms of the contract before they will so apply the condition as to work a failure to the insured of his right to sue; for that right to sue has been, not stipulated away by the insured,—the courts would not uphold such a stipulation,—only deferred in its right of exercise until certain preliminaries agreed upon in the contract have been performed. There must be, on the part of the insurer, no action which is inconsistent with the right to rigidly insist on an award as a condition precedent, else that right is waived, and the terms of the policy contract, in regard to time and manner of insisting on such appraisement, in providing for it, and in executing it, must all closely follow the provisions of the contract, or the appraisement attempted is not the appraisement which the policy has made a condition precedent. A court should not, and will not, permit its powers and process to be stayed, and prevented from taking cognizance of, and administering the right with reference to, controversies between citizens, by any stipulation made before the controversy arose, unless he who insists on such staying of justice shall have brought himself sharply and fully within the letter as well as the spirit of the stipulation.

What is shown by the evidence in this case? On October 20th next after the fire, which occurred on October 4th, plaintiff and the adjusters of the companies interested signed an agreement

for appraisement of the dwelling house included in defendant's policies, and also of other buildings as well, which were included in the policies issued by the other company, but which are not included in policies in suit. There was no agreement, or effort to agree, between the plaintiff and defendant as to the value of the property included in the appraisement agreement, or the loss or damage suffered by fire, except that plaintiff offered to have the adjuster for the other company fix the value or loss which he had suffered. Nor was there any disagreement as to loss or damage suffered by plaintiff. The evidence affirmatively shows that no written request was made by either party for an appraisement. But defendant's adjuster, without attempt at agreement with plaintiff, had drawn up, and, with the adjuster of the other company, signed, with plaintiff, the appraisement agreement offered in evidence. This agreement covers no part of the personal property included in the policies in suit, while it does include property not included in either of defendant's said policies. And, further, the terms of the policies as to appointment of umpire, and the terms of the agreement, are not in accord. In the latter the umpire is to be selected, "if necessary, to decide upon matters of difference only," and such necessity must be determined by the appraisers. The facts, as proven, with reference to the attempted appraisement, are that on October 20, 1892, and pursuant to notice orally given to plaintiff by the local agent of defendant, defendant's adjuster, Rodger Swire, came to the plaintiff's residence, bringing with him one Lund, whom he proposed to appoint as an appraiser. Without any written request therefor by either party, without any disagreement by either party as to values, loss, or damage suffered by plaintiff, and before any agreement was attempted thereto, defendant presented, and, with the other adjuster, signed, with plaintiff, an appraisement agreement, which had primarily been drawn in the interest of, and to be used in adjusting loss in, the Hartford Fire Insurance Company. This agreement does not refer to, or in any wise include, the policies in suit, except as, in its opening statement, it says:

"It is hereby agreed by Geo. D. Harrison, of the first part, and the Hartford Fire Insurance Company, of Hartford, Conn. (and such other companies as sign this agreement), that Geo. J. Fischer and Hans Lund (together with a third person to be appointed by them, if necessary, to decide upon matters of difference only), shall appraise," etc.

And the property to be appraised is described as covered by policy No. 1,113 of said Hartford Fire Insurance Company, and, further on in said agreement, is specifically described. The only specific reference to the defendant company—in fact, the only reference whatever, except in the parenthetical reference above quoted—is the signature to the agreement of "German-American Ins. Co., Rodger Swire, S. A." Fischer, who was selected by plaintiff, resided in Louisa county, Iowa, in the vicinity of the fire. Lund, selected by defendant, resided at Kansas City, Mo. The evidence shows that the appraisers at once began their work, but before the first half day had passed they were in serious disagreement. And it was

only after long and earnest pleading on the part of plaintiff and both the adjusters that the appraisers resumed their attempt at appraisal. On the next day, Lund informed his coappraiser that he could not then remain longer, but must return to his home, in Kansas City. The appraisers, it appears, then agreed that Fischer should, if possible, go to Kansas City, and they would there complete the appraisal. But Fischer was taken sick, and was unable to go. Correspondence passed between them meanwhile. Fischer was urging Lund to come to Louisa county and complete the appraisal, while a letter from Lund to Fischer dated November 19, 1892, insists on Fischer coming to Kansas City and completing the appraisal. Lund came to Iowa about January 20, 1893, while Fischer was not yet well. An effort was then apparently made to select an umpire. As might naturally have been expected, while matters were at this stage, no umpire was agreed upon, although each appraiser suggested names to the other, while plaintiff earnestly pressed on them the necessity for immediate action. The adjusters separated, Lund returning to his home, each desiring to examine as to the persons the other had suggested. They never came together again. Nor did defendant, so far as the evidence shows, make any further effort at appraisal. On December 10, 1892, December 19, 1892, and January 4, 1893, plaintiff is shown to have written the adjuster, urging action towards settlement of his loss. And on April 28, 1894, plaintiff served on the adjuster, Swire, and also on the two appraisers, a notice demanding completion of the appraisal. Fischer appeared at the time and place named in the notice, but neither Lund nor any one for defendant made an appearance. Neither defendant nor the appraiser Lund seems to have made any attempt at completing the appraisal after Lund departed for his Kansas City home, on January 20, 1893.

It will be noticed that the policies in suit differ from those policies which were under consideration in a number of cases to which counsel have cited the court, wherein the policies provide for appraisal without the formality or necessity of request therefor. In these cases the policies provided, in substance, that in all cases, unless the insurer and insured agreed as to values, loss, damage, etc., the matter should be submitted to appraisers, whose award should be final, etc. In such cases the courts well hold that no action whatever is necessary to make appraisal a requisite preliminary to suit, if the policy thus unconditionally forbade suit until award obtained, for the mere fact of failure to agree made the appraisal imperative. But in the case at bar, and many other cases cited by counsel, mere failure to agree does not make appraisal imperative. The company has chosen to declare, by the terms of these policies, that the appraisal provided for in the policies is only to be set in motion by the "written request of either party." The company might have provided differently, but it has not so done. And in this case, as was said by the supreme court of the United States in *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S. 255, 10 Sup. Ct. 945, with reference to the policy then under consideration,

and which, on this point, is identical with the policies in suit, the appraisal, when requested in writing, is distinctly made a condition precedent to the maintenance of any action. So, in *Wallace v. Insurance Co.*, 41 Fed. 742, Circuit Judge McCrary, speaking of a policy identical on the point with the policies in suit, said:

"The condition did not absolutely require an arbitration. It only authorized either party to require it by a request in writing. The inference is reasonable that, if neither party requested it in writing, the usual remedies by suit were to remain. \* \* \* If it was their purpose to require that in every case the damages were to be ascertained by arbitration, they could have said so in plain terms."

In the *Wallace Case* no arbitration was attempted. That far it differs from the case at bar. But the reasoning as to the effect of the clause, "at written request," is valuable here. Whatever arbitration (appraisement) was attempted in case at bar was had or attempted without any "written request of either party" therefor.

The attention of the court is called to the fact that the appraisal here attempted, and contemplated in the agreement, is a "joint" appraisal,—that is, of two companies, whose policies are not identical in the appraisal conditions therein contained,—and it is contended that a demand therefor, though in writing, would not be within the conditions of the policies sued on. *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, in part, at least, illustrated the point here made. After referring to *Hamilton v. Liverpool, London & Globe Ins. Co.*, supra, wherein it is declared that "the appraisal, when requested by either party, is distinctly made a condition precedent to the maintenance of any action," the court distinguishes, in part, the case (137 U. S. and 11 Sup. Ct.) from the *Liverpool, London & Globe Ins. Co. Case*, in that the policies differ as to the appraisers, in manner of selection and of exercising their duties, and the results differ accordingly in the two cases. *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 258, touches this point still more strongly. *Hamilton* held policies in some 12 different companies, all covering the property destroyed or damaged. The written demand on the insured to submit the loss, etc., to appraisers, was a joint demand made by the 12 companies. The *Liverpool, London & Globe Ins. Co. Case*, supra, is distinguished. In that case, after the insured failed to comply with the joint demand, the company made its separate written demand. In the *Connecticut Fire Ins. Co. Case*, there was no separate written demand by that company. Speaking of this joint written demand for appraisal, Judge Severens says:

"This was not a demand for appraisal by this insurance company, such as its policy gave it the right to make. It did not acquire its right, in any respect, from the policies of the other companies; and it had no legal concern with their disputes, or the mode to be adopted for their settlement, and had no obligation to champion their cause, or mix its controversy with theirs. The insured was not bound to accept such proposition for determining the value and damage as was demanded of him by the companies,—this among them. If he had done so, it would have been an arbitration outside and independent of this policy, standing on the general ground of common-law arbitrations."

In this case just quoted from, there was disagreement as to other points between the judges constituting the circuit court of appeals

for the Sixth circuit at that time, and separate opinions were filed in the case. Judge Swan—having stated, as one of the points in issue, that the insurance companies claimed the joint demand constituted a demand by the Connecticut Company, under its policy, for the appraisal of the insured property—quotes the language of Judge Severens, above given, and adds, "With this I entirely agree." Circuit Judge Taft, in his separate opinion (page 114, 8 C. C. A., and page 272, 59 Fed.), with reference to the opinions filed by Judges Severens and Swan, says:

"Both these judges concur with the views of Judge Sage, in the court below, that the demand of the twelve companies, in what is called the 'joint' correspondence, was for a single appraisal by one board of appraisers, and that this demand was not within the requirements of defendant's policy. \* \* \* It seems clear, therefore, \* \* \* the joint demand for appraisal or arbitration, of the character described, \* \* \* was not a demand for an appraisal secured to the defendant company under its policy."

In *Hamilton v. Phoenix Ins. Co.*, 9 C. C. A. 530, 61 Fed. 379, the circuit court of appeals for the Sixth circuit again had occasion to consider the point involved in the extracts just given. At this hearing, Circuit Judges Taft and Lurton and District Judge Ricks composed the court. The policy under consideration was one of the 12 policies to which reference was made in the foregoing extracts. Judge Taft, in delivering the opinion of the court (page 530, 9 C. C. A., and page 385, 61 Fed.), says:

"In the case of *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 258, it was held by this court—all the judges concurring—that the joint demand for a joint appraisal by the twelve insurance companies contained in the joint correspondence was not within the terms of the policy of the Connecticut Fire Ins. Company providing for an appraisal, for the reason that such policy stipulated for a separate appraisal. This holding is equally applicable to the case at bar."

And he quotes at length the extract above given from the opinion of Judge Severens, as a part of the holding of the case then under consideration. But, in the case now on trial, not only—if we assume the joint agreement for appraisement was the result of any demand—must there have been a joint demand for appraisement, but the property described in the appraisement agreement as to be appraised includes property which is not included in or covered by either of the policies issued by defendant, and which are herein pressed. Certainly, as to such property not insured by defendant, it has no right to appraisers, and (using the oft-repeated and oft-approved language of Judge Severens):

"It [defendant] did not acquire its rights, in any respect, from the policies of the other company, and it had no legal concern with their settlement, and no obligation to champion their cause, or to mix its controversy with theirs. \* \* \* If plaintiff had done so [accepted the proposal for joint appraisement], it would have been an arbitration aside and independent of the policy, standing on the general ground of common-law arbitration."

And as to such an appraisement the defendant cannot claim its "condition precedent" clause to apply, for its policies specially limit the prohibition of right to sue till award made to "an award \* \* \* obtained, fixing the amount of such claim in the manner above provided," and not to an award pursuant to or under a "common-

law arbitration." In other words, when defendant elected to take an appraisal which was not such "as its policy gave it a right to demand and insist upon," it waived whatever right it might otherwise have had to insist on the appraisal provided for in the policies it had issued to the plaintiff, and which it had inserted therein as condition precedent to suit thereon, and it proceeded (again using the language so often approved in the extracts above given) to "stand on the general ground of common-law arbitrations."

In *Adams v. Insurance Co.*, 85 Iowa, 6, 51 N. W. 1149, the supreme court of Iowa were considering the defense therein set up,—that arbitration and award had been had, and that the plaintiff was limited thereto in his right to recover. In that case the agreement to appraise did not follow the terms of the policy. Having found that such an agreement was a "material and fatal variance from the terms of the policy," the court declares, "The submission and award pleaded, not being in accord with the terms of the policy, are no defense to the action." It should, perhaps, be stated, as the same was stated by the court, that the defendant in that case did not plead the award as the result of a common-law arbitration, but pleaded it, and relied on it, as being the result of an arbitration which was binding under the policy in suit.

The policy in case at bar contains the following provisions: "And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of the company shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed hereon in writing." And defendant claims that there can be no waiver here, since no indorsement appears on either of the policies in suit. The answer to this must be that such provision is waived herein by the acts of the defendant, under the facts proven. The cases are numerous which justify this holding. In *Insurance Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, the policy contained provisions to the same effect as that herein pleaded, but with much more specific statements of them, and with a fullness which apparently did not permit any waiver or modification to escape the terms used. The court declares that "the contention of appellant's counsel that there can be no parol waiver, by reason of the provisions in the policy that waiver shall only be by writing indorsed on the policy, is not maintainable." And the court approvingly quote *Insurance Ass'n v. Matthews*, 65 Miss. 301, 4 South. 62, to the effect that such waiver may be made "despite such provision in the policy requiring it to be done in writing, and especially that such stipulation applies only to those conditions and provisions which relate to the formation and continuance of the contract of insurance, and are essential to its binding force while it is running, and does not apply to conditions which are to be performed after loss has occurred." Referring to stipulations in a policy which declare that "no agent of the company is authorized to change its terms or conditions, and they shall not be waived, except in writing indorsed on the policy," the supreme court of North Carolina, in a well-considered and elaborate opinion, dealing especially with this point, and quoting from and reviewing a large number of cases, affirm in *Dibbrell v. Insurance Co.*, 110 N. C.



193, 14 S. E. 783, that such a stipulation "does not apply to conditions to be performed after the loss is incurred." And the citations by the court include cases from the highest courts of Indiana, New Jersey, California, Maine, Pennsylvania, Minnesota, and its own state. I do not deem it necessary to multiply citations on this point, for the defendant expressly adopts and ratifies the acts of its adjuster when it sets up these acts, and the result thereof, as a defense in this action.

The Iowa statute (section 1734, McClain's Code) presents matter bearing on the point under consideration. Under that section the question is pertinent whether, as to the building described in the agreement to appraise, such agreement is of any validity, as against plaintiff, and whether the same is not in contravention of the express statute. That section, so far as it affects this question, is as follows:

"In any suit or action brought in any court in this state, on any policy of insurance, against the company issuing the policy sued on, in case of the loss of any building so insured, the amount stated in the policy shall be received as prima facie evidence of the insurable value of the property at the date of the policy; provided nothing herein shall be construed to prevent the insurance company from showing the actual value at the date of the policy and any depreciation in the value thereof before the loss occurred; \* \* \* and in order to maintain his action on the policy, it shall only be necessary for the insured to prove the loss of the building insured, and that he has given the company notice in writing of such loss, accompanied with an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of the loss; \* \* \* all the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

This section has repeatedly been under consideration by the supreme court of Iowa, one of the latest cases being *Green v. Insurance Co.*, 84 Iowa, 135, 50 N. W. 558. The court (page 136, 84 Iowa, and page 559, 50 N. W.) state that "both sides of the case recognize the fact that whether there was a waiver of the provision of the statute and the condition of the policy requiring proof of loss by affidavit, as required by the statute, is the only question in the case." And, having considered the facts presented, the court declare that the company waived formal compliance with the statutory provision providing for "notice in writing of such loss, accompanied by an affidavit," and thus bringing the statute closely in line with the present case. While it is not necessary to decide the point above suggested, in this case, there is much ground for the contention by plaintiff that an appraisement agreement, as in the present case, relating exclusively to value, etc., of buildings, could not, because of the terms of this statute, be used, in this state, to prevent his bringing suit on policies herein.

From the matters above considered, and the conclusions reached, it must necessarily follow that the defense is not sustained that this action cannot be maintained because of the "condition precedent" clause contained in the policies sued on, and, as to this defense, I find against defendant.

But what force or effect, as to plaintiff's right to sue herein, or to recover judgment, have the pending appraisement proceed-

ings? Defendant claims that this action is premature, with such agreement proceedings pending, and no award obtained as yet. If, as hereinbefore decided, the agreement for an appraisal, as signed in this case, does not provide for an appraisal according to the terms of the policy, but for a common-law arbitration, then it is merely a collateral and independent agreement, the breach of which, however much it might support a separate action, cannot be pleaded in bar to an action on the principal contract. *Insurance Co. v. Alvord*, 9 C. C. A. 623, 61 Fed. 752; *Hamilton v. Insurance Co.*, 137 U. S. 370, 11 Sup. Ct. 133; *Crossley v. Insurance Co.*, 27 Fed. 30; *Seward v. City of Rochester*, 109 N. Y. 164, 16 N. E. 348. The defense that this action was brought prematurely, because the appraisal proceedings had not been terminated by an award, must fall. The appraisal proceedings were commenced, and the appraisal proceeded far enough to enable the appraisers to see that they could not agree. Thereupon Lund went to his home, in Western Missouri, and returned some months after, to remain but a few hours, and ascertain that he and his associate appraiser were unable to agree on the selection of an umpire, when he again returned to his home. Since that time no effort has been made, either by himself or the company, to effect an award. If plaintiff had reason to believe that the appraisal was practically abandoned by defendant, surely his right of action remained to him. The evidence shows that at different times in December, 1892, and in January, 1893, plaintiff was appealing, by letter, for completion of the appraisal. The appraiser Fischer wrote to Lund in the same strain. One letter from Lund, in November, 1892, and his brief visit in January, 1893, appear to be the entire fruitage of these efforts for the procurement of an award. The petition herein was filed on January 28, 1893. The original notice was placed in hands of the county sheriff on January 23, 1893, and served on defendant on same day. So that whether section 3737, McClain's Code, providing that delivery of notice to sheriff, with intent to have the same served immediately, is a commencement of the action, here applies, or whether the actual filing of the petition is the commencement of the action, this action was not commenced until after Lund had made his final visit to Louisa county, and had returned to his home, in Missouri. In *Hamilton v. Liverpool, London & Globe Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, wherein the plaintiff is adjudged not entitled to recover, because he failed to arbitrate after due request to do so, the court add:

"If plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented."

So in *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 265, when considering the duty of the insured (where the policy made arbitration a condition precedent to suit), in his petition, to aver an award obtained, or give some proper excuse for not having obtained it, the court say:

"That duty would be discharged by a fair effort to obtain the appraisal, even though the insured failed in consequence of the fraud or misconduct of the other party, the impracticability of organizing the board, or the proceedings becoming abortive by reason of some radical error of the appraisers, or by any other obstacle preventing him, for which he is not at fault."

What could plaintiff have done, beyond that shown in the evidence, to procure an award?

In *Gere v. Insurance Co.*, 67 Iowa, 272, 23 N. W. 137, and 25 N. W. 159, the supreme court of Iowa were considering a case wherein the defendant claimed arbitration as a precedent to suit, and the effect of a pending arbitration on the pending suit:

"Its contention is that an arbitration is a condition precedent to a right to sue. But it is to be observed that it is not expressly so provided, nor, indeed, is an arbitration to be had at all, except one of the parties requests it. The agreement, then, to arbitrate the amount of the loss on the written request of either party was, we think, nothing more than a mode of providing what should be deemed conclusive evidence of one of the facts. Whether the written request was served too late or not, we need not determine. If it was not too late, the plaintiff, at the time the answer was filed, might still be allowed to choose an arbitrator, and procure her evidence in the mode agreed."

In case at bar, plaintiff, before the trial was had, had attempted to have the appraisal completed. But, though the notice therefor was served on defendant by serving it on the adjuster who signed for defendant the appraisal agreement, as well as served on the appraiser whom defendant had chosen, neither defendant's adjuster, nor any one else for it, nor its appraiser, appeared, although plaintiff and his appraiser were present. This notice was served April 28, 1894. The time named for the meeting was May 22, 1894, and the place named was the office of the local agent of defendant in Louisa county, Iowa, who had signed and delivered to plaintiff the policies in suit. Plaintiff's conclusion, at the time of bringing this suit, that defendant had abandoned the appraisal, and did not intend to press it further to a conclusion, seems to be fully warranted by subsequent events. The evidence establishes plaintiff's good faith and diligence in this matter. And, without attempting to decide whether the Iowa statute above quoted applies, I find that defendant was justified in bringing this action at the time it was brought, and that judgment herein ought not to be suspended until award, if such has been ever possible thereon, be reached. What has heretofore been said, perhaps, disposes of the defense that this action was prematurely brought, to wit, within 90 days from time proofs were received by defendant, and waiver thereon had. That defense is not sustained by the evidence.

The second policy in suit includes insurance on personal property to amount of \$800. Whether or not the policy provisions have been sustained, as conditions precedent to suit, plaintiff, under the evidence, would have been entitled to judgment for the full amount of insurance on this personal property. I also find that the plaintiff is entitled to judgment for the full amount of insurance on the dwelling house which is included in both policies. Let judgment be entered in favor of plaintiff for the sum of \$3,800,

with interest at 5 per cent. from October 4, 1892, and costs of suit. Clerk will compute the amount of damages herein allowed. To which defendant duly excepts, and is given 90 days to prepare, have signed, and file his bill of exceptions.

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PHILADELPHIA & R. R. CO. v. PEEBLES.

(Circuit Court of Appeals, Third Circuit. May 3, 1895.)

No. 1.

CONTRIBUTORY NEGLIGENCE.

In an action against a railway company for causing the death of one P., who was run over at a grade crossing, it appeared by plaintiff's witnesses that P. resided in the neighborhood of the crossing, and was familiar with it, and with the trains running over the road; that, from the road on which P. was traveling, at any point for several hundred feet from the crossing, the track on which the train which caused the accident approached could be seen, except for about 40 feet, where it was alleged the view was obstructed by a tool house; that P. approached the crossing in broad daylight, on a calm day, at the time when a well-known train was due, which ran at unusually high speed; and there was nothing to show that P. listened, looked, or took any precautions whatever. *Held*, that P. was guilty of contributory negligence, and the jury should have been instructed to give a verdict for defendant.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action by Mary A. Peebles, as executrix of John Peebles, deceased, against the Philadelphia & Reading Railroad Company, to recover damages for the death of said John Peebles. Plaintiff recovered judgment in the circuit court. Defendant brings error. Reversed.

James J. Bergen, for plaintiff in error.

James L. Griggs, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. On April 26, 1892, John Peebles was killed by the Royal Blue Line express train of the Philadelphia & Reading Railroad, while crossing the track at a point near Weston, N. J. His administratrix brought suit for damages, and recovered a verdict in the circuit court of the United States for the district of New Jersey. To the judgment entered thereon, the defendant company has sued out a writ of error to this court.

The facts of the case are as follows: The track runs in a straight line for several miles, and passes through a cut about 1,100 feet east of the crossing where the accident occurred. From the cut to the crossing it has an elevation of a couple of feet above the surrounding country. The road upon which the decedent was traveling runs parallel with the railroad for several hundred feet west of the crossing, and distant about 200 feet therefrom. Nearly opposite the crossing, and when about 165 feet distant, it turns an oblique angle, and crosses the track upon a slight rise. On the same side of the track, and

about 500 feet east of the crossing, was a tool house, 9 feet 6 inches high, 12 feet 6 inches wide, and 9 feet 7 inches long. Until within about 60 or 65 feet of the track, there was an unobstructed view of the track eastwardly for about 1,500 feet. For the next 40 feet it was claimed the tool house obstructed the view. For the next 20 feet, and until the track was reached, there was an unobstructed view of the track for 1,500 feet. The decedent was a farmer living about a mile from the crossing; was familiar with and had traveled the road often. On the afternoon in question, he came along it alone, in a one-horse buggy. The day was clear, and noise was carried a long distance. He was about 65 years of age; was slightly deaf. His horse was stubborn, hard in the mouth, and hard to back, and his buggy curtains were down. He approached the crossing about the regular passing time of the Royal Blue Line train, which was one of the regular trains, well known, and which ran at the highest speed, reaching as high as 60 miles an hour. The plaintiff's proofs do not show whether he stopped or took any precaution whatever. His horse cleared the track, the buggy was struck, and the decedent instantly killed. In the declaration, the only negligence alleged was the careless and negligent driving of the train at great speed over the crossing, without whistling or ringing a bell, the statute of New Jersey on that subject providing:

"Every incorporated company that has been or hereafter may be authorized to construct any railroad in this state, shall cause to be placed on some part of every locomotive engine used by such company a bell, of a weight of not less than 30 pounds, or a steam-whistle which can be heard distinctly at a distance of at least 300 yards, and shall cause such bell to be rung, or such steam-whistle to be blown, at a distance of at least 300 yards from the place where such railroad crosses such highways."

There was a whistle post for the crossing just west of the cut, 1,000 feet from the crossing.

At the close of the case, the defendant asked for binding instructions in its favor. This request was refused, and the case submitted to the jury in a charge to which error has been assigned. While the view we take of the case upon the question of the defendant's right to binding instructions is such as to render needless a discussion of the alleged subsequent errors of the court in the charge, yet we may say, referring to the eleventh assignment of error, that, had the case been one proper to submit to the jury, the court erred, in our opinion, in assuming that the tool house was an obstruction to one traveling the road, and in so charging the jury.

Returning, however, to the prior question, did the court err in refusing the request for binding instructions? If the evidence was of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in plaintiff's favor, then this instruction should have been given. *Railroad Co. v. Converse*, 139 U. S. 472, 11 Sup. Ct. 569, and cases cited. Tested by this rule, we think the duty of the court to affirm this point was plain. The proofs adduced by the plaintiffs showed him guilty of contributory negligence, for, from the facts that are affirmatively shown on the plaintiff's side, we think but one con-

clusion can be reached. This testimony showed the plaintiff was familiar with the crossing, and had been going over it for years. The train was a regular schedule one, one of the best known on the road, ran at an exceedingly high rate of speed, and was on time. The decedent was slightly deaf. His horse was hard in the mouth, somewhat stubborn, and hard to back. The side curtains of his buggy were down. The road was fenced in and led by an ascent beginning 30 feet away to the track. A ditch at the one side prevented him from turning when near the track. Sixty feet from the track to within twenty feet of it, his view was alleged to be obstructed by the tool house, 500 feet above. At 20 feet he had a view to the cut.

Plaintiff's witness Merrell says:

"Q. And, before you drive on the track, you could look down the road a long distance, after you pass the point where you claim this tool house interferes? A. Certainly; you can stop there and look."

A duty rested on the decedent, under the circumstances, of taking the ordinary precautions to insure his own safety. Lack of care by the defendant's servants, if such there was, did not relieve the decedent from care on his part. He was bound to use his senses before attempting to cross the track. The very presence of a railroad conveyed to him, as a prudent man, notice of danger. If he neglected to use his senses, and thoughtlessly or rashly attempted to cross without doing so, the result, if disastrous, cannot be visited on the railroad, though it may not be free from blame in other respects. These propositions are abundantly sustained by authorities, and accord with the common judgment and experience of men. The observance of these precautions on the part of Mr. Peebles would, without question, have saved his life. If he had paid attention and been on the alert for the train during the 40 feet it is said his vision was obstructed, he must have heard its approach. He was less than a quarter of a mile from the cut, and the tool house, 500 feet away, would not interfere with the travel of the sound. The day was clear. No wind was blowing, and all the plaintiff's witnesses heard the train. Thompson, a farm hand, was working on the Van Ness farm south of the cut. He heard the noise made by the train when it was further from him than Mr. Peebles was from the cut, and also heard the bell ringing after the train left Weston, and before it reached the cut. John E. Bartron was a half mile north across the field from the crossing. He says the atmosphere was clear, and no wind blowing; that he heard the rumble of the train before it reached Weston Station; that he first saw it before it reached the cut, and "heard the rumble of the train long before I saw it"; that it was running as fast as the Blue Line usually runs, 50 or 60 miles an hour; that his attention was first attracted by the roar of the train, and he heard it from then until the train stopped, about 1,500 feet beyond the crossing. After the accident, he drove over the road, to experiment when the same train was passing; and, from behind the alleged obstruction, he heard it all the time from its passage through the cut. Jacob J. Garretson was three-quarters of a mile back from the crossing; more than three times the distance of Mr. Peebles from the cut. He says the noise of the train was quite loud from where he was; that it was a still

day. Wilson, another witness, was a little further from the cut than Mr. Peebles, and to the north of the road. He heard the train "rumbling through the cut." John Dougherty was on the east side of the railroad, three-quarters of a mile from the crossing, and fully three times as far as Mr. Peebles from the cut, and says it was a warm, still, dry day; that he heard the whistle blown for Weston Station; that he heard the rumbling of the train from the crossing at Weston, approaching the cut, and as it came out of the cut. The testimony of these witnesses, all of whom were called by the plaintiff, show that they severally heard the train that afternoon, under conditions less favorable than those Mr. Peebles was in. The conclusion is irresistible that if the latter had been listening for the train, as he was bound to do, he would not have lost his life. The two methods of passing this spot seem to be summed up by one Veghte, a witness for plaintiff, who drove along the road to experiment after the accident. When asked about hearing the train when passing along the road where his vision was obstructed by the tool house, he says:

"I have come by there when I couldn't hear the train, when I wasn't listening for a train; but, when I was listening, I could hear, but, when I wasn't, I couldn't. Q. If you stop and listen, you could have heard it then? A. Yes, sir."

If Mr. Peebles heard the approaching train, it was his duty to have stopped. Dougherty testified that, in passing that point at another time, he heard the noise of a train, and could not see it; that he stopped about 30 feet from the track, and, as he stopped, a train came from back of the tool house.

But, supposing the decedent listened and did not hear the train, he had an opportunity to look before attempting to cross the track. The testimony of plaintiff's witnesses shows there was a clear view to the cut at a point 20 feet back from the track. James Z. Bergen says the obstruction began 60 feet back from the track, and continued for 35 or 40 feet. He says (speaking of traveling on the highway):

"That this tool house obstructs the way for thirty-five feet. Then you come within twenty feet—not much less, if any—of the track. Then you can see. You can see all the way down to the bridge [cut]."

The testimony of Merrell, another witness, is:

"Q. Before you drive on the track, you could look down the road a long distance, after you pass the point where you claim this tool house interferes? A. Certainly; you can stop there and look."

He says there was a slight grade from 30 feet back up to the track; and Bartron, another witness, says that, when the horse went up the grade, you could see down the track past the tool house. Garretson, another witness, says the tool house ceases to obstruct 20 feet from the track, and Dougherty says the same thing. These are all plaintiff's witnesses.

It certainly was Mr. Peebles' duty to look up the track as soon as his line of vision was open. If he had done so, he could have stopped. To our mind, it is quite evident he did not look. The same lack of precaution which led him over the other part of the

road without listening must have led him over this without looking. The necessity for an observance of due care on the part of a man approaching a crossing of this kind, at a time when he knew a train of extraordinary speed was due, where his view had been cut off, as plaintiff's witnesses testified, was imperative. Where the animal he was driving was hard in the mouth and hard to back, and where the ditch in the road prevented him from turning in case he should meet the train, the necessity became the more pressing for him to avoid placing himself in such a position of peril. If he attempted to cross the track under these circumstances without taking any precautions for his own safety, he certainly took the risk of his life in his own hands; and from the proofs but one satisfactory conclusion results,—that he did not look nor listen for the train. As we have seen, others, under less favorable conditions, heard it; and the presumption is overpowering that, if he had listened for it (waiving the question whether the whistle was blown in time), he could have heard the rumble and roar of the train, which the plaintiff's witnesses all heard; and, if he could not see it while his vision was obstructed by the tool house, he certainly had the opportunity of looking for it before he reached the track. To our mind, it is clear that the accident would not have happened had the decedent observed the due measure of care which the situation demanded of him. There was contributory negligence, and the defendant was entitled to binding instructions.

While we base the proof of contributory negligence on the plaintiff's testimony alone, we deem it proper to refer to the defendant's in part, as bearing on the question whether the verdict should be sustained.

Henry C. Clark, an engineer of experience, and a brother of the engineer on this train, was riding on the left hand side of the engine this trip. He says the bell was rung by the fireman from before they got to Weston, through the cut, and until the alarm sounded; that the crossing whistle was properly blown at the whistling board; that, immediately after, the alarm whistle was blown, and the air brakes applied; that he then saw the buggy advancing to the crossing, the head and neck of the horse then on it; that the curtains were down, and he could not see who was in the buggy; that the horse made a momentary stop, then a spring forward, and cleared the track, but the buggy was struck.

George W. Clark, the engineer, says:

"A. On coming out of the cut,—that is, below the crossing there,—I sounded the crossing whistle; and while I still had hold of the rope, hadn't let go of it yet, I cast my eyes across to the right, and I seen some kind of a vehicle, a carriage, something of that description, approaching the crossing. I kept my eyes on it for a trifle of time, and seen that they paid no attention to the crossing signal. I then commenced to sound the alarm whistle, and he still paid no attention to it, and I kept sounding the alarm whistle right along, and the carriage kept proceeding until the horse's head got about over the east-bound track. That was the track I was on. And there was what I would term a kind of pause, as if probably the carriage was going to back, or something that way; but they proceeded across the track. Q. Well, did you see any motion of the reins, or anything of that kind? A. It seemed to me that I seen a rein move, as if— Well, I couldn't tell you; up and down with the rein, in that way [illustrating]."



He says he applied the air brakes at once; that the bell was ringing all the time from Weston Station until the accident; that he saw the vehicle rounding the turn, and had a view of it until it was struck; that the tool house did not obstruct his view.

Brant, the fireman, says he rang the bell all the time from Weston Station until past the crossing; that he saw the man driving towards the crossing, and, when the horse's head was to the crossing, the horse stopped momentarily; that the man pulled the lines with one hand, and hit the horse with the other, and it jumped across the track; that the whistle was blown for the crossing before the whistle board was reached; immediately thereafter the alarm whistle followed, and the air brakes were applied; that he saw the buggy roof all the time over the top of the tool house; that the horse came along at a pretty smart walk; that he did not stop during all this time until the pause at the crossing itself; says he did not see the man look out; all he saw was his arms. Wilson, a milk agent, was on the next car to the engine; says he heard the crossing whistle blown, followed by the alarm, and felt the air brakes applied; that he leaped to his feet, and ran to the door. He is positive the alarm whistle was blown just as the whistle board was passed. Stryker, who was working in the fields a half a mile north of the railroad, says he heard the whistle just as the train was coming out of the cut. In addition to this, Taylor and Canfield, passengers, and Cuthbertson, the conductor, all testified that the crossing whistle and the alarm whistle were sounded and the brakes applied, but at what point they were unable to say.

In opposition to all this, we have the testimony of a number of witnesses for the plaintiff who state that they looked at the train when they heard the whistle, and that the train was then near or passing the tool house. But, in considering the testimony of these witnesses, the seeming contradiction must be modified by the fact that the sound would be from three to four seconds in reaching a person three-quarters of a mile away, and that during that time, at the 60-mile rate the train was running, it would have covered from 240 to 320 feet, a very substantial part of the distance between the whistle post and the tool house.

After a careful review of the entire testimony, we are of opinion that, tested by the rule laid down above, the court should have given binding instructions in favor of the defendant.

The judgment of the circuit court is reversed, and the case is remanded to that court, with directions to award a new trial.

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FRANK v. WM. P. MOCKRIDGE MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. May 3, 1895.)

No. 18.

INFRINGEMENT OF PATENTS—CUFF FASTENER.

The Frank patent, No. 397,119, for an improvement in cuff fasteners, 'in view of the prior state of the art, and of the fact that the improved form is described in the claims by letters of reference to the drawings, and of

the further fact that in the second claim such description was inserted by amendment after the rejection of a descriptive word, *held* to be limited to the specific form of hook therein described, and therefore not infringed by defendant's fastener. 65 Fed. 521, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by Henry C. Frank against the William P. Mockridge Manufacturing Company for infringement of a patent for cuff fasteners. The circuit court dismissed the bill on the ground that there was no infringement. 65 Fed. 521. Complainant appeals.

W. P. Preble, for appellant.

L. H. Scott, for appellee.

Before DALLAS, Circuit Judge, and WALES and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. This is an appeal by Henry C. Frank from a decree of the circuit court of the United States for the district of New Jersey, dismissing a bill filed by him against the William P. Mockridge Manufacturing Company. The prayer of the bill was to restrain the alleged infringement of the claims of letters patent No. 397,119, issued February 5, 1889, to complainant, for an improvement in cuff fasteners. Two defenses—noninfringement and lack of patentable novelty—were raised. Conceding the patentability of the device in question, of which it had some well-founded doubts, the court below decided that in view of the prior art, and the self-imposed limitations of the claims in the patent-office proceedings, those claims should be confined to the form of hook therein specified, and that, when so construed, infringement was not shown. The questions in the case were confined to a comparatively narrow limit, and the court below considered them in detail so fully, and its very careful and exhaustive opinion is so satisfactory and self-sustaining, that it would be a needless repetition to restate the reasoning and authorities which inevitably lead to the conclusion therein reached. We therefore adopt its opinion as fully expressing the views of this court. The appeal is dismissed, and the decree entered is affirmed.

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GERMAIN et al. v. WILGUS.

(Circuit Court of Appeals, Ninth Circuit. March 1, 1895.)

No. 207.

1. PATENTS--INFRINGEMENT SUITS--SUFFICIENCY OF BILL--PROPERT OF PATENT.

A bill for infringement will not be held bad for want of a sufficient description of the invention, where it makes profert of the letters patent, although the same are not annexed to the bill.

2. SAME--EQUITY JURISDICTION.

A bill for a mere account of profits and damages against an infringer, or which prays an injunction, but without alleging public acquiescence in plaintiff's rights, or that the patent had been sustained in an action

at law, or that there were grounds for discovery, cannot be sustained in equity, as it does not show that complainant's rights may not be enforced in an action at law.

**3. SAME—ENJOINING ACTION AT LAW.**

A bill for infringement, which, among other things, seeks to enjoin defendant from prosecuting an action at law against complainant for alleged infringement of a patent owned by defendant, cannot be sustained in respect to such injunction, where the only grounds set forth are that complainant will be put to great expense in such action for attorney's fees and other costs and expenses, and that he is informed and believes that defendant will be unable to pay the same.

**4. SAME—PLEADING—"PROFERT" DEFINED.**

The word "profert," as now used, does not necessarily imply that the recorded instrument pleaded is annexed to the bill, or actually produced to the court, and it may in fact be retained in complainant's own custody.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a bill by Eugene Germain, Isaac B. Newton, and William H. Mitchell against Daniel Wilgus, for infringement of a patent granted to Clement Gauthier, July 17, 1888, for an improvement in atomizers. The circuit court sustained a demurrer to the bill for want of equity, and, complainants having declined to amend, entered a decree dismissing the bill. Complainants appeal.

Appellants filed in the United States circuit court for the Southern district of California, Ninth circuit, a bill in equity praying an injunction against the defendant, restraining him from making or using any specimen of a certain patented apparatus named in the bill, and also to enjoin an action at law instituted by appellee against appellants, in which appellee claimed that appellants were infringing a certain patent right granted to him. The bill sets forth that Clement Gauthier, of Narsas, in the republic of France, was the true, original, and first inventor of a certain new and useful apparatus, named in the patent therefor as "Improvements in Atomizers"; that said Clement Gauthier on the 7th day of March, 1890, assigned all his right, title, and interest in said invention, for all the states and territories of the United States, to W. H. Mitchell, of Los Angeles, Cal.; that subsequently said Mitchell assigned an interest therein to appellants Germain and Newton; that a patent for said invention was granted to the said Gauthier by the United States, and letters patent delivered to him therefor, on the 17th day of July, 1888. Then there follows this part of said bill, which sets forth the equities which appellants claim entitle them to the relief prayed for, namely: "And your orators further show, on information and belief, that the said defendant, on and after the 9th day of June, 1890, and up to the commencement of this action, and within the term of seventeen years mentioned in said letters patent and after the granting of said letters patent, and after the said assignment of Eugene Germain and I. B. Newton, and within those parts of the United States covered by the said grant to Clement Gauthier, and afterwards assigned to your orators as aforesaid, unlawfully, wrongfully, and injuriously, and with intent to derive profit from making and using said apparatus, and to deprive your orators of the royalties which they might and otherwise would have derived from the sale of rights to make and use specimens thereof, and without the license of your orators or the said Clement Gauthier, or either of them, and against the will of your orators, did make and did use, and did cause to be made and did cause to be used, sundry specimens of said apparatus, and of machines which contained and employed substantially the invention covered by said letters patent, in infringement of the said exclusive right secured to the said Clement Gauthier by the letters patent aforesaid, and granted by him to W. H. Mitchell, and then to your orators, as hereinbefore set forth, but how many such specimens the defendant so made and used, or caused to be made and used, your orators are ignorant, and cannot set forth; but your

orators aver, on information and belief, that defendant so made and used, and caused to be made and used, a large number thereof, and that he derived large profits therefrom, but to what amount your orators are ignorant, and cannot set forth, and that your orators have been deprived of large royalties by reason of the aforesaid infringement of the defendant, and have thus incurred large damages thereby. And your orators further show that the defendant is claiming the right to make and use, and cause to be made and used, specimens of said apparatus, and of machines which contain and employ substantially the invention covered by said letters patent, under a patent issued to him subsequent to said patent theretofore issued to said Clement Gauthier. And your orators further show that said defendant has commenced an action at law against your said orators, Eugene Germain, Isaac B. Newton, and William H. Mitchell, in the circuit court of the United States for the Southern district of California, in the Ninth circuit, for damages by reason of the use and sale of sundry specimens of said apparatus, and of machines which contain and employ substantially the invention covered by said letters patent theretofore issued to said Clement Gauthier. And your orators further show that said action is now pending and undetermined in said court, and, if defendant is permitted to prosecute said action, it will put plaintiffs to great expense for attorney's fees, and to other costs and expenses, in the preparation for and trial of said cause. And your orators further show, on information and belief, that the defendant is unable to pay plaintiffs their costs and expenses in said action at law, in the event of its further prosecution to final hearing and judgment, and determination against him. And your orators further show that they fear, and have reason to fear, that, unless the defendant is restrained by a writ of injunction issuing out of this court, defendant will continue to prosecute said action at law, and to make and use numbers of specimens of said apparatus, and thereby will cause irreparable injury to your orators' aforesaid exclusive rights." The appellee demurred to this bill on the ground "that said complainants have not, by their said bill, made such a case as entitles them, in a court of equity, to any relief against defendant." The court sustained this demurrer, gave appellants permission to amend their bill, which they declined to do, and thereupon the court entered a decree dismissing the bill at appellants' cost. This is assigned as error.

Stephen M. White, Charles Monroe, and Graff & Latham, for appellants.

Cole & Cole, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

KNOWLES, District Judge (after stating the facts as above). One of the principal points urged against the bill of complaint herein is that it does not sufficiently describe the invention in the bill. It is urged that it should be so fully described as to apprise the court of its nature and character. Considering the allegations of the bill, we would be inclined to hold that the objection thereto was well taken, were it not for the fact that, in the bill, allegations of a profert of the letters patent under which appellants claim were made. It is true, a copy of such letters was not annexed to the bill. In Black's Law Dictionary it is, however, stated of the term "profert": "An allegation formally made in a pleading, where a party alleges a deed, that he shows it in court, it being in fact retained in his own custody." As originally understood, perhaps, the term implied that as a fact the written instrument pleaded was produced in court and read, or a copy thereof annexed to the pleading. In the case of Bogart v. Hinds, 25 Fed. 484, it was said:

"The weight of the opinion is in favor of the proposition that, where proffert is made of a recorded paper, it is, for all purposes, presented to the court as part of the pleading, and an objection thereto may be taken by demurrer."

See, also, *Post v. Hardware Co.*, 26 Fed. 618.

In the case of *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 803, Justice Brown said:

"The weight of authority is that the proffert of any recorded instrument is equivalent to annexing a copy \* \* \*; and if a party avers that he holds title to anything by a certain instrument which he annexes, and that instrument both grants the title and describes the full extent of the rights conferred, \* \* \* it is equivalent to an averment that he has title to all the rights specifically described in such instrument."

Under these authorities, it is evident the bill was not subject to the objection urged.

There is, however, more serious objection to the bill. In the case of *Root v. Railway Co.*, 105 U. S. 189, the supreme court, after an exhaustive discussion of the matter, said:

"Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement."

It is not denied in this case but that there may be other grounds for equitable relief than the right to an injunction which would justify a circuit court, sitting as a court in equity, in trying a patent case, and, as an incident to the equitable matters presented in the bill, take an accounting of the profits and revenues of which the patentee may have been deprived by the infringement of his patent, and also the validity of the patent and the fact of infringement. Before any of these matters, however, can be considered, the bill must clearly present some ground for the interposition of a court of equity. There are several decisions of United States circuit courts of acknowledged standing which hold that a circuit court, sitting as a court of equity, had the power, under a grant given in an act of congress, to try the validity of a patent and the fact of infringement concurrently with courts of law, and that no special equitable grounds were required in the bill. Since the decision in the above case of *Root v. Railway Co.*, the decisions in the circuit courts of the United States have been uniformly the other way. *Smith v. Sands*, 24 Fed. 470; *Adams v. Iron Co.*, 26 Fed. 324; *Brooks v. Miller*, 28 Fed. 615. In the case of *Clark v. Wooster*, 119 U. S. 323, 7 Sup. Ct. 217, the supreme court said:

"It is true that where a party alleges equitable ground for relief, and the allegations are not sustained, as where a bill is founded on an allegation of fraud which is not maintained by the proofs, the bill will be dismissed in toto, both as to the relief sought against the alleged fraud, and that which is sought as incidental thereto."

There would be a more sure ground for dismissing a bill where no allegations showing an equity which would be recognized in a court of equity were presented therein.

There is a prayer for an injunction presented in the bill before us. It is important, however, to determine whether there are sufficient facts presented in the bill to warrant the court in granting this prayer. There are no allegations showing that this patent right of appellants had been long recognized by the public; no allegations showing that its validity had ever been determined in an action at law. There are no allegations showing grounds for a discovery. In fact, it does not appear but that every important question presented in the bill could be tried as well at law as in equity. In the case of *Gutta-Percha & Rubber Manuf'g Co. v. Goodyear Rubber Co.*, 3 Sawy. 542, Fed. Cas. No. 5,879, Judge Sawyer thus presents this matter, in considering the bill in that case:

"There is no allegation that the matter has ever been litigated before and decided in favor of complainant, and no allegation in the bill that the right of complainant has been submitted to or recognized by the public. The bill, as an injunction bill, is defective in this particular."

In the case of *Hockholzer v. Eager*, 2 Sawy. 361, Fed. Cas. No. 6,556, the court, while acknowledging that it is not always necessary that the bill for an injunction should show that there had been a trial at law testing the rights of the patentee and the validity of his patent, said:

"Something more than a grant of letters patent must be shown,—something which, in the absence of a trial at law, may take its place in establishing the validity of the patent."

We think the view taken in these cases is in accordance with the general view entertained in courts of equity in regard to bills in equity, in patent cases, asking for an injunction. *Walk. Pat. § 660*; *Story, Eq. Jur. § 934*. In this case the bill shows that the right claimed by the appellants in regard to their patent is being contested in a court of law in a suit instituted by appellee. In this case at law the appellee claims rights under a subsequent patent to that under which appellants assert their right. The bill prays that this action at law be enjoined. The only ground set forth in the bill in support of this prayer is that appellants will be put to great expense for attorney's fees, and to other costs and expenses, in the preparation for and trial of said cause. And, upon information and belief, it is stated that appellee will be unable to pay said costs and expenses incurred by appellants, and it is further alleged, unless enjoined, he will continue to prosecute said suit. Notwithstanding this belief that appellee would be unable to respond for their costs and expenses, he is made a party to this suit, and asked to litigate the very questions sought to be litigated in the said action at law, together with other questions. The most usual ground presented to a court of equity, upon which to base its action for an injunction to enjoin an action at law, is some equitable right which cannot be made available at law. If no such right is presented,—and we find none in this bill,—the parties should be allowed to proceed in the action at law. In fact, a party having legal rights, unless some interposing equitable right is presented, has a constitutional guaranty that the facts he presents for determination shall be tried by a jury. We find no equity presented in

this bill which would give the circuit court, as a court of equity, any jurisdiction of the case presented thereby. The decree of the court below is therefore affirmed, with costs.

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THE NEREID.

FLYNN et al. v. THE NEREID.

(District Court, D. Massachusetts. May 14, 1895.)

No. 669.

1. ADMIRALTY—SEAMEN'S WAGES—DESERTION OF VESSEL.

A fishing schooner put into a port for bait. After the bait was secured, and when the schooner was about to sail, D., one of the crew, asked leave to go ashore, which was given, with a caution to return promptly. Thereupon, D. and several others of the crew, pursuant to a preconcerted plan, left the vessel, and went ashore. After some time the master sounded a signal for them to return, to which they paid no attention. He then prepared to put the vessel under way, when one F., another of the crew, asked and was given leave to go after the men. He found them all more or less intoxicated, and some of them unable to go aboard without assistance, which he reported to the master, who signified his purpose to go to sea without them. F., then, supposing that the vessel would not go, went ashore again for the men, but before he could bring them on board the vessel sailed away without them. *Held*, that the members of the crew, other than F., for their disregard of the interests of the vessel, and insubordination, should be subjected to the damage resulting from their failure to perform proper and reasonable duty.

2. SAME—SEAMAN DESERTED BY VESSEL.

*Held*, further, that F., having acted in the interest of the vessel, should recover his share of the catch of the vessel, and for his loss of time and expenses, and the value of his outfit carried away.

This was a libel by William Flynn and others against the schooner Nereid for wages and damages.

William A. Pew, Jr., for libelants.

John J. Flaherty, for libelee.

ALDRICH, District Judge. This is a proceeding to recover wages and damages on behalf of certain seamen who shipped on the fishing schooner Nereid, on the half lay, for a salt trip to Grand Banks, in the deep-sea fisheries. The libelants claim that while the vessel was in the Bay of Holyrood, Newfoundland, for bait, they went ashore, with permission, and, while ashore, that the master of the vessel deserted them, and sailed away to sea, whereby they were put to expense for board and lodgings, and lost the benefit of their share in the catch, which they would otherwise have received. The schooner, with her crew of fishermen, left Gloucester on the 27th of April, 1894, and was engaged in fishing until about the 20th of August, when she put into Holyrood for bait. After the bait had been secured and iced, in the forenoon of August 23d, the schooner was ready for sea, and the seamen understood that the master desired to get under way without unnecessary delay. About 10 o'clock in the forenoon, William Daley, one of the libelants, asked permission to go ashore for some alleged necessary purpose. Permission was given, with proper caution, and instructions to return at once, as the vessel

must be made ready to sail, whereupon, and while the master was below, all the libelants, except Flynn, together with other members of the crew, left the vessel, and went ashore. I find that these men left in accordance with a preconcerted plan, which was unknown to the master at the time permission was given to Daley. After waiting an hour or two, the master sounded the proper signal for the men to return; and, as the vessel was only a short distance from the shore, the signal must have been heard and understood by the men, but they did not heed it. After waiting for some time, the master gave directions to the men on board to put the vessel under way, whereupon Flynn asked permission to go ashore, saying that he thought he could get the men. Permission was given. Flynn went ashore, and found the men all more or less intoxicated, two of whom were prostrated, and could not, with the assistance at hand, be taken aboard. Flynn, thereupon, with one or two of the men, returned to the vessel, and reported the facts to the master, who signified his purpose to proceed to sea without them, when Flynn, acting upon the supposition that the vessel would not go, and desiring to bring the men on board, suddenly left the vessel, with others to assist; and as the men were being brought to the shore the vessel was found under way, and the men, together with Flynn, were left. I think the evidence shows such want of regard, on the part of the men who left, for the interest of the vessel and the other members of the crew, and such acts of insubordination, as to demand that they should be subjected to the damage resulting from their failure to perform proper and reasonable duty. It is evident that the men were not intoxicated to such a degree, at the time the signal to return was given, that they could not have returned, if they had desired, and that they willfully prolonged their stay. Therefore, as to all the libelants except Flynn, while deducting nothing for expected future catch, but only such damages as directly and necessarily resulted from failure to perform duty, I find that they should recover \$20 each, only.

As to Flynn, I take a different view. He was earnestly and faithfully acting in the interests of the vessel, the crew, and himself, trying to get the men on board, that the vessel might proceed fully equipped; and, as respects Flynn, the master did not act with discretion or fairness. After having given him permission to try, he should have treated his efforts with more tolerance and consideration. I think Flynn should recover his share in the catch, which I fix at \$91.74; expenses getting from Holyrood to the Bay of Bulls, and while there, \$15; loss of time while there, \$10; and for outfit and clothing carried away, \$50,—making, in all, \$166.74. From this however, should be deducted the owner's book account and the captain's account, \$50.31, leaving \$116.43.

Lundigan, one of the libelants, has deceased since the commencement of this proceeding; and it is understood that recovery cannot be had, unless an administrator, duly appointed, comes in. Decree in accordance with the above findings, with interest from date of libel.



**RANDALL v. SPRAGUE et al.**

(District Court, D. Massachusetts. May 11, 1895.)

No. 601.

**1. SHIPPING—DEMURRAGE—CONTRACT.**

Upon the trial of a libel for demurrage, it appeared that the respondent chartered libelant's schooner to carry a cargo of coal; that he informed libelant of the amount of coal he had then on hand, of the amount he was receiving daily from the mine, and that he was "working all regular"; that, after further conversation, libelant remarked, "Then you could load the schooner by the first of next week," to which the respondent replied that it ought to be done by Wednesday, at furthest. *Held*, that there was no contract to load by a day certain, but the libelant relied on what he thought would probably be done.

**2. SAME—DILIGENCE.**

Where a vessel has been chartered to carry coal, without any express agreement to load by a day certain, and mining and railroad transportation have been interrupted by conditions of weather which the charterer's care and diligence could not overcome, such charterer should not be held responsible for a delay of 15 days in loading.

This was a libel by William M. Randall against Charles H. Sprague and others for demurrage.

Carver & Blodgett, for libelant.

Charles Theo. Russell, Jr., for respondents.

**ALDRICH**, District Judge. In this proceeding the libelant claims that one James A. Boyce, of Baltimore, acting as agent and attorney for the respondents, entered into a contract of charter party with the libelant on the 9th day of January, 1893, to load the schooner *Louise H. Randall* with a cargo of coal for the port of Boston, and that by the agreement of charter the said schooner was to be loaded on the 18th day of January, 1893, and that, by reason of the failure of the respondents and their agents, the schooner was not loaded until the 3d day of February, and that there was a detention of 15 days, for which it is claimed the schooner is entitled to recover six cents per ton on her coal-carrying capacity for each day of detention, amounting to \$2,281.50. The libelant relies upon an oral agreement or understanding between Boyce, the agent of the respondents, and one William Beers, as agent or broker of the libelant, who was master and part owner of the schooner.

Upon careful examination of the libelant's evidence, and particularly of the testimony of Mr. Beers, Sr., it is found that the parties did not contract with reference to demurrage, or to loading on a particular day; and, the fact being so found, it follows that the libelant has not established the right of recovery upon the ground of an express agreement. According to the testimony of Mr. Beers, Mr. Boyce informed him as to the amount of coal on hand; the amount he was getting daily from the mine,—some three or four hundred tons a day,—and "that they were working all regular"; and after further conversation as to the situation, according to the testimony, Mr. Beers remarked, "Then you could load the schooner the first of next week?" and Mr. Boyce replied, "Yes; we ought to by Wednes-

day, at the furthest," which would be the 18th. In view of the testimony of Mr. Beers, the libellant's most material witness, and all the evidence bearing upon the agreement to load, it would seem that the parties talked over the situation, and that Mr. Beers was fully informed as to the condition of affairs, and relied upon what could and would probably be done, rather than any supposed contract with reference to demurrage or a day certain.

The libellant further says that, in the event that the finding should be against him upon the question of an express contract, the agreement at least placed upon the respondents the obligation of loading with reasonable dispatch; and upon this phase of the case, in view of the interruptions to mining and railroad transportation due to the condition of the weather, which the respondents' care and diligence could not overcome, it would seem that they ought not to be held responsible under the doctrine of implied obligations, and the finding, therefore, is that they exercised reasonable diligence, and were not guilty of unreasonable delay. Libel dismissed, with costs.

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O'BRIEN v. MILLER et al.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

**1. SHIPPING—CONSTRUCTION OF BOTTOMRY BOND—TRANSSHIPMENT OF CARGO—VOLUNTARY PAYMENT.**

In a port of refuge a portion of the cargo was transshipped, and the master gave a bottomry bond which covered this, as well as the ship herself and the balance of her cargo. The bond was conditioned to be void if the "said vessel" should be utterly lost by a peril of the sea. The vessel and the cargo in her were totally lost through a collision. *Held*, that the bond was not to be construed as being void only upon the condition that both the vessel herself and the vessel containing the transshipped cargo were lost, but must be interpreted, according to the plain meaning of its terms, as becoming void upon the loss of the vessel herself; and therefore a payment of the bond by the consignees of the transshipped cargo, in order to obtain possession thereof, was a voluntary payment, and could not be recovered by them from the vessel's owners, although the latter had recovered damages for her loss from the vessel with which she collided. 59 Fed. 621, reversed.

**2. SAME.**

The bond could not be sustained, as against the transshipped cargo, upon the theory that the same was to be treated as salvage from the wreck of the vessel which was lost; for it was in no sense "cargo laden on board" of her on the voyage from the port of refuge to her destination, which was the voyage upon which the bottomry lender had staked his money.

**3. SAME—COLLISION—RIGHTS OF BOTTOMRY LENDER.**

Quære, whether a bottomry lender upon a vessel totally lost in collision is entitled to recover damages against the offending vessel, or against the owner of the lost vessel after the offending vessel has made restitution to him.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Brice Alan Miller and others against Edward E. O'Brien to recover money alleged to be due as contribution for

the payment of a bottomry bond which libelants discharged, as they alleged, in order to obtain possession of cargo consigned to them. The cause was heard in the district court upon exceptions to the libel, which were in part overruled and in part sustained. 35 Fed. 779. After the filing of amended libels, a decree was finally rendered in favor of libelants. 59 Fed. 621. The respondent appeals.

George A. Black, for appellant.

Wilhelm Mynderse, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. In June and July, 1884, the libelants shipped on board the *Andrew Johnson*,—a ship owned by the respondent,—at Iquique Bay and Caleta Buena, 19,943 bags of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Anthony Gibbs & Sons, of London. Soon after sailing, the *Andrew Johnson* encountered heavy weather and met with disaster, whereupon she put into Callao, as a port of refuge. Surveys were held, and, in accordance with the recommendation of the surveyors, she was lightened by the discharge of part of her cargo, repairs were made to the vessel, and 1,130 tons of her cargo forwarded to Hamburg by another vessel,—the *Mary J. Leslie*; the shipment being made thereon in the name of J. H. Killeran, as master of the *Andrew Johnson*. For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment, and stowage of cargo, the master incurred expenses aggregating about £2,212; largely for handling cargo and transshipping cargo, the repairs to the ship not being of a permanent nature. In order to raise funds to meet these expenses, the master made a bottomry bond, dated September 15, 1884, which will be hereinafter more specifically set forth, to the firm of Grace Bros. & Co., for the amount of such advances, with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599. 8s. 9d. For the payment of this bond he bound, obligated, and hypothecated the *Andrew Johnson*, her boats and apparel, and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and his freight. The portion of cargo transshipped to the *Leslie*, and the *Andrew Johnson*, with the cargo remaining on her were, respectively, worth several times the amount of the bond. The two vessels sailed from Callao for Hamburg, carrying their respective lots of cargo. The *Andrew Johnson* came into collision with the British ship *Thirlmere*, and was sunk in mid ocean, no part of her apparel or cargo being saved; the *Leslie* arrived in regular course at Hamburg on February 5, 1885. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg. On February 10th the representatives of Baring Bros. & Co., of London, acting on behalf of the owners of the bond, demanded payment of it in full from Wirtz; and on February 11th the representatives of the bondholders and of the consignee of cargo entered into an agreement

that the claim against the cargo should be withdrawn, in consideration of Anthony Gibbs & Co. engaging to pay whatever proportion of the bond might be found to be legally due from the cargo of the Leslie, the question to be submitted to certain eminent and leading lawyers of Hamburg. Thereupon the discharge of the cargo was commenced and completed. The precise date when the Andrew Johnson and her cargo were lost does not appear in the record, but the fact of such loss was known in Hamburg when the question as to the effect of such loss was considered by the eminent lawyers to whom it was referred. Neither the shipowner nor the master, nor any representative of either, was a party to, or informed of, or present at the proceedings had before the Hamburg referees, nor, so far as appears, was there a scintilla of evidence before them, except the bond and the bill of lading, as to the intention of the contracting parties. The conclusion of the Hamburg lawyers is as follows:

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent, or appear to be lent, contingent upon the safety of the Andrew Johnson, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her nonarrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason: that if the bottomry bond were interpreted in this manner the cargo of the Mary J. Leslie would be entirely liberated after the loss of the Andrew Johnson occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly, this cannot have been the intention of the parties interested."

The gentlemen who gave this opinion have been examined, and they testify that such "opinion agrees with the laws administered in Hamburg"; undoubtedly meaning thereby that, if the intention of the parties was as they found it, the conclusion they arrived at was correct. Both of them further testified that the law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that, if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become void. The provisions of the General German Commercial Code which have been put in evidence in no way conflict with this statement of the expert witnesses as to the parties' power to contract to take the hazard of the vessel's survival. Upon the announcement of this decision of the Hamburg arbitrators, Anthony Gibbs & Sons, for cargo owners, paid to Baring Bros. & Co., for bondholder, the full sum of £2,592. 8s. 9d.

The collision by which the Andrew Johnson and her cargo were sunk was due solely to the fault of the Thirlmere. The owner of the Johnson sued the owners of the Thirlmere in the proper English court, in which suit the present libellants (cargo owners) appeared. The owners of the Thirlmere limited their liability, under the provisions of the British act, to £8 per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the Johnson received £5,179 on ac-

count of the loss of his ship, and £858 on account of his freight, and the libelants here the proportion of the value of the Thirlmere which was adjudged to them as owners of the cargo laden on the Andrew Johnson, but the precise sum does not appear in this record. The expenses incurred in Callao, for which the money was borrowed on the bottomry bond, were, as has been before stated, in part chargeable to ship, and in part to cargo. Having had an adjustment made in London, the libelants, who had paid the bottomry bond, brought this suit against the owner of the Johnson, in personam, to recover the share of such general and special charges in the port of refuge properly falling upon the vessel, which libelants aver they had to pay in Hamburg in order to redeem their cargo on the Leslie from the lien of the bond. Re-adjustment of some of the items having been made by a commissioner, the district court found in favor of the libelants for \$6,091.73, with interests and costs. 59 Fed. 621.

It is manifest that the libelants cannot maintain this action unless the bond was a valid obligation when the adventure terminated. The master of the Andrew Johnson left no debts behind him for work or supplies obtained by him in the port of refuge. All persons who furnished such work or supplies were fully paid, any liens they had therefor discharged, and all indebtedness to them fully extinguished. He secured the means thus to clear ship and cargo from all such claims by borrowing the money from Grace Bros. & Co., under a contract which he negotiated with them. If Grace Bros. & Co. had furnished this money as an unsecured loan, no one would contend that the cargo owner would have the right to intrude himself into the arrangement, volunteer to repay the loan, and then insist that the ship owner should pay him in whole or in part. It is only upon the theory that, by his negotiations with Grace Bros. & Co., the master of the Johnson so pledged the cargo sent by the Leslie that when it arrived in Hamburg it was bound to pay the money borrowed, or some part of it, that the cargo owner can contend that such payment was one to which Johnson or its owner should contribute. But if the master borrowed the money upon such terms that in the event of the happening of a specified contingency the cargo should be relieved from all obligation to pay, and, such contingency happening, the cargo owner nevertheless pays the loan, such payment is a voluntary one, so far as the ship owner is concerned; and it does not cease to be voluntary as to him because it is made in consequence of an unwarranted claim of the lender, or in accordance with an arbitration to which the ship owner is not a party.

The bond was executed in triplicate on September 15, 1884, by the master, in the presence of two witnesses, and acknowledged before the United States consul in Callao. It is no brief and informal draft or memorandum. Omitting a few immaterial words and clauses, it reads as follows:

"Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship Andrew Johnson, of Thomas, Maine, of the measurement," etc., "now lying in the port of Callao, am held and firmly

bound to Messrs. Grace Bros. & Co., of," etc., "in the penal sum of \* \* \* £2,212, to be paid to the said Grace Bros. & Co., or any of them," etc.

"For which payment to be well and faithfully made I bind myself, my heirs," etc., "and also the hull, boats, tackle, apparel, and furniture of the said vessel, and her cargo of nitrate soda, including about 1,200 tons of nitrate of soda transhipped on board the British bark Mary J. Leslie, of," etc., "and the freight to be earned and become payable in respect thereof, firmly by these presents. Sealed," etc., "Dated," etc.

"Whereas the *said vessel* lately sailed," etc., "\* \* \* sprang a leak, \* \* \* bore up to Callao, \* \* \* was duly surveyed, \* \* \* and certain repairs were recommended to be done to enable the *said vessel* to continue the voyage with safety, and also to tranship to another vessel about 1,200 tons of the cargo laden on board the aforesaid Andrew Johnson, in order to enable her to proceed on her voyage with perfect safety.

"And whereas, all necessary repairs and supplies have been made to the *said vessel*, and the said portion of cargo transhipped to the Mary J. Leslie to enable her to prosecute her said voyage, and she is now in a seaworthy condition, and ready to proceed to sea, but the said James H. Killaran having unavoidably incurred certain debts for such repairs, and other necessary and lawful matters and things relating to his *said vessel*, which he is totally unable to defray and make good, save and except upon the security of the bottom of his *said vessel* and her cargo and freight, hath been necessitated to raise the sum of \* \* \* £2,212 for the payment of the debts incurred as aforesaid, and to enable the *said vessel* to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit, or that of the owners of the *said vessel*, or in any other way than by bottomry and hypothecation of the *said vessel*, her boats, apparel, cargo, and freight.

"And whereas, the said Grace Bros. & Co. have, at the request of the above-bounden James H. Killaran, agreed to lend and advance to him the sum of \* \* \* £2,212, \* \* \* for the purpose aforesaid, upon his executing this present bond or obligation, and hypothecation of the *said vessel*, her boats and apparel, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Bros. & Co. are contented to stand to and bear the risk, hazard, and adventure thereof upon the hull, body, or keel of the *said vessel*, Andrew Johnson, her boats, tackle, apparel, and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid, and for securing the repayment of the said sum, \* \* \* the loan whereof is hereby acknowledged, he, the said James H. Killaran, doth by these presents mortgage, hypothecate, and charge the *said vessel*, her boats, tackle, apparel, and furniture, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Bros. & Co., their executors," etc.

"Now, the condition of this obligation is such that if the *said vessel* shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killaran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo, free of any average whatever, at the then current rate of exchange on London, well and truly pay, or cause to be paid, unto the said Grace Bros. & Co., "etc., "upon the present obligation, the sum of £2,212," etc., "being the principal money of this obligation, and the further sum of £387 for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds ten per centum, making together £2,599," etc.

"Or if, during said voyage, an utter loss of the *said vessel*, by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen," etc., "then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue."

It will be observed that this elaborate and carefully worded document sets forth all the essential circumstances under which

the contract was made between Grace Bros. & Co. and the master as fully as the record in this case does. The disaster, the seeking a port of refuge, the survey, the repairs to the ship, the handling of the cargo, the necessity of lightening the Andrew Johnson to enable her to complete her voyage, the transshipment of about 1,200 tons of cargo to the Leslie, the inability of the master to raise the money to pay expenses,—all these are fully disclosed by the instrument itself, and the other evidence in the case adds nothing to our information as to the situation existing when the bargain was made. The bond is clearly expressed, and free from any ambiguity. The words "said vessel," wherever they are used, from the beginning to the end of the bond, refer grammatically and logically to the Andrew Johnson, and to her only. To hold that the last paragraph should read, "Or if, during said voyage, an utter loss of both of said vessels \* \* \* shall unavoidably happen," etc., would not be construction, but alteration, of its language. It is not the function of the court to make changes in a written instrument which is apparently deliberately agreed upon, and which unambiguously expresses in plain language a definite meaning (*Dumont v. U. S.*, 98 U. S. 142), where there is no suit to reform the instrument, no evidence of mistake, no proof tending to show that words or phrases contained in it are used with special meaning. Interpretation according to intent is not to be resorted to when the document itself suggests no ambiguity, when it covers the whole subject-matter of the contract between the parties, and when there is no proof of any intent contrary to that expressed upon its face.

The arbitrators assumed, wholly without proof, that the contracting parties had carelessly employed some form of bond which happened to be at hand. They and the district court reached the conclusion that the real intention of the parties was that repayment of the money loaned should be contingent upon the safety of either vessel. The only reasons advanced for such a conclusion are that bottomry bonds are to be construed favorably to the lender; that they (the arbitrators and the district judge) find it inconceivable that the parties should have embraced the transshipped cargo in the bond without intending it to answer for the bottomry loan if the Leslie arrived safely, although the Johnson were lost; and that the cargo on the Leslie ought not to wholly escape if the Johnson were lost, since a part, at least, of the bottomry debt represented general average, which the cargo ought to pay. The answer to all these suggestions is that they are mere inference and assumption, unsupported by proof, as to the intention of an experienced business man in a distant quarter of the globe, who has expressed his intention, in plain English, the other way, and who must, in the absence of proof, be assumed to be intelligent enough to understand the meaning of the words he used, and sufficiently appreciative of his own business interests to see to it that the contract he made was the best contract he could get. When the firm of Grace Bros. & Co. expressly state, in careful phraseology, that they lend their money, and "are contented to stand to and bear

the risk, hazard, and adventure thereof upon the hull, body, or keel of the *said vessel* Andrew Johnson, her boats, tackle, apparel, and furniture, together with the cargo laden on board as aforesaid [the Johnson's cargo is uniformly referred to in the bond as "cargo laden on board"; the Leslie's, as "cargo transshipped] and the freight to be earned and become due," it will not do to hold, without proof, that they meant to stand to and bear a very different risk. Moreover, for the risk they took, as it is stated in the bond, viz. the loss of their loan if the Johnson became an utter loss, they charged a premium of  $17\frac{1}{2}$  per cent. But if they staked their loan on the safe voyage of either vessel, so that they could lose nothing unless both vessels met with disaster, manifestly their risk was far less; and who in Hamburg or New York can say whether the parties intended to pay a like premium of  $17\frac{1}{2}$  per cent. for such a risk? If courts thus, of their own motion, and without proof of mistake or of intent, reform mercantile contracts as clearly expressed as this, no business man can feel any confidence that his most careful choice of words will insure a construction of his agreement accordant to his own expressed intention, or otherwise than as the court may think such intention was, or ought to have been. We are of opinion, therefore, that the bond became void upon the sinking of the Andrew Johnson with her cargo, and not thereafter enforceable against the 1,130 tons transshipped to the Leslie, and that the payment of the bond by the consignee of that 1,130 tons was voluntary, and gave the cargo owner no right to call upon the owner of the Johnson for the repayment of any part thereof. The proposition that the 1,130 tons on the Leslie is to be treated "like any salvage from the wreck of the Johnson, precisely as if it had been rescued by the Leslie from the Johnson a few moments before the latter went down in mid ocean," and that it therefore remained subject to the bottomry lien after the Johnson went down is overstrained. In no possible sense was the 1,130 tons salvage of the "cargo laden on board" the Johnson on the voyage of that ship from Callao to Hamburg, which was the voyage on whose safe termination the bottomry lender staked his money.

It is not necessary to discuss the question whether a bottomry bond covers salvage, when it is a full and formal instrument, and contains no saving clause reserving to the lenders, in case of utter loss, any average that might be secured upon all salvage recoverable,—a clause which is usual in such full and formal instruments (*Insurance Co. v. Gossler*, 96 U. S. 645), since there has been no salvage either of cargo or ship in this case. The damages recoverable against the delinquent vessel which sent the Andrew Johnson and her entire cargo to the bottom are certainly not salvage. It may be that the bondholder, in the event of an utter loss which made his bond void, would have a direct claim against the offending vessel for damages caused to him by the destruction of property in which he had an interest superior to the owner's, and that when the offending vessel had made restitution in money for such destruction, in whole or in part, and the amount thus paid has come to the hands of the owner, the bondholder can sustain an



action against him for money had and received. *Smith v. Williams*, 2 Caines, Cas. 110; *Read v. Insurance Co.*, 3 Sandf. 54; *Watson v. Insurance Co.*, 3 Wash. C. C. 1, Fed. Cas. No. 17,286; *Appleton v. Crowninshield*, 3 Mass. 448; *Id.*, 8 Mass. 358; *The Empusa*, 5 Prob. Div. 6. The bondholder recovers in such a case, however, not upon any theory that his bond survives as an obligation enforceable against the fund, as the representative of the ship. No doubt, damages recovered for the tortious act of a colliding vessel are often treated in admiralty as a substitute for the destroyed vessel. But the hazard taken by the bottomry bondholder is the physical survival of the ship, or, at most, of any salvage from her. When she goes to the bottom with all she holds, there is an utter loss, within the meaning of the contract of bottomry, and the bond goes down with the vessel. Recovery by the bondholder, under such circumstances, is, as above stated, either against the offending vessel, for destroying the property interest which the bond gave him, or against the person who has, without right, appropriated his share of the damages. But that is not this case. Libelants are not suing, as assignees of the bondholder, to recover damages for the destruction of the bond, either from the person or thing responsible for such destruction, or from the respondent, as having received those damages to the use of the bondholder. The whole action is based upon the theory that libelants paid the bond as an obligation they were bound to pay, and now ask to be repaid the proportion due under the bond from respondent. As the record shows that by the happening of the contingency upon which the loan was hazarded the bond became wholly void, libelants were under no obligation to pay it, and, having paid it, can claim nothing under it from respondent. The decree of the district court is reversed, with costs of both courts.

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#### THE GYPSUM PRINCE.

HIGGINS et al. v. GYPSUM PACKET CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

1. COLLISION—WEIGHT OF TESTIMONY.

The rule that testimony of witnesses as to what was done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge merely from observation, does not mean that a vessel is to be held free from an alleged fault whenever her officers and crew testify that they did not commit it; but that when their evidence is given under circumstances calculated to bring out an independent story from each witness, and is direct, positive, consistent, and in accord with what would have been the natural course of events, it is not to be set aside because the testimony of observers upon other vessels as to the color and bearing of lights will not harmonize with it.

2. SAME—WEIGHT OF EVIDENCE ON APPEAL.

And, even upon an appeal in a case in which the district judge has seen and heard some of the witnesses, such testimony should still be accorded its proper weight, as against his conclusions, especially when his finding has been apparently induced in part by a misplacing of the testimony.

## 3. SAME—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE.

The vessel which was bound to keep out of the way has the burden of showing by a fair preponderance of proof that the collision was due to the fault of the other vessel.

## 4. SAME—SAILING VESSELS.

Where a schooner sailing free on the port tack, after several unavailing changes of course, collided with a schooner sailing closehauled on the starboard tack, *held*, upon the evidence, that the former had failed to sustain the burden resting upon her to show by a fair preponderance of proof that the latter changed her course. *Held*, therefore, that the former was solely in fault. 57 Fed. 859, reversed.

## 5. ADMIRALTY APPEALS—RECORD.

It is always desirable upon appeals in admiralty to have the record so prepared that it will show which witnesses were examined in the presence of the district judge, and which were not.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Lewis H. Higgins and others, owners of the schooner George S. Tarbell, against the schooner Gypsum Prince, to recover damages resulting from a collision between the two vessels. The collision happened in the night, some time between 10 o'clock and 20 minutes after, at a place about six or seven miles from Vineyard Haven light-ship, off the coast of Massachusetts. The district court found that both vessels were in fault, and rendered a decree for half damages. 57 Fed. 859. The libellants appeal.

Eugene P. Carver, for appellants.

Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The night was clear, though overcast, and excellent for seeing lights. The lights on both vessels were properly set and burning. The wind was from N. W. to N. N. W. The Tarbell, loaded with plaster, was bound from Windsor, Nova Scotia, via Gloucester, to New York. She was sailing by the wind closehauled on the starboard tack. The Gypsum Prince was running free on the port tack, and, when the Tarbell was first sighted, was heading about E.  $\frac{1}{2}$  N. The Tarbell was therefore the privileged vessel, entitled to and indeed required to keep her course, while it was the duty of the Gypsum Prince to keep out of her way. The facts above stated are wholly undisputed, and for a collision happening under such circumstances the burdened vessel is to be held responsible, unless the collision was brought about by inevitable accident, or by some fault of the privileged vessel. The *Havilah*, 1 C. C. A. 520, 50 Fed. 331. No one contends that this was a case of inevitable accident, and two of the charges of fault made against the Tarbell in the answer—namely, that she had no lookout and no competent officer on deck—are wholly unsupported by proof. The case narrows down, then, to the question whether the Tarbell changed her course after the vessels sighted each other. That just before the collision the Tarbell hard a-ported her wheel, and luffed up to ease the blow, is

not disputable; but we concur with the district judge in the conclusion that such maneuver was in extremis, and should be disregarded. It remains, then, only to determine whether, except for the final luff, the Tarbell changed her course after sighting or being sighted by the Gypsum Prince. If she did not, then she cannot be held in fault; and the burdened vessel, which concededly made four changes in her helm after sighting, must be held responsible; for, in the absence of proof of inevitable accident, it must be presumed that her maneuvers proved unsuccessful because they were not appropriate to meet the situation, as the color and bearing of the lights of the privileged vessel should have shown her that it was.

Undoubtedly, as the district judge says, it is extremely difficult from the testimony to find any satisfactory and certain explanation of how and why the collision occurred. Finding that the theory of neither side as to the successive movements of both vessels harmonized with the testimony, he has with great care undertaken to trace out their respective courses from the time of sighting, so as to bring them together at the place and in the manner testified to. In some particulars his theory fits the evidence; in others it does not. It begins with the proposition that a change of heading in the Tarbell from W. to W. by N. was made after the vessels came in sight of each other, and in this respect it is in direct conflict with the evidence from that vessel, and supported only by the testimony of two witnesses from the Gypsum Prince as to the color and bearing of the lights they saw. "The established rule is that the testimony of officers and witnesses as to what was actually done on board of their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observations." The Alexander Folsom, 3 C. C. A. 165, 52 Fed. 403. This does not mean that a vessel is to be held free from an alleged fault whenever her officers and crew testify that they did not commit it. But when their evidence is given under circumstances which are calculated to bring out an independent story from each witness, when it is in accord with what would have been the natural course of events, when it is direct and positive and consistent, it is a safe rule to follow that it shall not be set aside because the testimony of observers on the other vessel as to color and bearing of lights will not harmonize with it. And even on appeal, in a case where the district judge has seen and heard some of the witnesses, such testimony should still be accorded its proper weight, especially when, as in this case, his finding has been apparently in part induced by a misplacing of the testimony. The opinion shows that the district judge understood that an order given by the master, "if the wind started up, to keep her west by north," was given to the man who took the wheel at 10 o'clock (Peterson), when in fact the only testimony as to that order shows that it was given to the man who was at the wheel before 10 o'clock (Patterson). It will be sufficient to confine the rest of this discussion to that change of course, from W. to W. by N.,

as none other, except the one in extremis, is shown. And there is no necessity of undertaking out of the confusion, uncertainty, and contradictions of the entire body of testimony to plot out the course of both vessels from the time they sighted each other until the catastrophe. In every issue of fact which comes before a court one side or the other has the affirmative, and necessity long since prescribed the wholesome rule that, where the party holding the affirmative fails to maintain it by a fair preponderance of proof, the decision upon that issue must be adverse to him. As the burdened vessel, which made four changes of course to avoid the privileged vessel, and yet collided with her, the Gypsum Prince must be held in fault, unless she can maintain the affirmative of the issue whether or not the Tarbell changed her course; there being no other fault left in the case chargeable to the latter vessel. The only evidence in support of this charge of fault (a change of course by the Tarbell) is that of the lookout and the mate of the Gypsum Prince as to the lights they saw, and it need not be discussed, because, conceding, as the district judge finds, that they were observant and alert, it is, nevertheless, the testimony of observers only, and should not outweigh the testimony of the actors on the other vessel, if their testimony meets all the requirements above indicated.

The vessels were approaching each other with a combined speed of about 12 knots. A mile would therefore be traversed by them in five minutes, six miles in half an hour. The libel was filed December 9, 1892, and answer December 28, 1892. One of the witnesses from the Tarbell (the lookout, Stewart) was examined upon deposition in New York, January 7, 1893. The apostles indicate that Patterson and Peterson testified upon the trial, but it is averred in libelants' brief that they were examined separately, on different dates, upon deposition in Boston, and claimant's counsel conceded this to be so, since his brief asserts that only Higgins, the master, and Haskel, who was below until just before collision, were examined before the district judge. Incidentally, it may be noted that it is always desirable upon appeals in admiralty to have the record so prepared that it will show which witnesses were examined in the presence of the district judge and which were not. The Tarbell was close-hauled on the starboard tack, and was therefore entitled to right of way as against anything she was likely to meet (except an overtaken vessel), whether the vessel thus encountered were a steamer, a sailing vessel running free, or one closehauled on the port tack. She had passed Vineyard Haven light-ship. The course to be steered, if the wind allowed it, was W. by N., that being the regular course for Point Judith. Hatfield came on deck too late to testify to anything before the final change. Stewart testifies generally that "the Tarbell didn't change her course without she might keep a little closer to the wind"; but as he was the lookout, and not so placed as to be able to note slight changes of course, his evidence on the question at issue is of no importance. He fixes the time of the collision at 10 o'clock, as near as he could judge, and testifies that he sighted the light of the Gypsum Prince a quarter of an hour be-

fore collision. Stewart is clearly in error as to the hour of collision, for the testimony is uniform from both vessels that 15 to 20 minutes elapsed between sighting and collision, and is equally uniform and positive that neither saw the other until after changing wheelmen, —an event which occurred on the Tarbell at 10, and on the Gypsum Prince either at 10 or 5 minutes earlier. Shortly after 10 each vessel came in sight of the other, and the rules for navigating in the presence of an approaching vessel became operative.

Patterson, of the Tarbell, went to the wheel at 8, the vessel heading then about W.  $\frac{1}{2}$  N. The course given to him by the man he relieved was "by the wind, and, if he could, to head W. by N." Sometimes during his trick at the wheel she would go up to W. by N., and sometimes she fell off, but never as far as W.  $\frac{1}{2}$  S. The captain of the Tarbell testifies that about half an hour before the Gypsum Prince was reported, which would be from 25 to 15 minutes before 10 (not 10 o'clock, as the district judge gives it), he noticed the compass, and found the vessel heading about W., and gave instructions to the man at the wheel, "if the wind started up, to keep her W. by N." This is in accord with Patterson's testimony. The wind hauled more to the north, and the captain testifies that at the time of sighting she was heading W. by N. This is perhaps an inference of his, based upon the assumption that his orders to Patterson had been carried out as soon as the wind permitted; but not only is it a natural inference, but it is confirmed by the independent testimony of the new wheelman, Peterson, who relieved Patterson at 10 o'clock. He says that, when he took the wheel, he was steering W. by N., that the captain gave him orders to steer W. by N., and at no time ordered him to steer closer by the wind, which is consistent with the other testimony that the order to work up into the true course (W. by N.) if the wind permitted was given to Patterson, and before 10 o'clock. As the wind was when Patterson took the wheel, he says he could have kept a good full sail with one point higher. He gives the course as W. by N. when the lookout reported the light, and insists, on direct and cross examination, that there was no change of course down to the collision. No weight is to be attached to the apparent inconsistency of his statement that the Tarbell was heading W. by N. when struck. He says that he received and obeyed the order to put the helm hard down (to port), given in extremis, and that she luffed up about a point, but that he did not look at the compass at that minute, and evidently means that the compass course he steered was unchanged from the moment of sighting till the catastrophe, although at the last moment the Tarbell's head was swung to starboard of that course, to ease the blow. Evidence given as this was, independently, at different times and places, and which is so positive, so entirely consistent, and in such conformity to what might be expected from the circumstances that the Tarbell was bound where a W. by N. course would take her, and was, within knowledge of all on board of her, privileged as against any other vessel she might encounter, cannot be wholly disregarded; and, if it be given the weight it is certainly entitled to, the preponderance of proof is clearly against any change of course by the Tarbell after her lights became

visible to the Gypsum Prince. As the latter was the burdened vessel, and her repeated changes of helm failed to take her out of the track of a privileged vessel, which is not shown to have committed a fault of navigation, she must be held solely responsible for the collision.

The decree of the district court is reversed, with costs, and the cause remitted, with instructions to decree in accordance with this opinion.

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THE SWITZERLAND.

UEBERWEG v. LA COMPAGNIE GENERALE TRANSATLANTIQUE.

(Circuit Court, E. D. New York. May 2 and 14, 1895.)

1. COLLISION—INTEREST ON DAMAGES.

Interest on the amount of bills paid for repairing damages caused by collision will not be allowed to the libellant from the date of expenditure, where he has introduced, on appeal, new evidence which materially changed the case as presented below; but such interest may begin from the date of filing the mandate from the appellate court.

2. SAME—DAMAGES—SURVEYORS' CHARGES.

Fees of surveyors employed by the Belgian consul, as required by the Belgian law, to ascertain the damages occasioned to a Belgian vessel by collision, and make report to the insurance companies whether necessary repairs have been made, in order to reinsure the vessel in her proper class, constitute a proper item of damages. *The Belgenland*, 36 Fed. 504, and *The Alaska*, 44 Fed. 500, followed.

3. SAME—DOCKAGE.

Dry dockage rendered necessary for the purpose of making repairs is a proper item of damages.

4. SAME—NEW SAILS.

The cost of new sails, purchased to replace sails which were used temporarily for stopping leaks caused by collision, is a proper item of damages, in the absence of proof that the old sails could have been repaired.

5. SAME—WAGES OF CREW.

The wages of the crew, during the time the vessel is detained in a foreign port in consequence of a collision, is a proper item of damages.

Libels filed in the district court for the Eastern district of New York by the owners of the steamships *Switzerland* and *La Gascogne*, respectively, for damages caused by a collision between the two vessels. The district court sustained the libel of *La Gascogne*, from which no appeal was taken, but proceedings suspended; and the libel of the *Switzerland* was dismissed, with costs. 38 Fed. 853. From the final decree in this case an appeal was taken to the circuit court, and the decree affirmed pro forma. Libellant appealed to the circuit court of appeals for the Second circuit, and the decree was reversed. 9 C. C. A. 75, 60 Fed. 461. Additional proofs had been taken in the circuit court before the decision there. On the mandate of the circuit court of appeals, a reference was ordered in the circuit court to ascertain the damages sustained by the libellant. The commissioner reported the amount of damages sustained by the *Switzerland* at \$22,928.02, with interest from the

dates of payment to the date of his report, amounting to \$9,623.05. The report says:

"Many items of damages are not disputed. The amounts of the bills presented for dockage, painting, new sails, and stevedoring bills were objected to, and also the items of charge for surveys, for wages paid the crew, and for wharfage, and all items of interest on the sums allowed. The Switzerland was not on the dock any more days than was required to repair the damages caused by the collision. That the painting was done at the same time does not call for a pro rata deduction from the sum paid for dockage, and the whole is allowed. The amount charged for painting is conceded to be an estimate of what part of the whole bill paid was made necessary by the collision. There are two bills, with different estimates. I think the smaller bill is more accurately divided; and, applying its ratio to the other bill, \$50 has been deducted. There is no evidence that the sails used to stop temporarily the leaks in the bows could have been repaired; and, in computing damages in collision cases, it is not usual to make any deduction because of the replacing of old material with new. This item is allowed. The unloading of cargo, to get the steamship in trim to enter the dry dock, was begun Saturday afternoon, and carried on continuously night and day, till Monday. If even \$100 extra work had been saved by ordering the stevedore to wait till Monday morning, other items of damage that are allowed would have been increased; and the evidence does not convince me that the time employed or the wages was too much. The charge for wharfage is disallowed. It was not an item of actual expense, but appears to be a bookkeeping item of the accounts kept by the steamship company with their own vessels. The charge for survey bills is disallowed. While the cost of a survey to ascertain the injuries done and the repairs required is usually allowed, the fees of the surveyors employed to ascertain the damages and make report to the insurance companies whether necessary repairs have been made in order to reinsure the vessel in her proper class were disallowed by the court in the case of *The Italy*, in this district, in July, 1884. That ruling has been followed since. In the case of *Ciampa v. The F. W. Vosburgh*, 41 Fed. 57, decided in 1890,—after the case of the *Belgenland*, 36 Fed. 504,—exceptions to the disallowance of this item were again overruled; and the case was affirmed on appeal taken (on other grounds) to the circuit court and the circuit court of appeals successively. 1 C. C. A. 508, 50 Fed. 239. In the present case the steamship was a Belgian vessel, and it is claimed that the law of Belgium requires the consul to appoint surveyors in all cases of collision or general average, and compels the procurement of a consular certificate on their reports, and the three surveyors were so appointed by the consul. But aside from the questions what the law is, and whether the law is proved, or whether, if proved, the fees of the surveyors are proper items of damage to be assessed against the claimant, there is no evidence whereby to separate their fees as such surveyors from their fees as insurance inspectors, which under the present practice must be disallowed. The charge of insurance inspection of the cargo is also disallowed. The wages of the crew during the time the ship was detained are allowed. They were shipped for the voyage in Antwerp, and could not properly be discharged in a foreign port. There is no demurrage, as such, asked, for detention of the Switzerland. The usual practice in this district is to allow interest on the amount of bills paid in repair of damages and allowed; and while it is well settled that the allowance of interest is in the discretion of the court, in admiralty cases, I do not think it the province of the commissioner to withhold it, without special instruction from the court."

Exceptions were filed by the libellant to the disallowance of the charge for wharfage, and the disallowance of the fees paid insurance inspectors for surveying. The respondent excepted to the report as to the items for painting, sails, dry dockage, stevedore's bill, and wages of the crew, and also to the allowance of any interest on the items of damage. Respondent's exception to the al-

lowance of interest was sustained, and all the others overruled. Libellant's exception to the disallowance of the charges for surveys was sustained, and the other exceptions overruled. The ruling of the circuit judge on the exceptions is as follows:

"(1) The exception as to the allowance of interest is sustained, on the authority of *The Isaac Newton*, 1 Abb. Adm. 588, Fed. Cas. No. 7,090, mainly because of the circumstance that the new evidence introduced on appeal materially changed the case from that presented to the district court. (2) The exception to the disallowance of surveyor's charges (\$350) is sustained. The rule laid down in *The Alaska*, 44 Fed. 500, and *The Belgenland*, 36 Fed. 507, seems the fairer one. (3) The exception to the disallowance of wharfage charge (\$350) is overruled. (4) The exception to refusal of the master to credit respondent with \$619.25 for two days' dry dockage is overruled. (5) The exception to the allowance of the bill for new sails is overruled. (6) The exception to the allowance for painting (\$441.92) is overruled. (7) The exception to the refusal to allow a deduction of \$202.05 on the stevedore's bill is overruled. (8) The exception to allowance of wages of crew is overruled."

Before the entry of a final decree in the circuit court on the decision as to the exceptions, application was made by the proctor for libellant for a direction to fix the date of the circuit court of appeals as the date from which interest should run in favor of the libellant in the final decree in this court; and, after hearing, the following decision was rendered.

Robinson, Biddle & Ward and Charles M. Hough, for libellant.  
Jones & Govin and Edward K. Jones, for respondent.

LACOMBE, Circuit Judge (after stating the facts). If the libellant had prevailed in the district court, he would have been allowed interest from the date of expenditure, not from the date of master's report, and that, too, although he might have claimed more than the master gave him, or the master might have allowed some items which the court subsequently rejected. For reasons before stated, he cannot recover interest, when his failure to produce all available proof in the district court postponed his recovery. But that consideration ceases to be controlling when the proof is made complete and the case decided. Interest should run from the date of filing the mandate, May 21, 1894.

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## THE LUCKENBACH.

### THE GEORGIA v. THE LUCKENBACH.

(District Court, E. D. Virginia. December 5, 1891.)

#### **COLLISION IN HARBOR—STEAMER AND TUG—RULE 19.**

A tug, rounding Town Point, in Norfolk Harbor, at a speed of five or six miles an hour, suddenly came in sight of a steamer which had just left her wharf, and acquired a speed of four or five miles an hour, heading out into the harbor towards Portsmouth. The steamer blew one whistle, and kept her course. The tug replied with two whistles, and, putting her helm to starboard, attempted to cross the steamer's bow. The steamer promptly reversed, but could not avoid collision. At the time of first seeing each other, the stem of the steamer was only about 75 yards from the place of collision. No other vessels were near, to



embarrass the management of either colliding vessel. *Held* that, at the time the vessels first perceived each other, they were so near together that collision was inevitable, and that no fault was attributable to either in respect to the signals given; that the tug, having the steamer on her starboard side, was bound, under rule 19, to keep out of the way, and that rule 19 applied to the case, notwithstanding that the supervising inspectors, in their note to the rules of navigation, say that such rules are to be complied with, except when steamers are navigating in a crowded channel, or in the vicinity of wharves; and that the tug was solely in fault for approaching a bend, which excluded the view of other vessels, at a rate of speed which rendered it impossible for her to fulfill her duty of keeping out of the way after they came in sight. Affirmed in 1 C. C. A. 489, 50 Fed. 129.

These were cross libels by the owners of the steamer Georgia and of the tug Luckenbach against those vessels, respectively, to recover damages for a collision between them in Norfolk Harbor.

White & Garnett, for the Georgia.

Sharp & Hughes, for the Luckenbach.

HUGHES, District Judge. On the 9th of May last, between 4 and 5 o'clock p. m., a collision occurred in Norfolk Harbor, off Town Point, between the steam tug Luckenbach and the passenger steamer Georgia, causing serious damage to both vessels. Both ships were under headway at the time of collision,—that is to say, were moving forward on the water,—although their engines had just before been reversed. The Georgia is a large vessel, built for speed,—300 feet long,—driven by a propeller. Though a fast boat, yet, on account of being a propeller, she is, like all such vessels, comparatively awkward to handle in small spaces, on sudden emergencies, in a contracted harbor. The Luckenbach is also a propeller, built and used for towing purposes, and, to some extent, is similarly unmanageable in emergencies. Neither vessel was embarrassed at the time of collision by the near presence of any other ship in the channel. The tug was moving on a course about N. W. by W.  $\frac{1}{2}$  W.; and the Georgia, on one about S. by W., or S.  $\frac{1}{2}$  W. Their courses, therefore, crossed each other. At Town Point the wharf makes two obtuse angles from N. W. by W.  $\frac{1}{2}$  W. to N., which are 210 yards distant from each other, and are equivalent, together, to one angle of about 140 degrees. There are structures on the wharves of this angle which prevent a navigator moving northwardly along the wharves, from the direction of the ferries, from seeing ships that may be coming up the channel of Elizabeth river from any position north of Town Point, until he arrives well abreast of the point, and 340 yards from the Baltimore wharf. The place at which this collision occurred is in dispute. On behalf of the tug, it is placed opposite to about midway of the space between the two angles in the wharf of Town Point, which I have described. On the part of the Georgia, it is placed nearly opposite of the northernmost of these angles,—a little southwardly of that angle. The collision occurred between one and two hundred feet from the wharf. It is impossible, in an attempt to state the facts of this case, to avoid falling into violent contradiction with some portion or other of the unusually conflicting

and voluminous evidence that has been taken on either side. Fortunately, most of the evidence fails to affect or conflict with the few simple facts upon which the case turns. Most of it is immaterial, in respect to those few simple facts, and it would be as useless as tedious to attempt a thorough analysis of these parts of it. The crucial questions are: (1) How fast was the tug moving when about to round Town Point? (2) Was the Georgia at that moment in motion, under headway, and at what speed? (3) What did each vessel do on seeing the other; it being an indisputable, if not an admitted, fact that the tug had the Georgia on her starboard hand?

I conclude from a comparison of all the evidence that the Luckenbach was moving, at the time of coming in sight of the Georgia in rounding Town Point, at the rate of five to six miles an hour. I gather from all the evidence that at that moment the Georgia had got under way, after emerging from her slip, and had attained a headway that gave her a speed of about four or five miles an hour. Furthermore, the evidence discloses that the Georgia gave the first signal after the two vessels came in sight; that signal being one whistle, directing the tug to pass to the right (port to port), and that the tug answered with a cross signal of two whistles, indicating her intention to pass to the left (starboard to starboard), and thereupon put her helm hard to starboard, and held it there until the ships were in collision. The Georgia replied to the cross signal of the tug with an alarm signal, and backed her engine. Examining the chart, and measuring with compasses, I find that, if the collision occurred at the point fixed by the diagram of counsel for the tug, that point was 215 yards from the southeast corner of the Baltimore wharf, which the Georgia had left, and 145 yards from the place which the tug had reached, off the Carolina wharf, when she first saw the Georgia. These, of course, are approximate distances. If the collision occurred at the point indicated by the diagram of counsel for the Georgia, the distance was 210 yards from the Baltimore, and 250 yards off from the Carolina, wharf,—again speaking approximately. These distances are important as showing the imminent danger of collision, and the speed at which the vessels were moving. If the point of collision indicated by counsel for the Georgia be the true one, the Georgia was moving rather more slowly than I have above supposed, and the Luckenbach rather more rapidly. But in either event the joint speed of the two vessels in approaching each other at the time of the Georgia's first signal was, as I estimate, about 10 miles an hour, or nearly 300 yards a minute,—each ship at about half that speed. If the speed of the boats was only 4 miles an hour, they approached each other at the rate of 8 miles an hour, or about 245 yards a minute, each moving at half that speed.

I have stated the crucial questions of fact in this case. The question of law is whether or not the tug was under obligation to obey the nineteenth fundamental law of navigation, which provides that "if two vessels under steam are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." This rule or law applies not merely

in the open seas and in open expanses of navigable waters, but is as often enforced in close harbors and in the vicinity of wharves. In the following cases the collisions all occurred in this latter class of waters, viz.: *The Johnson*, 9 Wall. 146; *The Corsica*, Id. 630; *The E. A. Packer*, 140 U. S. 360, 11 Sup. Ct. 794; *The Admiral*, 39 Fed. 574; *The Emma Kate Ross*, 41 Fed. 826; *The Panama*, 46 Fed. 496; *The Clarcoie*, 27 Fed. 128; *The Pequot*, 30 Fed. 840; *The Cement Rock*, 38 Fed. 764. These and other cases that might be cited were cases of collision in harbors and channels of navigation, and in the vicinities of wharves, even more crowded with shipping than the narrow channel of Norfolk harbor, abreast of Town Point. And it so happened that, at the time of the collision under consideration, there was no vessel in the channel off Town Point to give the least embarrassment to either of the colliding vessels. If rule 19 is to govern in the present case, then the *Luckenbach* must be pronounced in fault. Having the *Georgia* on her starboard hand, it was her duty to keep out of the way. This was her duty irrespectively of any signal which she might receive from the *Georgia*. Rule 19 is arbitrary. It does not make it the duty of the controlling vessel to keep out of the way of the other, if she gets no embarrassing signal from that other. It is imperative and unconditional in terms, imposing an unqualified obligation. Whether the signal first given by the *Georgia* was the right one, or not, did not affect in the least degree the duty which the rule imposed upon the tug. Her duty was to keep out of the way of the *Georgia*, regardless of any other circumstance whatever. Nothing could relieve her from the obligation of this rule, and from responsibility for a collision, if it happened, except the single contingency of the *Georgia* failing to perform her correlative duty, imposed by rule 23, of "keeping on her course."

It follows from what has just been said that the *Georgia*, if rule 19 governs this case, had no right to give the signal of one whistle, and that the tug was under no obligation to comply with it when given. It did not in any degree affect the obligation of the tug to keep out of the *Georgia's* way, by whatever maneuver she might determine, in her own judgment, to make. It is therefore wholly immaterial whether the *Georgia's* first signal was a wharf signal, or a signal of navigation. It may have tended to confuse the pilot of the tug, but it could not excuse him. It may have been improper or injudicious, but, if the *Georgia* kept her course, it made no sort of change in the obligation of the tug to keep out of the *Georgia's* way. Nor was the mere fact of the tug's giving a cross signal necessarily a fault on the part of the tug. The tug had the right to give it and to attempt to cross the *Georgia's* bow, if, in her own judgment, she could thereby succeed in keeping out of the way of the *Georgia*. Rule 19 necessarily confers this sort of discretion upon the dominating vessel, but holds it responsible for the result, if the exercise of that discretion results in disaster.

I have no fault to find with the single whistle of the *Georgia*, nor the cross signal of the tug. The two vessels, when first in each

other's sight, were approaching a point where their respective courses crossed, at a speed of 240 to 300 yards a minute, or 12 to 15 feet a second. They were both under headway. Possibly, if both had instantly backed their engines, the collision could have been avoided, but this is doubtful. The tug took the risk, without instantly backing her engine, of an attempt to cross the Georgia's bow. She miscalculated chances, and the collision resulted, under circumstances under which rule 19 makes her responsible for the collision, the Georgia not having changed her own course. My opinion is that, when the two vessels first saw each other, they were approaching a common intersecting point at a speed which rendered a collision inevitable. This seems to have been the opinion of the navigating officers of the Georgia, whose stem was then only about 75 yards from the place of collision. I think it was already out of the power of the two boats, or either of them, to avoid a collision at the time they first saw each other, and that no fault is to be found with the signals of either, whatever they might have been. The fault was anterior to the time when they saw each other. The fault consisted in the tug's being under such headway in coming down the harbor at Town Point that she was unable to keep out of the Georgia's way. Whatever the speed might have been at which she was moving, it was so great that when, on turning Town Point, she found herself under the obligation of rule 19 in respect to the Georgia, she was hopelessly unable to comply with it. Clearly, a vessel has no right to steam along the wharves lining Norfolk Harbor, from the ferries to Town Point, at such speed that on turning that point she is unable to keep out of the way of a steamer coming up the harbor from the other direction. If rule 19 does not apply to the meetings of vessels in curved channels like this, it is of little use. It imposes upon vessels approaching such curvatures the duty of slackening speed, and placing themselves under complete self-control, by the time of arriving at the curvature. The rule may operate unfairly, as between vessels meeting each other near such curves; but it will operate so, only upon vessels which, mindful of its existence, fail to reduce themselves to such speed and control as, on arriving at curves, to be in condition to comply with the rule.

If rule 19 is to govern the case at bar, the Luckenbach was in fault, not so much in what she did after coming in sight of the Georgia, as, before that vital moment, in being under such headway that she could not conform to rule 19; the Georgia's stem being then within 75 yards of the place of collision, and the tug being hardly more than 100 yards off; the two vessels being less than a minute of time from collision. But counsel for the tug contend that rule 19 does not apply in this case, and should not be enforced in cases of collision in crowded harbors and the vicinities of wharves; relying in this contention on the rulings of the courts in the cases of *The Sunnyside*, 91 U. S. 210, and *The B. B. Saunders*, 19 Fed. 118. The facts in the first of these two cases present no analogy to those of the case at bar, and it is cited only to show that the supreme court holds that rules of navigation are adopted to save life and property,

and that, consequently, they have exceptions, in which parties in fault are not allowed to invoke them in defense or excuse of plain errors in handling vessels. The case of *The B. B. Saunders* is cited to show that courts of admiralty will recognize instructions given by supervising inspectors to pilots, especially in their note to rules of navigation of which rule 19 is one, in which note they say: "The foregoing rules are to be complied with in all cases except when steamers are navigating in a crowded channel, or in the vicinity of wharves;—under such circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary, to guard against collision or other accidents." This note is a repetition, in other language, of rule 24, which provides that, in obeying all cardinal rules of navigation, "due regard must be had to all dangers and to any special circumstances which may exist in any particular case, rendering a departure from them necessary in order to avoid immediate danger." I do not see anything in these two ordinances which released the *Luckenbach* from the duty of keeping out of the way of the *Georgia*, or the *Georgia* from the duty of "keeping her course," on the occasion of the collision under consideration. The harbor, at the place where it occurred, was not crowded. Though it happened in the vicinity of wharves, there was no circumstance existing in connection with the wharves to affect in the least degree the duty under rule 19 of each vessel, in the emergency in which they found themselves,—no circumstance except the single one that the wharf made a considerable bend at that place, as already described. If that bend had suddenly occurred, just as the tug approached it, the case would have fallen under rule 24; for the event, being unforeseen, could not, in that case, have been provided for by either vessel. But the bend had been there for many years. It is shown by all the charts, and its existence was as well known to the navigator of the tug as any other physical feature of the harbor. Knowing of its existence, the tug ought to have approached the bend in such manner as not to have been under the necessity of appealing to rule 24 for protection against any consequences which might result from its manner of approaching it. So that the language of the court in the case of *The Sunnyside* applies to the tug, in reference to rule 24: "No party ought ever to be permitted to defend or excuse a plain error by invoking a general rule of navigation." I must decree against the tug.

NOTE. The decree entered in this case was affirmed by the circuit court of appeals upon an appeal taken by the owners of the tug. See 1 C. C. A. 489, 50 Fed. 129.

## TUG RIVER COAL &amp; SALT CO. v. BRIGEL et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 249.

## 1. FEDERAL COURTS—JURISDICTION—ALLEGATION OF CITIZENSHIP.

An allegation that the citizenship of a party or parties is unknown is insufficient to sustain the jurisdiction of the federal courts, as the requisite citizenship must distinctly appear.

## 2. SAME.

An allegation as to the residence or place of business of a party is not equivalent to an averment of citizenship, for the purposes of jurisdiction in the federal courts.

## 3. SAME—CITIZENSHIP—NECESSARY PARTIES.

Where a bill to foreclose a mortgage makes judgment creditors and all persons interested in the property parties defendant, the object being to sell a perfect title by cutting off all adverse rights and liens, and to settle all questions of priority in the proceeds of sale, all parties defendant are necessary parties, and, if any of them are citizens of the same state with any of complainants, the controversy is not wholly between citizens of different states.

## 4. SAME—JURISDICTION.

Act March 3, 1875, providing that if an absent defendant does not appear within a time limited after substituted service, as provided by the act, the court may entertain jurisdiction of the suit in the same manner as if the absent defendant had been served within the district, simply allows substituted service in certain cases where the court has jurisdiction, and does not purport to change or modify the law as to jurisdiction.

## 5. COSTS—REVERSAL FOR WANT OF JURISDICTION.

A judgment was reversed on the sole ground that the federal courts had no jurisdiction, which point was raised for the first time on appeal. *Held*, that appellant must recover costs in the lower court, but that the costs of appeal should be equally divided.

Appeal from the Circuit Court of the United States for the District of Kentucky.

In Equity. Bill by Leo. A. Brigel and Logan C. Murray, trustees, against the Tug River Coal & Salt Company and others, to foreclose a mortgage and for further relief. There was a decree for complainants, and the Tug River Coal & Salt Company appealed.

Thomas F. Hargis (Baxter & Hutcheson, of counsel), for appellant. Hollister & Hollister and Walter A. De Camp, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

CLARK, District Judge. This case is now before the court on a question of jurisdiction only, raised for the first time in this court on motion of appellant. The suit is brought to foreclose a mortgage executed by the Tug River Coal & Salt Company to Leo. A. Brigel, Logan C. Murray, and William C. Ireland, as trustees, to secure payment of bonds issued and sold by said company, amounting in the aggregate to \$30,000 besides accrued interest. The mortgage conveys a tract of land embracing about 20,000 acres, known as the "Warfield Estate," with all improvements. Beyond the mortgage debt there were judgments and other claims against

the company amounting to a large sum. The relief asked is foreclosure of the mortgage and sale of premises, and other equitable relief, as will appear further on. The question involves the original jurisdiction of the circuit court of the United States for the district of Kentucky, in which the suit was brought. This question alone being now considered, it is only necessary to refer to so much of the record as presents this issue and is material to its decision. The case is one where jurisdiction depends on diverse citizenship of the parties. The caption of the bill, with the allegations as to citizenship, the objects of the suit, and relief sought, are given just as made, as follows:

"Bill of Complaint.

"Leo. A. Brigel and Logan C. Murray, Trustees, Complainants, vs. The Tug River Coal and Salt Company, a corporation created by and existing under the laws of the state of Kentucky; Kentucky & Cincinnati Natural Gas & Fuel Company, a corporation created by and existing under the laws of the state of Kentucky; James D. Barrett, Leo. A. Brigel, A. Lee Barrett, E. G. Piper, John B. Wellman, Lane & Bodley, Nordyke, Harmon & Company, Gale Brothers, A. H. Hogan, John Mead, Levi A. Ault, and Frank B. Wiborg, Defendants. Bill in chancery to foreclose a mortgage on real estate, for the appointment of a receiver, and for an injunction and equitable relief.

"To the Honorable, the Judges of the Circuit Court of the United States within and for the District of Kentucky: Your orators, Leo. A. Brigel and Logan C. Murray, humbly complaining, represent unto your honors: (1) That the said Leo. A. Brigel is a citizen of the state of Ohio, and resides in the city of Cincinnati. That Logan C. Murray is a citizen of the state of New York, and resides in the city of New York. That the defendants the Tug River Coal and Salt Company and Cincinnati Natural Gas & Fuel Company are corporations created by and existing under the laws of the state of Kentucky, and are citizens of the state of Kentucky. That the said James D. Barrett is a citizen of the state of Kentucky, and resides in Martin county. That the Christian names of A. Lee Barrett, E. G. Piper, and A. H. Hogan are unknown to complainants, nor do the complainants know the respective residences or places of business of said E. G. Piper, A. H. Hogan, John Mead, and John B. Wellman. That they are ignorant also of the names of the constituent members of the respective firms of Lane & Bodley, Nordyke, Harmon & Company, and Gale Brothers, and do not know the citizenship of their respective constituent members, nor their places of business, excepting that Lane & Bodley is a partnership doing business in the city of Cincinnati, state of Ohio; that Levi A. Ault and Frank B. Wiborg are citizens of the state of Ohio, both residing in Hamilton county, in that state; that Leo. A. Brigel is a citizen of the state of Ohio, and resides in the city of Cincinnati; and that A. Lee Barrett is a citizen of the state of Kentucky, and resides in Martin county, in that state. That all of said parties defendants claim some interest in the land, the subject-matter of this suit, and are made parties defendant hereto in order that, after answering fully the allegations in this bill of complaint contained, they may severally be required to set up such claim as they may respectively have, to the end that, under the sale hereinafter prayed, a good title to the lands described herein may be given to the purchaser, and, all parties being before the court, their respective rights, if any, may be passed upon in one suit, agreeably to the usages and practice of courts of equity. \* \* \* (4) That the said mortgage be foreclosed. That the equity of redemption of the said the Tug River Coal and Salt Company in said property be forever barred and cut off. That an appraisalment of the said property be made in conformity with the laws of the state of Kentucky, and that on a day to be fixed by the court the said real estate and property be sold in accordance with the terms of said deed of trust or mortgage, and that out of the proceeds thereof there be paid: First, the costs and expenses of this suit, including a reasonable compensation to the said trustees and their counsel; second, the coupons and interest due

upon said bonds; third, the bonds themselves, pro rata; fourth, to such other lien holders as may establish their claims and liens in this cause in the order of their respective priorities; and, fifth, the balance, if any, to said the Tug River Coal and Salt Company or its assigns. (5) And for all other and further orders which to your honors may seem meet, and for all other relief to which your orators may be entitled in equity and good conscience, and under the laws and practice of Kentucky, and under the circumstances of the case; and your orators will ever pray."

It does not admit of question that the defendants are proper and material parties to a bill framed as this is, making the charges and asking the relief which it does. The object is to sell a perfect title, cut off and extinguish all adverse rights or liens, including the judgment creditors' right to redeem, and to settle all questions of priority in the proceeds of sale. Subpoena was served on some of the defendants. Substituted service was had on Piper, Lane & Bodley, Ault, and Wiborg as nonresidents of the district. Others appeared, and no action was taken as to part of the defendants. The suit was dismissed as to Mead and the Gas Company. It does not appear distinctly what the claim of Ault and Wiborg was, beyond the fact that at one time they were holders of some past-due coupons secured by the mortgage. J. D. Barrett, Brigel, and Piper filed petitions in the case, setting up claims as creditors, Brigel and Piper by judgment, and parts of the claims of Brigel and Barrett are for taxes paid for the company, and Brigel's claim was allowed priority over the bonds to the extent of the taxes. The other defendants, except A. Lee Barrett, are shown by the report of the special master to be judgment creditors, with liens on the real estate from the date of judgment. It appears in the record proper that Piper and Lane & Bodley were citizens of Ohio, the latter answering as the Lane & Bodley Company, a corporation of that state. The citizenship of the other defendants alleged to be unknown to complainant does not appear in the record. Their claims were presented to the master, and allowed, doubtless, on copies of the judgments. While not filed as a creditors' bill, formally, the case was so treated, with the usual reference, report, and decree ordering sale, and the case comes to this court by appeal.

The complainants' own statement of their case shows that some of the parties defendant, namely, Leo. A. Brigel, Ault, and Wiborg, are citizens of the same state with Brigel, one of the complainants, and that the citizenship of other defendants is unknown, and the question of jurisdiction is thus presented in two aspects. For the purpose of this question Brigel, sued as defendant in his individual right in a bill brought in his right as trustee, occupies the same position as if sued by another person in that right. The jurisdiction depending on diversity of citizenship alone, this must distinctly and affirmatively appear in the record proper. *Horne v. George H. Hammond Co.*, 155 U. S. 393, 15 Sup. Ct. 167; *Wolfe v. Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602; *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873; *Everhart v. College*, 120 U. S. 223, 7 Sup. Ct. 555; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207. In *Wolfe v. Insurance Co.*, Mr. Chief Justice Fuller, delivering the opinion, says:

"It is essential, in cases where the jurisdiction depends upon the citizenship of the parties, that such citizenship, or the facts which in legal intendment



constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments."

And, as the controversy must be one wholly between citizens of different states, each party plaintiff must be competent to sue, and each defendant subject to suit. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303; *Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010; *Coal Co. v. Blachford*, 11 Wall. 172. In the last-named case the court, through Mr. Justice Field, said:

"In other words, if there are several coplaintiffs, the intention of the act is that each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, or the jurisdiction cannot be entertained."

Recent decisions of this court are to the same effect. *Shipp v. Williams*, 10 C. C. A. 247, note, 62 Fed. 4; *Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co.*, 10 C. C. A. 20, 62 Fed. 705. In the last case cited, Judge Lurton, speaking for the court, said:

"The very late case of *Wilson v. Oswego Tp.*, 14 Sup. Ct. 259, is a case much in point. There federal jurisdiction was held to be defeated as to a defendant whom the court thought an unnecessary party to the relief sought by the complainant, yet a proper party because of its interest in the controversy. We are clearly of opinion that, while the Central Ohio was not a necessary party to the accounting between the Baltimore & Ohio Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company, yet it was, in view of its interest in the issues arising upon that account, a proper party."

So, where the object of the suit is to recover possession of property, real and personal, parties in possession, although as stakeholders, claiming no interest, are not formal, but indispensable, parties. *Massachusetts & S. Const. Co. v. Cane Creek Tp.*, 155 U. S. 283, 15 Sup. Ct. 91, following *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259.

And the same rule was applied in *Wetherby v. Stinson*, 10 C. C. A. 243, 62 Fed. 173. This is a case, therefore, where it affirmatively appears from complainants' bill that the court is without jurisdiction. The rule being that the requisite citizenship to sustain jurisdiction of the federal courts must distinctly appear, it follows necessarily that a suit of this character cannot be maintained in the courts of the United States upon an allegation that the citizenship of the party or parties is unknown. In such case nothing appears, and there is clearly a lack of jurisdiction, and it is in effect so held. *Conwell v. White Water V. C. Co.*, 6 Fed. Cas. 372, 4 Biss. 195; *Speigle v. Meredith*, 4 Biss. 120, Fed. Cas. No. 13,227.

The particular allegation as to Piper, Hogan, Mead, and Wellman is that their "residence or place of business" is unknown. Citizenship is probably meant, notwithstanding it is established that the terms are not synonymous, and that an averment of residence is not the equivalent of an averment of citizenship for the purposes of jurisdiction in the courts of the United States. *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. 966; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207. Strictly, therefore, no allegation is made as to the citizenship of the parties just named. It is insisted by appellees that the trustees on one side, and the Tug River Coal & Salt Company, the mortgagor, on the other, are the only necessary parties,

and that the presence of the other parties does not defeat jurisdiction. In view of what has been said as to the object of the suit, and the relief asked, we think this position is wholly untenable. The question of necessary parties is not determined by any designation of the bill as a foreclosure, or vendors' bill, etc., but upon the object stated and relief sought in the particular case. Within certain limits this may be restricted, or enlarged, as complainants may choose. If the bill had been for foreclosure merely, and against the mortgagor company, although brought as a creditors' bill, the jurisdiction, having once attached, would not have been defeated by interventions by these parties for the purpose of litigating their claims. *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163; *Hardenbergh v. Ray*, 151 U. S. 112, 14 Sup. Ct. 305. This is what really happens generally in practice. The case here is very different. Section 8 of the act of March 3, 1875, has no bearing on the question as is supposed. The act simply allows substituted service in certain cases where the court has jurisdiction, and does not purport to change or modify the law as to jurisdiction, and it is to be borne in mind that the necessary citizenship is a constitutional, as well as statutory, requirement. *Greeley v. Lowe*, 155 U. S. 73, 15 Sup. Ct. 24.

It is urged that the defendant creditors may be arranged on the side with the trustees, their interest being the same. We have seen that exactly the character of interest claimed by Ault and Wiborg does not fully appear. There can be no doubt that, as the bill states the case, these parties are interested adversely to the trustees. This is the only reasonable construction of the bill; and whether this might be shown subsequently to be untrue, for the purpose of removing the jurisdictional objection, it is not necessary to decide. The bill asks that the right of redemption be cut off; that these defendants set up their claims and liens; that the court pass on all questions, so that the purchaser may obtain title free from all such claims; and (not mentioning other points) *Leo. A. Brigel* and *J. D. Barrett* set up claims, parts of which are for taxes paid, and which would be entitled to priority over the bonds. We think their interests are so far different and adverse as to prevent their being arranged as suggested. Moreover, conceding that such arrangement might be made, and we would have creditors, citizens of Kentucky, placed with complainants, and this would involve the case in the same difficulty that now exists.

Another and decisive reason against any such method of meeting the objection is that the citizenship of a number of the defendants is not known, and not disclosed by the record. It cannot be known whether placing such parties on the opposite side would tend to sustain or defeat jurisdiction. In any view, therefore, we are clearly of opinion that the circuit court never rightfully acquired jurisdiction of the case. Whether, with the case back in the circuit court, the complainant could amend and limit the relief to foreclosure, and the mortgagor as defendant, and thereby make a case within the jurisdiction of the circuit court, we are not called upon to decide. On reversal for want of jurisdiction, the general rule is to allow costs against the party improperly instituting or removing

the suit, for the reason that it was the duty of such party to place on record the facts necessary to sustain the jurisdiction of the court. *Kellam v. Keith*, 144 U. S. 568, 12 Sup. Ct. 922; *Bradstreet Co. v. Higgins*, 114 U. S. 263, 5 Sup. Ct. 880; *Iron Co. v. Stone*, 121 U. S. 631, 7 Sup. Ct. 1010; *Horne v. George H. Hammond Co.*, 155 U. S. 393, 15 Sup. Ct. 167; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34. It was held, however, in *Peper v. Fordyce*, 119 U. S. 471, 7 Sup. Ct. 287 (citing *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, and *Hancock v. Holbrook*, 112 U. S. 229, 5 Sup. Ct. 115), that, "upon a reversal for want of jurisdiction in the circuit court, this court may make such order in respect to the costs of the appeal as justice and right shall seem to require." And in *Wetherby v. Stinson*, 10 C. C. A. 243, 62 Fed. 173, the circuit court of appeals reversed the decree for want of jurisdiction, and refused to allow costs, though the reason is not stated. In this case the record is voluminous. Appellant has had the entire record brought up and printed. Appellant made no objection to jurisdiction in the circuit court, and did not call the court's attention to lack of jurisdiction. While the defendant appellant must recover costs in the court below, we do not think it should be allowed full costs in this court. The costs of the appeal will be divided equally. Reversed, and the case remanded to the circuit court of the United States for the district of Kentucky, with instructions to dismiss the bill, unless, upon application for leave to amend the bill, leave to so amend it as to exhibit a case within the jurisdiction shall be granted by that court.

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**HAYES v. COLUMBUS, L. & M. RY. CO. et al.**

(Circuit Court, N. D. Ohio, W. D. May 18, 1895.)

No. 1,080.

**COURTS—JURISDICTION—POSSESSION OF PROPERTY INVOLVED.**

A suit was instituted in a federal court against a railway company for the purpose of marshaling liens and bringing its property to a sale. A receiver was appointed, who took possession of the property of the company, consisting chiefly of an unfinished roadbed. Pending such suit, application was made to the federal court for leave to make the receiver a party to a suit in a state court, instituted under a state statute, for the purpose of condemning and appropriating a part of the roadbed as abandoned. *Held*, that the court should not permit the property held by it for the benefit of creditors and lienors to be subjected to the jurisdiction of another court, and to possible dismemberment, but should hasten the proceedings for a sale, under its own direction, in order that the rights of all parties might be preserved.

This was a suit by Otho L. Hayes, receiver of the Lima National Bank, against the Columbus, Lima & Milwaukee Railway Company, to marshal liens and bring about a sale. A receiver of the property of the defendant having been appointed, the Lima & Northern Railway Company applied for leave to make such receiver a party to an action pending in a state court.

Hoyt, Dustin & Kelley, for receiver.

Cable & Parmenter, for complainant.

W. B. Richie, C. N. Haskell, and Watts & Moore, for Lima & N. Ry. Co.

RICKS, District Judge. This case was instituted some months ago by the complainant for the purpose of marshaling the liens and bringing to sale the property of the Columbus, Lima & Milwaukee Railway Company, to the end that the proceeds of such sale might be distributed among the creditors according to their priorities and equities. In the meantime a receiver was appointed to take charge of the property. The latter consists mostly of an unfinished roadbed and valuable franchises and corporate privileges, for which it is claimed that nearly half a million of dollars have been expended. While said property is so in the possession of this court, the petitioner, the Lima & Northern Railway Company, makes application for leave to sue the receiver in the common pleas court of Putnam county, Ohio. The object of the suit therein pending, and to which it is asked that the receiver be made a party, is to condemn and appropriate a large portion of the unfinished roadbed belonging to the said Columbus, Lima & Milwaukee Railway Company, which lies in Putnam county, and which it is claimed lies in an unfinished condition, without having the ties and iron placed thereon, and that it has continued in said condition for the five years immediately preceding the commencement of that suit. Said proceeding in Putnam county is against the said Columbus, Lima & Milwaukee Railway Company, the Atlantic Trust Company, and O. M. Stafford, the three parties claiming to represent the legal and equitable title to and ownership of said roadbed. The petitioner asks this court to authorize him to make the receiver a party to said proceeding, and claims the right to maintain such action against the receiver, both under section 3415 of the Revised Statutes of Ohio, and section 3 of the act of March 3, 1887, of the congress of the United States. The provision of the Ohio statute cannot apply to the power or authority of this court to grant or deny such motion. The act of congress of March 3, 1887, granted to parties the right to sue receivers appointed by federal courts, concerning acts and transactions of such receivers in the management of the property in their control, in the state courts having proper jurisdiction, without first obtaining leave to bring such suit from the court appointing such receiver. The policy, scope, and effect of this act have been fully considered by several of the circuit courts, and several of the circuit courts of appeals, and the concurrent trend of opinion is that the receivers can only be sued in such courts with reference to acts and transactions of theirs concerning the management of said property. But, confessedly, this application has a far more significant and important purpose than ordinarily contemplated by suits under said act. The purpose of this proceeding in the common pleas court of Putnam county is to condemn and appropriate a part of the res or corpus of the property now in the control of this court in the equity suit and proceeding heretofore referred to. That such property, in the hands of the receiver, is wholly within the jurisdiction of this court, to be sold, and the proceeds to be distributed according to the priorities and liens of the persons interested, is well settled by repeated adjudications of our highest judicial tribunals. In *Re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, the court reviews very

fully the powers and authority of United States courts of equity to retain in undisturbed control the possession of property within their jurisdiction, brought there by proper proceedings. In that case the state of South Carolina, through its proper officers, claimed the right to levy upon and seize by distraint for taxes due the state certain rolling stock belonging to a railroad then in the control and jurisdiction of the circuit court of the United States for the district of South Carolina. This power the supreme court distinctly denied, and declared that said property, when so in the possession and jurisdiction of the United States court, was as much withdrawn from the judicial power of state tribunals as if it had been carried physically into a different territorial sovereignty.

The proceeding now in this court is, to a certain extent, a proceeding in rem. The corpus of the property of the Columbus, Lima & Milwaukee Railway Company is within the control and jurisdiction of this court, to be sold, and the proceeds thereof distributed according to the well-settled principles of equity jurisprudence. The right of the petitioner to proceed in the state court, and condemn this property, or any part thereof, and thereby take it out of the jurisdiction of this court, cannot for a moment be conceded. The petitioner does not claim such right, but concedes that it can only be permitted to do so upon the proper leave and authority of this court. The question, therefore, presented is whether this court, in justice to the litigants now already before it, and in the exercise of a sound discretion, ought to permit this suit in Putnam county to proceed, to the end that a part of this property be taken out of the custody and jurisdiction of this court, and in lieu thereof the proceeds to be awarded in such condemnation proceedings be accepted. It is evident that the statute of Ohio contemplated that such condemnation proceedings should only take place against railroads which had abandoned the hope and expectation of continuing the construction of the road as projected, and where such property was so abandoned the right to proceed under the statute must be conceded. But, the creditors and lienholders who had a claim upon said unfinished roadbed having exercised their right to proceed in this court to subject such property to sale and distribution, it cannot be said that such property has been abandoned within the spirit and meaning of the Ohio statute. On the contrary, the very fact that such creditors were active in bringing the case into court for proper sale and distribution is in itself conclusive evidence that abandonment is not contemplated. If this court permitted said proceedings to continue, allowed its receiver to be made a party thereto, and a valuable part of this roadbed to be condemned and appropriated, it might, and probably would, very seriously prejudice the rights and interests of the parties to the proceedings pending herein. It is no sufficient answer to the objection of such suitors to say that the sum allowed in such condemnation proceedings in the state court will be brought into this court in lieu of the part of the roadbed so permitted to be condemned and appropriated. But such dismemberment of the property might lead to very great damages to creditors and lienors. The probabilities are that a part of

this property so appropriated and condemned would not be sold with so much regard to its value with reference to the remaining portions of the line so uncompleted, or with such proper regard to the impairment of the value of the franchises under which the road was projected, and was being completed. The safer and wiser course for this court to pursue will be to bring this suit to a speedy issue and decree, and sell the property as an entirety. At such sale the petitioner can take its chances with other bidders, and secure the property at whatever proves to be, in the public opinion, a fair determination of its value. In this way the rights of the creditors and lienors who first acquired the right to control the sale of this property will be fully protected, and no wrong will be done the petitioner. The court will not permit the receiver to continue in the quiet possession of this property, and to deny to the public the right to have all or part of it appropriated under the Ohio statute. The court recognizes all that counsel for the petitioner has said as to the wisdom and purpose of that act. It was undoubtedly put upon the statute book to prevent parties who have acquired, by right of eminent domain, the privilege of projecting and finishing railroads, the power to hold them dormant, and prevent others from completing them after the time prescribed by the statute has passed. The court will recognize the purpose and spirit of this act, and speed the case to an early hearing and sale; and all parties are hereby notified to proceed in that spirit. The motion of the petitioner will be denied, and the petitioner is hereby restrained temporarily from proceeding further in the common pleas court of Putnam county to condemn and appropriate any part of the property now within the control and possession of the receiver and the jurisdiction of this court.

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## MUNDY et al. v. LOUISVILLE &amp; N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

## No. 201.

## 1. CONTRACTS—CERTIFICATE OF ENGINEER.

A provision in a construction contract that the engineer or architect of the owner shall finally determine, as between the contractor and owner, what work has been done, and the amount to be paid for it, is valid, and should be enforced, in the absence of fraud or palpable mistake.

## 2. SAME—FRAUD—EVIDENCE.

M. & Co. made a contract with the L. Ry. Co. for certain grading, under which they were to be paid at a certain rate for excavating earth, and at a much higher rate for excavating loose rock. The estimate of the engineer of the railway company was to be conclusive as to the classification of material, and the amount due. M. & Co. claimed that the engineer had classified certain material as earth which should have been classified as loose rock. The evidence as to the actual character of the material was conflicting, as was also the evidence as to statements claimed to have been made by the engineer to M. & Co., before and after the contract was made, as to how he would classify the material. Held that, upon the whole case, there was nothing to impeach the good faith of the engineer.

## 3. SAME—ESTOPPEL.

The contract provided that monthly estimates of the work done should be made by the engineer, and 90 per cent. of the amount appearing to be due should be paid to the contractors, and that at the close of the work a final estimate should be made by the engineer, who should not be bound, in making it, by the monthly estimates, and the balance then found to be due on the final estimate should be paid to the contractors. It was also provided that the contractors should assure the payment of the laborers, and, in case of failure, the engineer might arrange for their payment out of the sums due monthly. After certain monthly estimates had been made by subordinate engineers in charge of the work, the chief engineer expressed the opinion that such estimates were excessive, and would have to be reduced, but upon inquiry by the contractors, who informed him that they wished to avoid paying their subcontractors more than it might afterwards appear they were entitled to, the chief engineer assured the contractors that the reduction would not amount to so much, and they might safely pay the subcontractors. The contractors accordingly paid the subcontractors sums which exceeded by \$12,114 the amount allowed on the final estimate to the months in question. *Held*, that the railway company, for which the engineer acted, was estopped to claim a reduction which would subject the contractors to loss.

## 4. EQUITY PRACTICE—FUND SUBJECT TO ATTACHMENT—PAYMENT INTO COURT.

The railway company objected to paying to the contractors the balance found due to them, on the ground that notices of attachments and assignments of the fund had been served upon it. *Held*, that the decree should provide that the fund might be paid into court, and that the railway company could protect itself by bringing in all claimants.

### Cross Appeals from the Circuit Court of the United States for the Middle District of Tennessee.

This was a suit by J. A. Mundy, Jr., J. H. McTighe, and J. V. Hussey against the Louisville & Nashville Railroad Company to adjust the rights and claims arising out of a construction contract. From the decree entered by the circuit court, both parties appeal.

This is a controversy over the amount due the contractors under a railroad construction contract. The complainants, J. A. Mundy, Jr., a citizen of Virginia, J. H. McTighe, a citizen of Arkansas, and J. V. Hussey, a citizen of Tennessee, compose the firm of Mundy, McTighe & Co., who made a contract on July 7, 1890, with the Louisville & Nashville Railroad Company, a Kentucky corporation, for the grading of what is called the Clarksville Mineral Branch of the Louisville & Nashville Railroad, together with a branch of that branch, 6 miles in length, called the Vanleer Spur. The road projected and to be constructed extended 31 miles, from a point in Montgomery county on the Memphis Division of the Louisville & Nashville to a point in Dickson county on the Nashville, Chattanooga & Memphis Railroad. The Vanleer Spur, or branch six miles in length, left the main branch about 10 miles from the latter terminus, and ran to the Cumberland Furnace. The complainants constructed the entire line and the Vanleer Spur, except a division of 7 miles, from the fourteenth to the twentieth mile, inclusive. This middle division they cleared for grading, but were then notified by the company to do no further work thereon. Monthly and final estimates were prepared by the chief engineer under the contract, and the work, as done, was accepted by the company. The contractors refused to accept the final estimate, on the ground that they were not allowed therein what should have been allowed, in accordance with the terms of the contract, by \$83,000. They filed a bill against the company in the chancery court of Montgomery county, at Clarksville, Tenn.; and this was removed, by petition of defendant for removal, to the circuit court of the United States for the Middle district of Tennessee. The bill attaches the contract under which the work was done, as an exhibit. In the contract were the following provisions: "The contractors further bind themselves \* \* \* to promote good order among the laborers upon the

work embraced in this contract, by giving them assurance of the full payment of their wages." "It is further agreed that if, out of any monthly estimate paid to the contractors, they shall fail to pay the wages of the laborers for that month, it shall be at the discretion of the engineer thereafter to provide for the payment of the laborers for each month out of the estimate for the month, according to such rules as he shall prescribe. \* \* \* It is further agreed that the amount of force employed by the contractors is at all times subject to regulations, and must be increased or diminished as required by the engineer. \* \* \* And it is distinctly understood and agreed between the parties that the work under this contract shall, at every stage of its progress,—from beginning to end,—be subject to the direction, inspection, and acceptance of the engineer, who shall determine what, in any case, a fair construction of the contract requires to be done by either party, and whose measurements, classifications, and estimates, monthly or final, shall be conclusive upon both parties, unless founded on fraud or mistake. \* \* \* And the railroad company, in consideration of the full and complete performance of this contract, to the entire satisfaction of the engineer, to be evidenced by his certificate, agrees to pay to the said Mundy, McTighe & Co. the prices set forth in the schedule to the proposal of the said Mundy, McTighe & Co., a copy of which is attached, and which is to be taken and considered as a part of this contract, and to have the same effect as though inserted in it, to wit, on or about the first day of each month, during the progress of the work, the engineer shall make an estimate of the relative value of all the work done by the contractors for the month preceding, and on or about the 20th of the month 90 per cent. of such estimate shall be paid to the contractors at the office of the railroad company, in Louisville, Kentucky, in cash. And when all the work embraced in this contract shall have been completed agreeably to the specifications, and in accordance with the directions, and to the satisfaction and acceptance, of the engineer, there shall be a final estimate made of the quantity, character, and value of said work, agreeable to the terms of this contract; the balance appearing due to the contractors shall be paid to them upon their giving a release, under seal, to the railroad company, from all claims or demands whatsoever growing in any manner out of this contract. And in computing said final estimate, and giving his final certificate, the said engineer shall not be bound by any preceding estimates and certificates, but such preceding estimates and certificates shall be held to be only approximate to the final estimate; and the said monthly estimates and certificates on unfinished work shall in no case be taken as an acceptance of the work, or a release of the said contractors from responsibility therefor, until the final estimate is made, and the work, in its entirety, is accepted as complete under this agreement." In the general specifications appear the following: "Excavations will be classified under the following heads, to wit: Earth, loose rock, solid rock, iron ore, and excavation in water. Earth will include clay, sand, gravel, loam, decomposed rock and slate, stone and boulders, containing less than one cubic foot, indurate clay, cement gravel, and all other material of an earthy (sic) kind. Loose rock: All boulders and detached masses of rock measuring over one cubic foot, and less than one cubic yard; also slate, coal, shale, soft friable sandstone, and soapstone, and all other materials except solid sandstone and limestone in place, and those described above as earth; also stratified stone in layers six inches thick and under, separated by a strata of clay. Solid rock: All rock in place which rings under the hammer, in masses of more than one cubic yard, with the exception of stratified stone, described in the specification for loose rock. Borrow pits will be located by the engineer on land provided by this railroad company, and shall be excavated in conformity with such shape and to such depth as directed by the engineer; and all material so removed and placed in the embankment will be measured in accordance with actual sections of finished roadway and adjuncts. \* \* \* In sections where the embankments exceed the excavation, the excess may be supplied from the sides of the adjacent cuts, or from such other places as the engineer may direct; but the excess so excavated shall be estimated as embankment only, and paid for as such. \* \* \* Contractors must satisfy themselves of the nature of the soil; of the general forms of the surface of the ground; of the quantity of materials



required for forming the embankments or other work, and all matters which can in any way influence their contract; and no information upon any such matters derived from the maps, plans, profiles, drawings, or specifications, or from the engineer or his assistants, will in any way relieve the contractor from all risks, or from fulfilling all other terms of this contract."

The most important controversy between the parties is whether a material called "chert" should be classified as loose rock or earth, under the specifications. Complainants contend that it should be classified as loose rock. As they contracted to excavate loose rock at 39 cents a yard, and earth at 13½ cents a yard, it will be seen that the difference was very material. The bill averred: That before the complainants made a bid they went over the projected line, and then asked the engineer how he would classify chert. That he replied that there was but little on the line; that, if any was found, he would classify it as loose rock. That after the contract was signed he again promised so to classify it. That, notwithstanding these statements, he directed his assistant engineers not to classify it as loose rock; and, when they had classified a percentage of it in this way in monthly estimates signed by him, he, knowing that he was doing the complainants gross injustice, arbitrarily and fraudulently cut down the amount of loose-rock excavation in his final estimates so as to reduce the sum earned by complainants more than \$10,000 below that which was allowed in the monthly estimates. The bill also averred that, in the same manner, the chief engineer cut down the measurements or quantities of excavation and embankment shown in the monthly estimates, without any sufficient examination or measurement by himself. An amendment to the bill averred that, by a custom prevailing with reference to the classification of material under these railroad-construction contracts, the engineer exercised an equitable discretion to classify as loose rock material not strictly within the words of the specifications, but which, because of the difficulty of excavating it, should be paid for at the same rate, but that the engineer in this case arbitrarily and fraudulently refused to exercise any such discretion. The bill further averred that the "defendants knew that complainants had subcontractors on parts of this work; that these subcontractors were paid monthly for the work done by them according to the estimate made monthly, less a retained per cent. held by the defendants. They were often paid directly by the chief engineer from the monthly estimates given complainants, and complainants had a right to presume that on a final estimate they would be allowed a larger amount than was given in the monthly estimates. On the contrary, however, and as stated, they were cut down by the said chief engineer. By the monthly estimates they were induced and compelled to pay their subcontractors the parts they were entitled to receive of the monthly estimates for the work done by them, and, if the final estimate of the chief engineer is permitted to stand, it will leave the subcontractors largely indebted to complainants; they having already received more than the engineer now says they were entitled to receive for all the work done by them," by some \$12,000. The answer contained specific denials of the averments of the bill that Cobb had ever agreed to classify chert as loose rock. It set out, by way of explanation of the reduction of the final estimate below the monthly estimate, that one of the assistant engineers admitted that there were grave errors in his measurements and classifications, requiring a complete remeasurement and reclassification, which showed a gross excess in both. Upon the question of overpayments by complainants to subcontractors due to the excessive monthly estimates, the averment of the answer was as follows: "Respondent does not know positively, but believes and charges, that no overpayments were made by complainants to subcontractors until complainants had notice of the errors in classification and measurements on the sections upon which corrections were made. But, however this may be, the contract provides that the monthly estimates should only be approximate, and subject to correction, and by reason of this provision the complainants are precluded from a recovery against respondent on that account. Again, respondent believes and charges that complainants well knew all the while that the classifications on said sections were in violation of the contract and the instructions of the chief engineer, and for that reason there can be no recovery for any alleged overpayments to subcontractors."

The answer also averred that the complainants had acquiesced in and accepted the chief engineer's classification of the chert as the greater part of its earth. "Respondent again shows to your honors that the contract provided that the railroad company should, during the progress of the work, pay complainants only 90 per cent. on the monthly estimates, reserving the rest until its final completion. Several times during the progress of the work, with a full knowledge of the character of the classification being made, and the construction given the contract by the chief engineer, complainants, being in need of further payments to meet demands against them, applied for and received advances upon the retained per cent., and never once did they intimate to respondent that anything was due to them as now claimed, but they always applied for and received said payments as advances upon the retained per cent." Finally, the respondent, in the answer, objected to the payment of the sum admitted to be due the complainants under the final estimate some \$5,000, because it had been attached in the hands of the respondent company by creditors of complainants, and because it had been assigned by them to others, who had served notice of the assignment upon respondent.

Leech & Savage, for complainants.

Burney & Gholson, for defendant.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). The controversy which the complainants seek to make in this case is whether proper measurements and classifications of the excavation and embankment done by the complainants under the contract entitle them to recover a large sum from the railroad company. One of the terms of the contract is that the measurements and classifications of the chief engineer of the defendant, as contained in his final estimate, shall be conclusive of the amount to be paid by the company to the contractors, in the absence of fraud or mistake. It is conceded by both parties that the amount due according to the final estimate has been paid to the contractors, or their order, except \$5,531.03, and this sum the company expresses its willingness to pay to those who may be now entitled to have it. The authorities leave no doubt that construction contracts, in which the contractor stipulates that the engineer or architect of the owner shall finally and conclusively decide, as between him and the owner, what amount of work has been done, and its character, and the amount to be paid therefor under the contract, are legal, and should be enforced. In such cases, after the work has been done, the contractor can recover nothing in excess of the amount found due by the engineer, unless he can make it appear that the engineer's decision was fraudulently made, or was founded on palpable mistake. *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344; *Kihlberg v. U. S.*, 97 U. S. 398; *Fox v. Railroad Co.*, 3 Wall. Jr. 243, 9 Fed. Cas. 627 (Case No. 5,010); *Lewis v. Railroad Co.*, 49 Fed. 708; *Ranger v. Railway Co.*, 5 H. L. Cas. 72; *Waring v. Railway Co.*, 7 Hare, 482; *McIntosh v. Railway Co.*, 2 De Gex & S. 758; *Hill v. Railway Co.*, 11 Jur. (N. S.) 192; *Scott v. Corporation of Liverpool*, 28 Law J. Ch. 230; *Herrick v. Railroad Co.*, 27 Vt. 673; 2 Wood, R. R. 1138 et seq., and cases cited.

The fact that the contract at bar expressly stipulates that the decision shall not be conclusive in case of fraud or mistake does not vary its construction. The exception would be implied, if it were not expressed. The result is that, before the complainants can establish their right to recover any sum over and above that allowed in the final estimate, they must show that the engineer, in making his estimate, was guilty of fraud, or exhibited such an arbitrary and wanton disregard of the complainants' plain rights under the contract as to be the equivalent of fraud, or committed errors and mistakes to the complainants' prejudice so gross and palpable as to leave no doubt in the mind of the court that grave injustice was thereby done to them. We proceed to examine the chief circumstances upon which the complainants rely to make such a case. The chief engineer was Capt. Cobb, of many years' experience in railroad engineering, and quite familiar with the country through which the line projected was to be built. His brother-in-law, Capt. Gracey, was interested in having the road built, both because it was supposed to be of advantage to Clarksville, where he lived, and because he owned an iron mine which would be reached by the new line. He showed his interest by subscribing \$10,000 for its construction. Cobb made the usual preliminary estimate of the amount of the necessary work and its cost, before the bids were taken. It is urged on behalf of complainants that Gracey's interest in securing the construction of the road led Cobb to make an unreasonably low estimate in order to induce the Louisville & Nashville Company to undertake the enterprise, and that, having reported such an estimate, he had a strong motive to vindicate his estimate by making the subsequent cost square with it. This is one of those circumstances proper to be considered in weighing evidence adduced to establish fraud, which derives importance from the necessity, if any exists, for explaining the subsequent conduct of the person charged. It suggests a motive for unjust action. That is all. The particular conduct of Cobb, the good faith of which has been chiefly attacked, was his classification of the material called "chert" by the complainants, and the first circumstance relied on by complainants is the statements of Cobb as to how he would classify this material before and after the contract was made. It might be significant of a fraudulent purpose on his part if he deliberately agreed to classify a certain material as loose rock before the bids were made, to induce low bids, and subsequently gave it the much less lucrative classification of earth. But what does the evidence show? Cobb had been engineer in the construction of a railroad in Alabama called the "Birmingham Mineral," where, under a similar contract, he had classified a material which was there called "chert" as loose rock for McTighe, one of the complainants, who was there the contractor. McTighe expressed the opinion to Cobb, after he had gone over the Clarksville Mineral line, that the same material would be found on it, and asked him how it would be classified. Cobb said he did not think the Birmingham chert would be found on the Clarksville line, but that if it was it would be classified as loose rock, as it was at Birmingham. Clearly there was no deception here,

unless the fact is that the Birmingham and Clarksville materials are identical. There is a conflict upon this point, but the great weight of the evidence shows a marked difference between the two. Again, it is charged that Cobb frequently agreed, during the progress of the work, to classify this so-called chert as loose rock. The evidence in regard to these statements is quite conflicting, and yet the differences are not incapable of reconciliation. J. H. McTighe, one of the complainants, was their chief witness. He says that the word to "classify" a material is to place it either in the loose-rock or solid-rock class; that when any material is to be treated as earth, under the specifications, it is not called "classified material." His further examination disclosed that when a percentage of a material was put in the loose-rock class he considered it classified. There is no doubt that the contractors were constantly complaining of the difficulty of excavating this chert, and insisting to Cobb that it should be classified as loose rock. There is no doubt, also, that Cobb agreed to give them a fair classification. They probably understood this to mean that he would give them a classification by which a good percentage of the chert should be rated as loose rock. Cobb testifies that he said he would give them a fair classification under the specifications. McTighe admits that he frequently referred to the specifications as his guide. Other witnesses for complainants say that he only assured them that they would not lose money by the work. Cobb says that especial complaint was made of the classification of Neblett, assistant engineer in charge of the south-end division or residency and the Vanleer Spur, and that he agreed to go over the work, and himself classify the material; that he did so, and raised the percentage of loose rock,—a statement which does not seem to be contradicted in the record. On the whole case, we think it reasonably clear that Cobb's assurances to the contractors were that he would give a reasonable and fair classification of the material, rather than that he would give them any specific percentage of loose rock. The extravagant statement of the bill, and of one or two of complainants' witnesses, that he agreed to classify all chert as loose rock, falls of its own weight, and is entirely at variance with the course of the complainants in continuing the work under estimates from month to month in which a large per cent. of the chert was classified as earth. Cobb admits that he instructed his assistants that they should classify nothing of the chert as loose rock, except so much of it as was boulders, or detached masses of rock measuring over one cubic foot in size. This is said to be a gross violation of complainants' rights under the contract. "Earth" was defined by the contract to be "clay, sand, gravel, loam, decomposed rock and slate, stone and boulders containing less than one cubic foot, indurate clay, cement, gravel, and all other material of any earthly kind." "Loose rock" was defined to be "all boulders and detached masses of rock measuring over one cubic foot, and less than one cubic yard; also slate, coal, shale, soft friable sandstone, and soapstone, and all other materials except solid sandstone and limestone in place, and those described above as earth; also stratified stone in layers six inches thick and under, separated by

strata of clay." Now, if this chert, so-called, was made up of boulders or pieces of rock mixed in with clay, decomposed rock, or other material of an earthy kind, then the earthy material was to be classified as earth, and boulders or detached rock masses or stones were to be classified as earth or loose rock, as each boulder or mass of rock was less or greater in size than one cubic foot. If chert did not contain earthy material in any substantial quantity, then, under the residuary phrase of the loose-rock clause, it should have been classified—all of it—as loose rock. What, then, was this Clarks-ville chert? There is much evidence in the record to show the difficulty with which it could be worked. Except as this may reflect on the question whether the material is earthy, or not, it has no relevancy to the discussion. There is nothing in the contract authorizing the court or the engineer to classify material according to the difficulty of handling it. It may have been—it doubtless was—the intention of the parties so to define the classes of material that the earth class should contain materials more easily excavated than loose rock, but we must presume that, for the very purpose of avoiding a discussion as to difficulty in handling, specific description of the different materials was inserted. The weight of the evidence shows that a large part of the so-called chert was of earthy material, as defined by the contract. The witnesses for the company say that the material is made up of clay in which are mixed boulders or pieces of flint varying much in size. Several witnesses for the complainants say that the material is rotten or decomposed limestone, with flint masses interspersed through it. Now, rotten limestone seems to be included in the term used in the earth clause of the contract "decomposed rock." But it is not material how the weight of the evidence may be upon this point, unless it shall appear that it is so overwhelmingly with the complainants as to give reasons for thinking that Cobb's judgment was biased, partial, and consciously unjust. The parties agreed that Cobb should decide this very point. He has decided it. When it appears that the evidence to sustain his conclusion is strong and creditable, the fact that the court might, by a nice weighing of all the evidence, reach a different conclusion, is not of importance. Having, with good reason, decided that chert was largely composed of earthy material, his instructions to his assistants not to classify any chert as loose rock, except that part of it composed of boulders or detached masses of rock exceeding one cubic foot in size, were in accordance with a proper and legal construction of the specifications, and cannot now be made the subject of complaint. Much was said in the brief and argument of counsel for complainants concerning a custom prevailing in the execution of such railroad contracts as this one, by which the engineer exercises an equitable discretion in his classification to depart from the letter of the specifications, and to allow the contractor quantities of material under the higher classes based on the difficulty of the work. That evidence of custom may be introduced to show authority of an agent, or to throw light upon the construction of a contract, is well settled. Before it can have any effect, however, the evidence must disclose a custom reasonable, notorious, and well

defined. *Insurance Co. v. Waterman*, 6 U. S. App. 549, 4 C. C. A. 600, 54 Fed. 839. And no custom is permitted to prevail over the express words of the contract. *Smith v. Society*,<sup>1</sup> 65 Fed. 765. We think the evidence relied on does not show a certain and well-defined custom, and that the custom claimed is in conflict with the terms of the written contract. Of course, the classification of material cannot be mathematically exact, in the construction of railway works. The engineer must use his judgment or discretion in estimating the percentage of loose rock or earth in any excavation; but that he may, under the terms of a contract like the one here, deliberately ignore the specifications, and substitute for them loose and undefined considerations of equity and justice, in fixing the amount to be paid for different materials, cannot be conceded. But suppose such a custom were to prevail; it would amount only to a permission to the engineer to depart from the specifications, or not, as he should deem proper; otherwise it would not be a discretionary power. How can the contractors complain if, in the exercise of such discretion, he adheres to the specifications?

Another circumstance relied upon by the complainants to show that the final estimate of Cobb should not be regarded as conclusive is that he made a material reduction in the measurements, and a material change in the classifications, as they appeared in the monthly estimates for July and August. Each monthly estimate contained a statement of the entire work done under the contract, in units of quantity and class, from the beginning. Deducting the amount shown in the previous monthly estimate gave the work done during the current month. The record shows that the amount of work credited to the contractors by the estimate given at the end of July, 1891, was greater in money value by some \$20,000 than that allowed in the final estimate; and this although the work done in August, 1891, to complete the job, was not inconsiderable. This calls for explanation. The line was divided into three residencies or divisions. The south end and the Vanleer Spur were in charge of Assistant Engineer Neblett. The north end was divided between Assistant Engineers Grundy and Mills. When the July estimate was returned, Cobb says that he became convinced that the loose rock returned on the north end was an overclassification. He thereupon went over Grundy's residency with him, and in detail discussed his classification, learning from him that he had not adhered to the specifications, in deciding what was to be classed as loose rock, but had exercised what he regarded as an equitable discretion to soften the harshness of the specifications in the contractor's favor. He returned 55,608 yards of loose rock and 102,581 yards of earth excavated on his residency. Cobb reduced the loose rock to 29,585 yards, and increased the earth to 128,331,—a reduction in money earned by the contractor of about \$6,565. In the case of Mills, Cobb went over his division with him, and in comparing amounts, Mills admitted that he had overclassified the loose rock in the "big cut" which was on his residency, and that he had

<sup>1</sup> 13 C. C. A. 284.

given Cobb the wrong amounts, in calling his figures for loose rock. It turned out, moreover, from Mills' own written confession, that he had destroyed his own note book, because it would not verify his returns, and that he was unable to make a correct final estimate. Cobb then took Grundy, and went over Mills' division himself, made all the measurements, and reclassified the work, and made his final estimate. Complainants employed two engineers to go over the work, to make measurements and classifications; and their figures, as a whole, greatly exceed Cobb's. The company also employed two engineers to go over the work, and their measurements and classification are quite far below Cobb's. The latter make two estimates, the one based on a strict classification, according to the specifications, and the other on a so-called equitable classification, in which the definitions of "earth" and "loose rock" in the contract are not exactly followed. Both estimates show much less money earned by the contractors than Cobb's final estimate.

On the whole case, there is nothing at all to impeach the good faith of Cobb in making his final estimate. He did say to the contractors that he would recommend the payment of some \$16,000 more than his final estimate by the company to them, because the specifications worked harshly against them, on condition that they would accept it as a finality. He says this was in accordance with his practice of requiring the contractors to live up to the specifications, and of then relieving them from any hardship by recommending to the company the payment of a lump sum in addition to the estimate made according to the contract,—a practice much more reasonable and safe than the one which the complainants here seek to establish as a custom. The contract specifically provided that the engineer, in making his final estimate, should not be bound by quantities in the monthly estimates; so that, in revising the entire work, Cobb was only doing what the contract contemplated; and, as no bad faith or palpable error appears in his measurements and classification, we think that the final estimate must be regarded as conclusive, except in the respects now to be discussed.

In the course of the work, Mundy, one of the complainants, who was also a subcontractor, absconded, leaving many creditors. Complainants gave a chattel mortgage to secure a considerable indebtedness. Both occurrences led to attachments and injunctions, which much embarrassed complainants in the fulfillment of the contract. In an adjustment between the attaching creditors, the company, and the complainants, it was arranged that Cobb should draw the amount due on each monthly estimate, and then pay out the same to the subcontractors, material men, and other creditors, on the order of complainants. This was done. It was very important to the company that the subcontractors and laborers should be paid, so that the work might progress, and several provisions of the original contract were evidently inserted to prevent interruptions from a failure of the principal contractors to pay their debts. Thus the principal contractors, to promote good order among the laborers, bound themselves in the contract to give assurance to the laborers

of full payment of their wages. It is further provided that if, out of any monthly estimate paid to the contractors, they fail to pay the wages of the laborers for that month, it shall be at the discretion of the engineer thereafter to provide for the payment of the laborers for each month out of the estimate for the month, according to such rule as he shall prescribe. When the July estimate was made up by the assistant engineers, and signed by Cobb, he expressed the opinion that it was an excessive allowance, and would have to be reduced. This came to the ears of the contractors, who visited Cobb, and said that they did not wish to give orders in favor of subcontractors on the basis of a monthly estimate, when, by a final estimate, it might appear that they had paid more than the subcontractors were entitled to. Cobb says he was then of opinion that the reduction could not be enough to lead to such a result, assured them of this, and even guaranteed that Guinn and Shippey might safely be paid some \$2,500. It also appears that he thought the August estimates would have to be reduced, and that he then had reasonable ground to suspect that Mills' work was wholly unreliable. Nevertheless, he went on with payments to subcontractors on the orders of the principal contractors to the extent of \$12,114.72 more than his final estimate showed to be due to them from the principal contractors. Some question is made of the sufficiency of the evidence to show that the overpayments by the complainants to their subcontractors amounted to so large a sum. McTighe, who testifies positively to the sum above stated, gave details in respect to but two or three of his subcontractors,—presumably, because he was not inquired of as to the rest. The sum overpaid to these particular subcontractors was only about 25 per cent. of the amount stated by him to be the aggregate of complainants' overpayments. He was not cross-examined upon the subject, and no ground appears for discrediting his positive testimony concerning the aggregate amount. The engineer by the provisions in the contract, and by the subsequent arrangement between the company, the complainants, and their creditors, was given authority to act for the company in securing payments by the complainants to their subcontractors and laborers. When, therefore, he gave the complainants assurances that the monthly estimates would not be so reduced by the final estimate as to make it possible that payments to their subcontractors on the basis of the monthly estimates should turn out to be overpayments, the company became estopped to claim such a reduction of the monthly estimates as would subject the principal contractors to loss thereby.

It is suggested that the principal contractors knew of the overclassification and overmeasurement. There is nothing to show this. They claimed then, and they claim now, that justice was not done them, even in the monthly estimates, in respect either of classification or measurement.

Again, it is pressed upon us that in returning the final estimate the engineer was an arbitrator; that he did not more represent the company than the contractor in making it; and, therefore, that the company could not be estopped by his act in the capacity of arbi-



trator, any more than a party to a lawsuit could be estopped by a misleading judgment of a court, which the same court should subsequently reverse. It may be doubted whether the engineer occupies the position of indifference between the parties which this argument assumes. In a leading case in England (that of *Ranger v. Railway Co.*, 5 H. L. Cas. 72), a controversy arose as to the conclusiveness of the decision of the engineer of the company upon a disputed point arising in the execution of a construction contract, by the terms of which the engineer was finally to decide it. It was sought to impeach the decision on the ground that the engineer was a shareholder in the company. The House of Lords held that this could not be done, because he did not hold an indifferent position between the parties, and they both knew this when the contract was made. He was not a judge, but the representative of one party, in whose decision the other had been willing to acquiesce, and had stipulated to do so. Of course, such a stipulation carries with it an implied condition that the agent of the company shall be guilty neither of fraud nor gross mistake; but, by his assumption of a quasi judicial function, his employer does not cease to be responsible for his acts in that capacity, because it is well settled that his failure to act, or his fraud in acting, estops the company from relying on the condition of the contract that money shall only be due under the contract upon his certificate. *Waring v. Railway Co.*, 7 Hare, 482; *McIntosh v. Railway Co.*, 2 De Gex & S. 758. We are clearly of opinion that the respondent company is estopped to claim any reduction from the July and August estimates which will involve the contractors in loss due to the making of payments to subcontractors on the basis of the monthly estimates. It follows that on this account the complainants are entitled to recover \$12,114.72.

It appears to be conceded that, by a mistake, the complainants were not allowed, in the final estimate, \$170 for clearing the middle division of the line, upon which their work was subsequently stopped, and \$675.42 for extra work not covered by the contract. Only \$200 was claimed for extra work in the bill, but the complainants should have leave from the circuit court to amend their bill to accord with the undisputed evidence.

The amounts due the complainants, therefore, are as follows:

Due by final estimate.....	\$ 5,531 03
Clearing .....	170 00
Extra work.....	675 42
Overpayments to subcontractors.....	12,114 72
	<hr/>
	\$18,491 17

These amounts should bear interest from the date of the final estimate. It is claimed by the respondent company that notices of attachments and assignments served upon them make it dangerous for them to pay this sum to complainants. They may be protected by bringing in all persons claiming an interest in the fund as parties to the action; and the decree to be entered below should provide that a payment of the sum due into the registry of the court, with interest until the day of payment, will satisfy the same. The de-

cree of the circuit court is modified in accordance with this opinion. The costs of appeal will be divided. The costs in the circuit court will be taxed to the railroad company.

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TRUMAN v. WEED et al.

(Circuit Court of Appeals, Third Circuit. May 14, 1895.)

No. 17.

**MORTGAGES—RECORDING—PENNSYLVANIA STATUTE OF 1715.**

One W., in 1878, mortgaged certain lands to T. In 1882 W. died, leaving a will, by which he gave all his property, including the mortgaged lands, to one M., in trust to carry on business, making the trust estate liable for the debts of such business. M. contracted debts to an amount largely in excess of the value of the trust estate, credit having been given on the faith of such estate. In 1893, after the trust estate had become insolvent, and after M. had been removed and a new trustee appointed, the mortgage to T. was recorded for the first time. *Held*, that such mortgage was within the mischief of the Pennsylvania statute of May 28, 1715 (section 8), requiring mortgages to be recorded within six months after execution, and was invalid.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action of scire facias on a mortgage by Emily M. Truman against Lucy T. Weed and others. The circuit court gave judgment for the defendants. Plaintiff brings error.

C. La Rue Munson (Addison Candor and Rodney A. Mercur, with him), for plaintiff in error.

Seth T. McCormick (Henry C. McCormick, with him), for defendants in error.

Before DALLAS, Circuit Judge, and GREEN and BUFFINGTON, District Judges.

DALLAS, Circuit Judge. This was an action of scire facias on a mortgage which was dated October 10, 1878, but was not recorded until August 5, 1893. The court below held that this mortgage, because of the delay in recording it, was invalid, and therefore, upon points reserved, entered judgment for the defendants. The material facts and circumstances of the case were well stated by the learned trial judge, as follows:

"Although the mortgage in suit was executed and delivered on October 10, 1878, it was not recorded until August 5, 1893. The mortgagor, Frederick R. Weed, died on April 1, 1882, leaving a will, by which he devised all his estate, real and personal, to Mills B. Weed in trust, with power to 'possess, hold, and manage the same, and conduct and carry on business, and trade, barter, buy, and sell in and for all things that pertain to the said estate and its business or its products, and make such investments and purchases of other property, real or personal, as he may deem best for the interests of the trust hereby created,' etc. Mills B. Weed accepted and entered upon the duties of this trust, and, in the execution thereof, conducted several kinds of business which his testator had carried on, until the month of March, 1891, when he suspended payment of his obligations. In thus carrying on business under the powers conferred by said will, the trustee contracted debts which at the time of his failure, in March, 1891, amounted to about \$250,000. The value of all the real and personal estate so devised and bequeathed to the trustee was then (March, 1891) of the value of about

the sum of \$150,000 only. The trustee was then personally insolvent. He was not then nor thereafter personally possessed of any property.

"The supreme court of Pennsylvania had occasion to consider the will of Frederick R. Weed, and to determine the relation of the trust creditors to the trust estate and the duty of the trustees to the trust creditors, in the cases of Woddrop v. Weed, 154 Pa. St. 307, 26 Atl. 375, and Young v. Weed, 154 Pa. St. 316, 26 Atl. 420. The court then said:

"While the wife and the others are named in the will as *cestuis que trustent*, there came into existence, by reason of the power of the trustee, the estate embarked in trade, and the credit given the trust estate in the business, a class of persons whom equity in cases of insolvency will protect by the preservation of the trust property from destruction or dissipation. This equity has its foundation in the estate which is embarked, and to which credit has been given.' 154 Pa. St. 312, 26 Atl. 375.

"The trust estate is primarily liable for the debts contracted upon the faith of it. As it is insolvent, and the trustee, as the master finds, is also insolvent, he became a trustee for its creditors.' 154 Pa. St. 313, 26 Atl. 375.

"The purpose of the trust was to conduct and carry on the business, and by the insolvency this purpose was at an end. Such being the case, the duty of the trustee was to file his account and terminate the trust by the distribution of its assets among the creditors *pro rata*.' 154 Pa. St. 313, 26 Atl. 375.

"Speaking of the attempt of Mills B. Weed as executor of the will of Frederick R. Weed to waive the five-years statutory limitation of the lien of a debt of the testator, the court said:

"In the present case the lien upon the property in question had expired by operation of law, and Mills B. Weed, as trustee, held it free from it, for the benefit of the trust estate. The estate being insolvent, and the rights of the creditors in consequence of it having intervened, he had no right as a trustee to waive the operation of the statute, and thus restore the lien. As the title to this property has vested in the trustee free from the lien of this debt, as the rights of creditors to it as part of the trust estate had intervened, a confession of judgment by him as executor could not re-establish this lien that had ceased to exist against it.' 154 Pa. St. 321, 26 Atl. 420.

"On April 22, 1893, the court of common pleas of Lycoming county removed Mills B. Weed from his said trust, and on April 29, 1893, appointed in his place J. C. Hill as trustee. The effect of the adjudication by the supreme court of Pennsylvania is that the land against which this *scire facias* is directed, as part of the trust estate devised to Mills B. Weed, is bound for the debts created by the trustee in carrying out the provisions of the will of Frederick R. Weed; and, by the action of the court of common pleas, J. C. Hill became invested with the legal title to the land for the purpose of the sale thereof and the distribution of the proceeds among the trust creditors *pro rata*. Now, it was not until August 5, 1893, after Hill's appointment as trustee, when the land was in *gremio legis*, that the Truman mortgage, which had laid dormant for nearly 15 years, was put on record. There is no evidence of prior knowledge of it by Mills B. Weed, or by any of the trust creditors. Presumably, both the trustee and trust creditors acted in ignorance of its existence."

The provisions of the Pennsylvania recording acts which have been discussed by counsel are as follows:

Act May 28, 1715 (1 Smith's Laws, 95; 1 Brightly's Purd. Dig., 11th Ed., p. 587, pl. 119):

"Sec. 8. No deed or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved, and recorded within six months after the date thereof, where such lands lie, as hereinbefore directed for other deeds."

Act March 18, 1775 (1 Smith's Laws, 422; 1 Brightly's Purd. Dig., 11th Ed., p. 583, pl. 94):

"Section 1. All deeds and conveyances which, from after the publication hereof, shall be made and executed within this province, of or concerning any lands, tenements or hereditaments in this province, or whereby the same may be any way affected in law or equity, shall be acknowledged by one of the grantors or bargainors, or proved by one or more of the subscribing witnesses to such deed, before one of the judges of the supreme court, or before one of the justices of the court of common pleas of the county where the lands conveyed lie, and shall be recorded in the office for recording of deeds in the county where such lands or hereditaments are lying and being, within six months after the execution of such deeds and conveyances; and every such deed and conveyance that shall, at any time after the publication hereof, be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim."

Act March 28, 1820 (7 Smith's Laws, 303; Brightly's Purd. Dig., 11th Ed., p. 588, pl. 122):

"Section 1. All mortgages, or defeasible deeds in the nature of mortgages, made or to be made or executed for any lands, tenements or hereditaments within this commonwealth, shall have priority according to the date of recording the same, without regard to the time of making or executing such deeds; and it shall be the duty of the recorder to endorse the time upon the mortgages or defeasible deeds when left for record, and to number the same according to the time when they are left for record, and if two or more left upon the same day, they shall have priority according to the time they are left at the office for record; and no mortgage or defeasible deed in the nature of a mortgage, shall be a lien, until such mortgage or defeasible deed shall have been recorded, or left for record as aforesaid: Provided, that no mortgage given for the purchase-money of the land so mortgaged, shall be affected by the passage of this act, if the same be recorded within sixty days from the execution thereof."

The act of 1715, in its eighth section, relates only to mortgages or defeasible deeds, and, as to them only, makes recording a condition of title. The act of 1775, for the first time, required that absolute deeds should be recorded (*Powers v. McFerran*, 2 Serg. & R. 47; *Keller v. Nutz*, 5 Serg. & R. 252; *Kingston v. Lesley*, 10 Serg. & R. 389), and made their validity, as against subsequent conveyances or mortgages, dependent upon priority of record. The purposes of the two acts were different. In *Burke v. Allen*, 3 Yeates, 355, they were contrasted, and the court said:

"There is no appearance in any part of the act [of 1775] of any intention of the legislature to make any alteration of the former act [of 1715] as to the invalidity of mortgages not recorded within the six months."

In *Souder v. Morrow*, 33 Pa. St. 84, it was, however, subsequently held that a mortgage, although not recorded until after the expiration of six months from its date, is good, as against an absolute deed of later date, if the mortgage be first of record. This decision, it is claimed, conflicts with the others to which we have referred. But it seems to have been made without consulting them. They were not mentioned either by counsel or by the court, and the act of 1715 was either overlooked or was regarded as inapplicable. The judgment was based solely upon the act of 1775, which, it was said, supplied "the very law" of the case. The only question which appears to

have been considered was whether the benefit of that act, notwithstanding its restrictive designation of subsequent conveyances or mortgages, could be extended to a prior mortgage, and it was held that it could be; but, as has been already said, the point that the particular mortgage there involved was void under the act of 1715 was not taken, nor had it arisen or been discussed in any of the cases which counsel there cited, and which were said by the court to "cover the whole case." Under these circumstances, we must decline to regard *Souder v. Morrow* as overruling *Burke v. Allen*, or as authority for the proposition (which in that case was distinctly negatived, and in *Souder v. Morrow* was neither expressly affirmed nor advisedly accepted) that the eighth section of the act of 1715 was abrogated by the act of 1775. It is the uniform course of the state decisions by which in such matters this court should be guided, and not by one of them, though the latest, in which the judges, without at all considering the same question, but with reference solely to a distinct and different one, were led to a conclusion which occasioned an anomalous result. *Townsend v. Todd*, 91 U. S. 453. In *Fries v. Null*, too, when first argued (154 Pa. St. 573, 26 Atl. 554), none of the cases which had dealt with the act of 1775 in connection with the act of 1715 were referred to; but, again, the last-mentioned act was left entirely out of view. As in *Souder v. Morrow*, the parties litigant were "purchasers or mortgagees," contending for priority; and, as to them, it was held that, under the act of 1775, a mortgage recorded after six months was entitled to preference over a deed recorded subsequently, though within six months; but whether any estate would pass by a mortgage not recorded as required by the act of 1715 was not considered. It was said, with regard to the act of 1775, "that it is the first recording that gives the preference"; but that, by the act of 1715, the recording of a mortgage within six months is requisite to make it "good and sufficient \* \* \* to pass any estate," was not adverted to. *Souder v. Morrow* was followed, but that case, as we have seen, was equally silent upon the particular subject with which we are now concerned, and to that subject the other cases which were mentioned by the court have no relevancy. They were not cases of mortgages or defeasible deeds. Manifestly, in *Fries v. Null* (when first decided), as well as in *Souder v. Morrow*, the act of 1715 was not in contemplation. But *Fries v. Null* was reargued (158 Pa. St. 16, 27 Atl. 867), and, attention being then directed to the decision in *Burke v. Allen*, the court said, not that it was incorrect, but that it was not applicable. If, however, *Burke v. Allen* had been disapproved in *Fries v. Null*, the latter case would not be controlling in the present one. The rights of these parties had accrued at a time when *Burke v. Allen* was authoritative, and therefore its rejection thereafter by the state court would not have prevented its application by this tribunal to the controversy which it is now called upon to decide. *Burgess v. Seligman*, 107 U. S. 33, 2 Sup. Ct. 10; *Bucher v. Railroad Co.*, 125 U. S. 584, 8 Sup. Ct. 974.

The act of 1820 made no change in the act of 1715. In *Fries v. Null*, 158 Pa. St. 16, 27 Atl. 867, it was said:

"Nor is the act of 1820 at all applicable to these parties or to their controversy. Of course, as between opposing mortgages, there is no lien except from the date of record."

This remark was made with especial reference to the act of 1775, but it is no less cogent when related to the act of 1715. It quite as effectually disposes of the act of 1820 in the present case as in that in which it was made.

The earnest and able argument of counsel for the plaintiff in error upon the effect of the cases we have discussed has induced their careful examination, but the view we have taken of them is, we are convinced, the only reasonable one; and in this we are confirmed by the fact that in other Pennsylvania decisions (about to be referred to) it has been assumed that the eighth section of the act of 1715 was not affected by the subsequent legislation, but that the only question was as to its applicability to particular cases. Nothing could be plainer than the meaning of the section of the act of 1715 upon which, as we have now shown, this cause must be determined. It could not be made more clear by the substitution of any other language for that in which it is couched. As it concerns the present case, it is: No mortgage shall pass any estate unless recorded within six months after the date thereof. To apply this provision to the mortgage in suit is to extinguish that mortgage. But it is contended that it should not be applied in this case, and, to maintain that contention, counsel have cited several adjudications of the supreme court of Pennsylvania, which we have attentively read, but need not refer to in detail. It appears from them that, under the familiar rule that statutes are to be so construed as to suppress the mischief and advance the remedy, it has been held that, where no one is injuriously affected by failure to record, the mischief intended to be remedied is not present; and that, therefore, regard being had to the spirit of the enactment, the omission to comply with its requirement is, in such cases, not fatal. "The mortgagor is not hurt, neither is a subsequent purchaser or mortgagee with notice, nor a judgment creditor who gave credit with the unrecorded mortgage before his eyes; and, were they enabled to destroy the rights of the mortgagee, their doing so would be a fraud upon him." It has been only where "no one was hurt" that the courts have "felt at liberty to construe the statute according to its spirit and design, rather than its letter." Appeal of Britton, 45 Pa. St. 172. And though, in such cases only, "the letter of the law gives way to promote the equity of the spirit, still an unrecorded mortgage is a forbidden thing." Appeal of Nice, 54 Pa. St. 200.

We have, we think, correctly indicated the reasoning and effect of all the Pennsylvania authorities upon this subject; but, if there was any conflict among them, this court would be at liberty to adopt, and would not hesitate to apply to the facts disclosed by this record, the observations made by Lord Ellenborough in *King v. Inhabitants of Leek Wootton*, 16 East, 118, that, "where there are conflicting decisions upon the construction of a statute, the court must refer to that which is and ought to be the source of all such decisions; that is, the words of the statute itself." The Pennsyl-

vania decisions, however, do not, according to our understanding of them, lend any support to the position of the plaintiff in error. The defendants in error would be grievously "hurt" if the letter of the law were to be set aside in this case, and an unrecorded mortgage—"a forbidden thing"—were suffered to prevail against them. It clearly appears from the statement which we have extracted from the opinion of the court below that neither the trust creditors nor Mills B. Weed were mere volunteers. By the former, credit was given to the trust estate, in good faith, and without notice of the unrecorded mortgage; and, by the latter, services were rendered and pecuniary responsibility assumed, without knowledge of its existence. To permit it to deprive them of the whole or any part of the property upon which the state of the record justly entitled them to rely, would not be to equitably construe the statute, but to deny its protection to innocent and meritorious parties, and this at the instance of the representative of a mortgagee, whose demand to be relieved from the consequences of the failure to comply with the terms of the act is not supported by any consideration of justice or equity.

There is no force in the objection which was interposed in the court below, that the defense set up is an equitable one. It clearly is not. The point does not call for discussion here. It was correctly decided by the court below, and what the learned judge of that court said upon the subject in the opinion which he filed, is entirely satisfactory and amply sufficient. The judgment is affirmed.

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#### OREGON & C. R. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1895.)

No. 147.

#### STATUTES—INTERPRETATION—RAILROAD LAND GRANTS.

Congress, in 1870, passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from P. to A. and M., in the state of Oregon." The first section granted certain lands, adjacent to the line, and within 20 miles from it, "for the purpose of aiding in the construction of a railroad and telegraph line from P. to A., and from a suitable point of junction, near F., to the Y. river, near M." F. lay nearly due west from P., and in the general direction of a road from P. to A. M. lay nearly due south from F., and entirely out of the line from P. to A. The road was built from P. to F., and thence nearly at a right angle from F. to M. No other part of the road having been built within the time fixed by the granting act, congress passed an act forfeiting the granted lands adjacent to the incompleated part of the road. The secretary of the interior, in designating the lands to which the forfeiture applied, treated the lines of track from P. to F. and from M. to F. as separate roads, and the adjacent lands as bounded by lines drawn north and west at right angles to the tracks at F., excluding a quadrant adjacent to the corner at F. *Held*, that the act of congress contemplated only a single road, of which the line from F. to M. was a part, and hence that the lands adjacent to the corner at F., where the road turned, were not forfeited.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit by the United States against the Oregon Central Railroad Company and the Oregon & California Railroad Company to enjoin them from asserting title to certain lands claimed to have been forfeited. The circuit court rendered a decree for the complainant. 57 Fed. 426. Defendants appeal.

This is an action brought by the United States against the railroad companies to enjoin them, and all persons claiming under them, from asserting title to the lands described in the complaint, which were granted by the government to the Oregon Central Railroad Company, and assigned by the latter to the Oregon & California Railroad Company, and claimed by the United States to have been forfeited. The defendant companies answered the bill, and filed a cross bill to quiet their title to the lands. The granting act was approved May 4, 1870, and is as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right-of-way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, sidetracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the secretary of the interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

"Sec. 2. And be it further enacted, that the commissioner of the general land office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the secretary of the interior maps of the survey and location of twenty or more miles of said road, the said secretary shall cause the said granted lands adjacent to and coterminous with such located sections or road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands; and provided also, that settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

"Sec. 3. And be it further enacted, that whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the secretary of the interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections.

"Sec. 4. And be it further enacted, that the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, sidetracks, woodyards, standing ground, and other needful uses in operating the road, shall be sold by the company only



to actual settlers, in quantitles not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

"Sec. 5. And be it further enacted, that the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, sidetracks, and woodyards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semiannually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said funds shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the district court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

"Sec. 6. And be it further enacted, that the said company shall file with the secretary of the interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

The act of forfeiture was approved January 31, 1885, and is as follows:

"An act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon.

"Section 1. That so much of the lands granted by an act of congress entitled 'An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon,' approved May fourth, eighteen hundred and seventy, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain and made subject to disposal under the general land laws of the United States as though said grant had never been made.

"Sec. 2. \* \* \*

The facts are stipulated by the parties, and it appears, to quote from the opinion of the circuit court, that "the line of the railroad from Portland to the point of junction near Forest Grove runs directly west, and the road from such point of junction runs nearly south to the Yamkill river. In July, 1871, the Oregon Central Railroad Company filed in the office of the secretary of the interior a map showing the location of the line of the road from Portland to a point on the Yamkill river, near McMinnville, and also from a junction near Forest Grove towards Astoria, to a point one mile north of the summit of the range of hills dividing the Tualatin from the Nehalem Valley, a distance of 20 miles. The map of definite location from Astoria to said point was filed June 23, 1876. On February 16, 1872, the secretary of the interior accepted the first 20 miles of completed road, commencing at Portland, and on June 23, 1876, he accepted 27½ miles, from the 20-mile post to the Yamkill river. On September 8, 1880, the Oregon Central Railroad Company sold and conveyed to the Oregon & California Railroad Company its said road, and all its title and right to the said land grant. On July 8, 1885, the commissioner of the general land office issued instructions to the local land officers, at the land office at Oregon City, for their guidance under the forfeiture act, with which was inclosed a diagram showing the limits of the forfeited lands, and of that part of the grant not affected by the forfeiture act. This diagram shows that the road runs from Portland west to Forest Grove, where it turns almost at a right angle, and runs

[illegible]

The circuit court gave judgment for the United States.

George H. Williams and John M. Gearin, for the United States.

McKENNA, Circuit Judge, after stating the facts, delivered the opinion of the court.

The grant is made in section 1, the other sections being but provisional and subsidiary. It is as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamkill river, near McMinnville, in the state of Oregon, there is hereby granted to the Oregon Central Railroad Company \* \* \* the right of way through the public lands, \* \* \* and each alternate section of the public lands, not mineral, \* \* \* to the amount of ten such alternate sections per mile, on each side thereof. \* \* \*"

By this section, plaintiff contends, two roads are described,—one beginning at Portland, and terminating at Astoria; the other beginning at Forest Grove, and terminating at McMinnville. The defendants contend that only one road is described, beginning at Portland, and having termini, respectively, at Astoria and McMinnville. The controversy, therefore, is clearly defined, and the parties have warmly and ably supported their respective sides. The importance of any decision is manifest, and we have given the case a commensurate care and attention.

For the contention of plaintiff, there is the authority of the late Justice Lamar when secretary of the interior, and the decision of the circuit court, and the most convenient, if not the clearest, consideration of the case, will be a comment on their reasoning, weighed with independent views of the statutes. The learned secretary held that the section should read:

"A railroad and telegraph line from Portland to Astoria, and a railroad and telegraph line \* \* \* from a suitable point of junction near Forest Grove to the Yamkill river, near McMinnville."

To attain this result, he disregarded the title of the act (which we shall refer to hereafter) and all its designations, and concentrated attention solely to the words "point of junction," which he declared "were invariably used in railroad language to indicate a point where two or more railroads join, and not to designate points between termini of a single road." This, certainly, is very abstract, and forces the inquiry, is it permissible? If the definition be granted (and the learned secretary may not have precisely distinguished between the word "junction" and the phrase "point of junction"), a presumption of its use is not irresistible against every evidence, and it is a well-settled canon of construction that all the words of a statute must, if practicable, be given effect. The object of the congressional grant was railroad communication between certain points. If chiefly from Portland to McMinnville and Astoria, a line between these points, even via Forest Grove, must either be circuitous, or deflect from Forest Grove and return to it, for McMinnville and Astoria are not in the same direction from Portland. If circuitous, there would be no confusion about its singleness, however near its different parts might approach, and their union in a single track from Forest Grove to McMinnville was certainly competent for congress to permit or provide and regard it and the part between Portland and Astoria as one road. Between such parts there must be a point of junction; indeed, more strictly so than between independent roads; and, if the language of the act is sufficient to express either, the most that can be said is that it is ambiguous,

and an attempt must be made to resolve the ambiguity by a resort to other parts of the act. Examining them, we find that the title of the act describes but one road, with its initial point at Portland. It is "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon." The description in section 1, if we transpose some of its words, is almost as definite. Making such change, it would read as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria and to the Yamhill river, near McMinnville, \* \* \* from a suitable point of junction near Forest Grove."

That the title describes but one road seems to be conceded, but it is objected that the title is no part of an act. This is true in a certain sense, but it is firmly established that the title may be resorted to as an aid to interpretation. And sensibly so. Its purpose is descriptive, and, if it receives less consideration than the body of the act, it receives enough to be some index of intention. "When the mind labors," said Chief Justice Marshall, "to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration." *U. S. v. Fisher*, 2 Cranch, 386. This language is repeated and the same rule announced in a number of cases. See 23 Am. & Eng. Enc. Law, 328, where they are collected.

The title, therefore, cannot be disregarded. Giving it the attention which the rule announced by the learned chief justice requires to be given to it, and interpreting it as describing one road, is it consistent with the body of the act, and the body of the act with it? We think so. The designations are "road," "railroad," and "line"; not once "roads," "railroads," and "lines." As we have already said, the grant is made in section 1, and, after the description of the road to be aided, the section proceeds as follows:

"There is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road \* \* \* the right of way through the public lands of the width of 100 feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road and also the necessary lands for depots," etc., "in operating the said road, \* \* \* and, also, each alternate section \* \* \* not mineral \* \* \* designated by odd numbers nearest to said road. \* \* \* And in case the quantity of ten full sections per mile cannot be found on each side of said road, \* \* \* other lands \* \* \* shall be selected \* \* \* on either side of any part of said road nearest to and not more than 25 miles from the track of said road to make up such deficiency."

The references and designations in all of the other sections are also to and of one road. It is unnecessary to quote them, as they have already been given at length.

To meet the language of the statute, stress is put by counsel, and was by the circuit court, on the rule of the interchangeability of the singular and plural numbers. The court said this rule "has frequent application in the case of railroads," and further said:

"It is common to speak of a system embracing many roads as though there was but a single road, probably because of the habit of using the word 'railroad' to designate the company."

An objection to this is, If there was any such habit, there was nothing to cause its indulgence. The road and the company had to be and were accurately distinguished. Any indulgence of the habit would have produced utter confusion, and it cannot be supposed, therefore, that it influenced the minds or the language of the authors of the statute. If we may suppose congress contemplated two roads as a system, we would also have, under the provisions of the act, to suppose a grant to every mile of it; and, extending the supposition to the forfeiting act, land opposite every completed mile would be exempt from forfeiture.

It is further urged, quoting Justice Lamar's decision as secretary of the interior, "that it is well settled in legal parlance that the singular includes the plural and the plural the singular." The proposition is stated too universally. Neither can overrule the context. They are interchangeable when intention would otherwise be defeated.

The supreme court of Indiana, in *Carrigus v. Board*, 39 Ind. 66, construing the Code of the state, which provided that "words importing the singular number only may be applied to the plural of persons and things," said that:

"This construction is only to be given to the words of a statute or instrument when the plain and evident sense and meaning of the words to be derived from the context renders such construction necessary to give effect to the purpose of the makers of the statute or instrument."

Singleness and plurality are not the same. One railroad is not the same as two railroads, and there is certainly some presumption in favor of one being meant when one is expressed.

The court of appeals in New York, in *Newell v. People*, 7 N. Y. 97, says:

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or take away from that meaning."

To summarize, therefore, we find that the title of the act describes one road. A fair and unforced construction of section 1 describes one road, and all the language, references, and provisions of the act describe one road. This concurrence makes a strength of proof which, by any rule of construction we are acquainted with, cannot be resisted. If addition be needed, it is given by the act of forfeiture. Its title is "An act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon,"—a railroad in Oregon, not railroads; and it is described in section 1 to be a "railroad \* \* \* from Portland to Astoria and McMinnville." In other words, the road is described by the title of the

granting act. This clearly shows that congress understood the granting act to describe one road, and make it the test and meaning of the forfeiture. And this was natural under the conditions existing at the time of its passage.

It is provided by section 2 of the granting act that:

"Whenever and as often as the said company shall file with the secretary of the interior maps of the survey and location of twenty or more miles of said road, the said secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands."

In pursuance of this provision, the secretary of the interior, after a report by commissioners, accepted the road in sections—First, of 20 miles, to a place called "Hillsboro"; and, second, of 27 miles from thence to McMinnville. This was only competent upon the supposition that there was but one road, and it is not conceivable that congress overlooked the fact or the significance of the secretary's action.

It is asserted that the section to Astoria was the chief inducement to the grant, and a sense of the injustice is expressed of permitting the railroad company to claim that which was given as consideration for building the whole road for building a section of it. The former proposition is disputed, and the record affords us no evidence to resolve the dispute, nor is it necessary. Whatever the inducement to the grant, and whatever comment the conduct of the railroad company may bear, its rights must be measured by the terms of the act of congress. There was no preference expressed by it, and the order of construction of the parts of the road was unreservedly committed to the company.

It is further urged, however, that there is necessarily a doubt as to the meaning of the acts of congress, arising from their language and the decision of Secretary Lamar, and that such doubt must be resolved in favor of the government; and in support of this the language of Mr. Justice Field in *Slidell v. Grandjean*, 111 U. S. 437, 4 Sup. Ct. 475, is quoted, as follows:

"Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the government, rather than that of the individual. Nothing can be inferred against the state."

We think counsel makes too broad an application of the language of the learned justice. The rule it expresses is directed against putting into a statute, by presumption or inference, that which its language does not express, or where, after interpretation has been exercised, the language will bear equally two meanings. It does not mean, because a controversy can be started, there must be judicial doubt. If so, the rule would be as simple as summary, and we may well wonder at the long line of cases in which public grants have demanded and received construction by the supreme court, and the grants sustained against not only ingenious, but strong and plausible, contentions to the contrary. We have an illustration in a decision cited by both sides. Land grants came up for consideration in *U. S. v. Union Pac. Ry. Co.*, 148 U. S. 562, 13 Sup. Ct. 724, v.67F.no.6—42

and the difference in the constructions contended for involved 200,000 acres of land. The terms of the acts were ambiguous in the sense that there was controversy about them by able minds, including that of a secretary of the interior. The decision of the supreme court was, nevertheless, against the United States. We do not consider it necessary to dwell on this point further, as we deem the granting and forfeiting acts reasonably plain.

The action and opinion of the secretary of the interior in opening the disputed lands to settlement are urged upon us as a contemporaneous construction of the acts of congress. It could not be of both acts. It could only be of the forfeiting act. If there was contemporaneous construction of the granting act, it was by a former secretary of the interior when he approved the location by the company of the part of the road from Portland to McMinnville, and accepted the sections from Portland to Hillsboro, and from the latter to McMinnville. This construction was against the present contention of the United States, and the subsequent, not contemporaneous, construction of his successor, of many years' interval. A period of 15 years elapsed between the granting act and the forfeiting act. Whatever strength, therefore, there is in the rule, supports our interpretation of the former; and if it could be contended that the forfeiting act, notwithstanding, revokes the grant to the disputed lands, questions would arise which have not been submitted for our judgment, and we have no desire to volunteer in their consideration.

The appellee further contends that the government had a right to revoke the grant, because the Oregon Central Railroad Company was incorporated in 1868; and at such time, under the laws of Oregon, a corporation had power only, to quote from the statute, "To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation," and that the object of its incorporation was defined in its articles as follows:

"The object and business of the corporation shall be to construct and operate a railroad from the city of Portland through the Willamette Valley to the south boundary of the state, under the laws of Oregon and the laws of congress recently passed, granting lands in aid for such purposes."

The answer to this contention is that the company did have the power to construct a road from Portland to McMinnville, and to accept a grant in aid of it; and that, besides, it is a question for the state of Oregon, and not the United States.

In *Bank v. Matthews*, 98 U. S. 628, Justice Swayne, speaking for the court, said:

"Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose."

In support of this the learned justice cited a number of cases. See, also, *Cowell v. Springs Co.*, 100 U. S. 55.

Judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

## OVERMAN WHEEL CO. v. GRIFFIN.

(Circuit Court of Appeals, First Circuit. May 7, 1895.)

No. 122.

## 1. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE PREMISES—ADMISSIBILITY OF EVIDENCE.

A night watchman was found dead under an unrallied bridge connecting two buildings, which he customarily crossed in the performance of his duties. *Held*, in an action to recover damages for his death, evidence was admissible which tended to show what kind of man he was in respect to health, vigor, activity, and sobriety, and his bodily and mental peculiarities.

## 2. SAME—INSTRUCTIONS—DUE CARE AND DILIGENCE.

Defendant requested an instruction that unless deceased was as careful and diligent to avoid danger as men of ordinary care and prudence would have been, "under the same or similar circumstances," he failed to exercise the care and diligence which the law required. The instruction given by the court was that plaintiff must show that the deceased was in the exercise of ordinary care and diligence, and that ordinary care was the care "which reasonable men exercise under ordinary circumstances." *Held*, that the requested instruction was correct, and should have been given either in terms or in substance, and that the instruction given was erroneous, in that it substituted "ordinary circumstances" for "similar circumstances."

## 3. TRIAL—INSTRUCTIONS—DUTY OF COUNSEL.

Where counsel proposed a definite and proper instruction, but found that the court gave something very different, *held*, that he might well have understood that the change was no mere inadvertency of expression on the part of the court, and that he was therefore not required to call its attention to the matter at the time, as otherwise, under the rule of the court, would have been his duty.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Mary Griffin against the Overman Wheel Company, to recover damages for the death of her husband, John Griffin, which occurred while he was in the employ of defendant. Upon the first trial the court directed a verdict for defendant at the close of plaintiff's testimony, and entered judgment accordingly. Upon a writ of error sued out by plaintiff to this court, the judgment was reversed. 9 C. C. A. 542, 61 Fed. 568. Upon a second trial, plaintiff recovered a verdict and judgment, and defendant has now sued out a writ of error.

The action was founded upon the Massachusetts statute known as the "Employers' Liability Act" (Act 1887, c. 270). The facts were as follows:

John Griffin was a night watchman at the defendant's factory in Chicopee Falls, having entered its employ in February, 1891. It was his duty as such to make rounds of a certain number of the defendant's buildings once every hour during the night, and to press several buttons, which were connected by electrical appliances with a watchman's clock or dial in the defendant's office, upon which a mark was registered every time a button was pressed. Griffin had seventeen of these buttons to press, numbered consecutively from 31 to 47, inclusive. The principal building through which Griffin passed in the performance of his duties was known as "Mill No. 2." Another building, known as the "Rubber Mill," had been erected during Griffin's term of service and a short time before his death. It was connected with mill No.



2 by a bridge  $4\frac{1}{2}$  feet wide, about 15 feet long, and about the same distance from the ground. Only the stringers and floor of the bridge were completed. The railing was in process of construction, but had not been erected. It was in dispute as to how much, and by whom, the bridge was used, but the evidence conclusively showed that the bridge was not used for the purpose for which it was designed until after Griffin's death. Before the rubber mill was occupied for the purpose for which it was built, three buttons were placed in different parts of the building, and connected by wires with the watchman's clock in the office, and, about four weeks before his death, Griffin began to cross the bridge, and push the button in the upper story of the rubber mill, and then recross the bridge and finish his trip. There was evidence that the order in which the watchman pressed the buttons was in accordance with the plan of the electrician who put up the buttons, and that the route adopted by the watchman was the most direct way to reach the buttons in the order established by the electrician, but the only order of the superintendent to the electrician was to put "three buttons in the rubber mill, two in the first story and one in the second," and there was no evidence of instructions or authority for him to change the buttons in mill No. 2. No officer of the Overman Wheel Company, nor any persons whose principal duty was superintendence, knew the watchman was using the bridge. On the night of the accident he was seen to start on his round at 1:30 a. m., pushing button No. 31 in the engine room. He was not seen again until he was found about two hours afterwards lying on his back on the ground, dead, between the rubber mill and mill No. 2, east of the bridge, with his head towards mill No. 2, and his feet toward the rubber mill, and his lantern, which was crushed so that the oil ran out of it, by his side. There was a cut about two inches long on the back of his head, in which there was sand and gravel, and his skull was fractured. The watchman's clock or dial in the office showed that on the 1:30 o'clock trip buttons Nos. 31, 32, 33, 34, and 35 had been pushed, and button No. 36 had not. The bridge in question sloped somewhat from mill No. 2 to the rubber mill. It was in evidence that the night on which Griffin met his death was cold, dark, cloudy, and frosty. There were no railings or guards on either side of the bridge. About a week before the night of Griffin's death a small engine had been placed in the machine room on the ground floor of mill No. 2, from which there was an exhaust pipe which came out of the ground floor of the mill through the window of the basement, about 16 inches from the ground, and about 18 inches west of the bridge, and extended about 18 inches beyond the window. On the night in question the wind was blowing from the northwest, and it was in evidence that the steam from this exhaust pipe would envelop the bridge at least to some extent.

The first assignment of error related to the admission of the testimony of one Henry Dubuque as to the habit and customary way of John Griffin in regard to doing his work, and what kind of man he was. The testimony objected to was as follows:

"Q. Now, Mr. Dubuque, in what way did Mr. Griffin do his work? A. He was a man— (Objected to.) The Court: What do you mean by that? Mr. Carroll (counsel for plaintiff): I mean his habit and customary way of doing his work, and I propose to follow that up, if he answers that, by inquiring what kind of a man he was. The Court: He may answer that. Do you object? Mr. White (counsel for defendant): Yes, sir. Q. What was Mr. Griffin's customary way and manner of doing his work? A. He was right up to the handle. Q. He was right up to the handle? A. Yes, sir. Q. What do you mean by that? A. He was a man that was very prompt about doing his work, and right up on time. Q. What kind of a looking man was he,—that is, what size? A. I should judge six feet high. Q. And as to his agility and quickness? A. Yes, sir; he was a very quick man,—very quick motion. Q. All the time that you knew him did you know him to start exactly upon time? A. What, sir? Q. All the time that you knew him to work there as a watchman in that mill, did you know him to start on the exact time, at the same time, on the half hour? A. Yes, sir. Q.

Never knew him to fall? A. Always start on the half hour, and always start the same time, as far as I know. Q. And, as far as you know, did he get back at the same time? A. Yes, sir. Q. And during the rest of the hour where did he stay? A. In the engine room, right there where he drives the first pin; there is where the clock was. Q. What was his appearance and conduct on this particular night,—the night of the 5th of January? A. I don't understand exactly what you mean? Q. How did he look, how did he act, on the night of the 5th of January? A. The same way as ever. Q. What about his sobriety? A. Just the same; I didn't find any difference to him that night than any other night. Q. Was he a perfectly sober man? A. Yes, sir."

The plaintiff's counsel claimed in his argument to the jury to have proved by the foregoing testimony that Griffin was habitually careful in doing his work, and that, therefore, they should find that he was in the exercise of due care at the time of his death.

Luther White, for plaintiff in error.

James E. Cotter (James B. Carroll, on the brief), for defendant in error.

Before PUTNAM Circuit Judge. and NELSON and WEBB, District Judges.

WEBB, District Judge. At the conclusion of all the evidence, the defendant in the court below moved that the jury should be instructed to return a verdict in his favor. To the denial of this motion he excepted, and the exceptions were allowed. This brings before us all the evidence at the trial. Upon careful consideration of it, this court does not consider that the instruction asked would have been proper, or that its denial was erroneous. The testimony of the witness Dubuque, admitted under objection, and excepted to, was competent for the purpose of showing to the jury what kind of a man the deceased was, in respect to health, vigor, and activity, and his bodily and mental peculiarities. It was also admissible to show his condition as to sobriety and apparent health and vigor immediately before his death. If, in the course of argument, the plaintiff's counsel made unwarrantable use of that evidence, the defendant should have at once called the attention of the court to the objectionable argument, and requested its prohibition.

Sundry requests for instructions on points of law were presented to the presiding judge at the trial, as to which, in the refusals to give the instructions asked for, and, with one exception to be noticed hereafter, in the instructions given, no error is perceived. Among those requests was one that the jury should be instructed that Griffin "was in law bound to exercise the due care and diligence of a prudent and careful man, and, unless he was as careful and diligent to avoid danger as men of ordinary prudence and care would have been under the same or similar circumstances, he failed to exercise the care and diligence that the law required of him, and the plaintiff cannot recover." Upon this part of the case the jury were instructed: "The plaintiff must show that the deceased was in the exercise of ordinary care and diligence at the time of the accident. Now, it has been said, with respect to what constitutes ordinary care, that ordinary care is the care which reasonable men

exercise under ordinary circumstances." The requested instruction should have been given, in terms or in substance. The conduct of prudent men, under similar circumstances, was the rule of standard of prudence required. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 656, 6 Sup. Ct. 590. The instruction given substituted ordinary circumstances for similar circumstances, and was erroneous. "Ordinary circumstances" would not convey to the minds of the jurors the necessity of comparing the conduct of the deceased, under the circumstances shown by the evidence, with what would be the conduct of prudent men under the same or similar conditions. We attach no importance to the expression "reasonable men" instead of "prudent men." Having expressly requested definite and proper instruction, and finding something very different given, the defendant's counsel might well understand that the change was no mere inadvertency of expression on the part of the court, and was therefore not required to call the attention of the court to the point at the time, and ask a correction, as otherwise, under the rule of the court, would have been his duty. Judgment is reversed. The verdict is set aside, and a new trial ordered.

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PITTSBURGH, C. C. & ST. L. RY. CO. v. RUSS.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1895.)

No. 237.

1. RAILROADS—EXPULSION OF PASSENGER—MEASURE OF DAMAGES.

The extent of the injury of a passenger who has been wrongfully expelled from a railroad train, and the amount of damages recoverable, do not depend at all upon the intentions or good faith of the conductor in executing a rule of the company, but only upon what was done and the consequent injury.

2. SAME—CONSEQUENCES OF RESISTANCE.

A passenger who is wrongfully expelled from a railroad train is entitled to compensation for any increased injury which results from such forcible resistance to expulsion as he is entitled to make to denote that he is being removed against his will. Per Woods and Jenkins, Circuit Judges.

3. SAME—DEGREE OF RESISTANCE.

The public interest against a breach of the peace is no more a limitation on the rights of the injured plaintiff, in trespass against a railroad company, than against any other wrongdoer. The passenger may make sufficient resistance to repel an unlawful assault by the company, and the latter will be liable for all hurt inflicted on such passenger in overcoming or attempting to overcome his resistance. *Railroad Co. v. Winter's Adm'r*, 12 Sup. Ct. 356, 143 U. S. 73, distinguished. Per Showalter, Circuit Judge.

In Error to the Circuit Court of the United States for the District of Indiana.

This was an action by Charles A. Russ against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company for personal injuries. Upon the first trial in the circuit court the plaintiff recovered a judgment for \$1,000, which was reversed by this court. 6 C. C. A. 597, 57 Fed. 822. Upon a second trial the plaintiff recovered a judgment for \$2,500. Defendant brings error. Affirmed.

The plaintiff was a passenger on one of defendant's trains from Louisville, Ky., bound to Indianapolis. He tendered to the conductor a mileage ticket, which, by the conditions annexed to it, was not transferable, and required the passenger presenting it to sign his name upon the ticket, in the presence of the conductor, in order to identify himself. The company had issued instructions to its conductors requiring them to enforce these conditions strictly, without fear or favor. The conductor required the plaintiff to sign his ticket, which he did; but the conductor, in the erroneous belief that the plaintiff was not really the owner of the ticket, took it up, and required the plaintiff to pay fare. Upon his refusal to do so, he was forcibly put off the train at Jeffersonville, Ind. The plaintiff claimed that the force used in overcoming his resistance to expulsion brought on a nervous disorder, from which he had previously been suffering.

Samuel O. Pickens, for plaintiff in error.

Albert J. Beveridge, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This action was for the wrongful removal of the appellee from a passenger train of the appellant. The case is here the second time, and for a fuller statement of it reference is made to the opinion reported in 6 C. C. A. 597, 57 Fed. 822, 18 U. S. App. 279. The first recovery, which was for \$1,000, was reversed because the jury was instructed that punitive damages might be allowed if the injury was wanton. The judgment against which relief is now sought is for \$2,500, and the errors assigned again relate to instructions given and refused, but it is stated in the brief of appellant that the only error relied upon is the refusal of the court to give the instructions asked. There are two of them. The first is to the effect that railroad companies have the right to issue nontransferable mileage tickets with reasonable conditions attached, like those attached to the ticket sold by the appellant to the appellee, and in regard thereto to issue reasonable instructions to conductors, like those shown to have been issued by the appellant to its conductors. All evidence in respect to the ticket and its conditions, and in respect to the rules and regulations of the company on the subject, was introduced on behalf of the appellant, and the argument in support of the proposed instruction is that:

"If the conditions attached to the ticket, and the instructions of the company under which the conductor was acting, were reasonable, and such as the company might lawfully make and enforce, and the conductor was acting thereunder in good faith, with no purpose to oppress or wrong the passenger, the defendant in error was not entitled to damages for any increased humiliation and shame and consequent mental suffering resulting from the determined action of the conductor in obedience to said conditions and instructions."

The proposition is too remote and intangible to be availing. There is nothing in the conditions of the ticket, or in the regulations of the company in respect to tickets of that class, which a fair-minded juror, though unaided by an instruction, could have regarded as unreasonable, or as affecting the amount of damages, which were to be awarded, as the charge of the court required, on the basis of compensation for the injury actually suffered by the appellee, including the humiliation and consequent mental suffering caused by the action of the conductor. The extent of that injury—punitive

damages being excluded—in no manner depended upon the intentions or good faith of the conductor. It was material to consider only what was done by the conductor, and the consequent injury to the appellee.

By the second request the court was asked to charge that if the plaintiff resisted the conductor's efforts to eject him, so as to require the use of force, and such resistance aggravated or increased the nervous trouble under which the plaintiff claimed to have been suffering, the resistance and resultant increase of suffering should be considered in mitigation of damages. Our views upon the question of the right of a passenger upon a railroad train to resist wrongful expulsion are indicated by our former opinion in this case. The rule declared by the supreme court in *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 73, 12 Sup. Ct. 356, is that one rightfully on a train as a passenger has the right to refuse to be ejected, and to make a sufficient resistance to denote that he is being removed against his will. There was, therefore, no error in refusing the instruction in question. If it had been limited to injury caused by a voluntary or intended excess of resistance over what was necessary to show the unwillingness of the appellee to be expelled from the train, it ought perhaps to have been given; but, to the extent of rightful resistance, if increased injury resulted, the right to increased compensation necessarily followed.

SHOWALTER, Circuit Judge (concurring). If the passenger be ordered to leave the train, his getting off is *prima facie* caused by the order. He need not resist "to denote" that his leaving is "against his will." If, however, the company have no right to eject him, he may repel the assault with all needful force, and the company will be liable for the trespass and all the consequences thereof, whether he succeed in remaining on the train or be put off. On the other hand, if the passenger be, like a ticket holder in a theater, a licensee, then he must leave the train when ordered. By refusing, he becomes himself a trespasser, and may be put off. On either theory, the company would be liable for refusal to carry him, and this liability might involve consequences of aggravation. On the former theory, an action would also lie for the assault, but, of course, not on the latter. The dictum in *Railroad Co. v. Winter's Adm'r*, 143 U. S. 73, 12 Sup. Ct. 356, that one "rightfully on the train as a passenger" has "the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he is being removed by compulsion and against his will," implies that the public interest against a breach of the peace may be a limitation upon the rights of the injured party in trespass against the wrongdoer. Substantially this idea was the ground of decision in the overruled case of *Newton v. Harland*, 39 E. C. L. 952, in England, and in the cases, also overruled, of *Dustin v. Cowdry*, 23 Vt. 635, and *Reeder v. Purdy*, 41 Ill. 279, in America. The passenger cannot have the right to remain on the train while the carrier has the right to eject him. The latter cannot be saved from the consequences of the former's resistance to an unlawful attempt to eject him. A

right on the part of the carrier to persist in the assault cannot arise out of a resistance by the passenger greater than necessary "to denote" that he is "being removed by compulsion and against his will." The passenger's right to remain on the train secure from assault cannot be lost or impaired by such persistent resistance to a wrongful assault. In *Railroad Co. v. Winter's Adm'r* the passenger was hurt as a consequence of a resistance obviously much more than sufficient "to denote" that he was "being removed against his will," but the carrier was held for such hurt. As stated in the report, "there was no question in the case respecting the measure of damages." The dictum above quoted was aside from the case. I agree that we must affirm. But, since we hold that the order to leave the train does not make the passenger who disobeys a trespasser, our judgment must necessarily mean that the defendant is liable for the consequences of whatever resistance the passenger wrongfully assaulted and expelled saw fit to make. The judgment of the circuit court is affirmed.

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CHICAGO & N. W. RY. CO. v. NETOLICKY.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1895.)

No. 508.

1. NEGLIGENCE—QUESTION FOR JURY.

The tracks of the C. Ry. Co., running east and west, crossed a highway, running north and south, near a large city. For some distance north of the tracks the highway ran between a grove on the west and a 20-foot embankment on the east, on which were the tracks of the B. Ry. Co., the C. Ry. tracks passing through the embankment by a culvert about 120 feet from the highway. The embankment and culvert obstructed the view of the C. Ry. tracks from the highway, up to a point very near such tracks, and also obstructed the sound of trains approaching from the east. One T., while driving an empty wood wagon, at a trot, southward, along the highway, was struck at the crossing by a freight train coming from the east, and killed. It appeared that persons in a sleigh some distance behind T. heard the train before T. reached the crossing; that T. apparently knew nothing of the train until it whistled for the crossing, and then looked first west, then north on the B. tracks, and then east, and was nearly on the tracks before he appeared to see the train, when he whipped up his horses, and tried to cross the tracks. There was also evidence that the first whistle was sounded by the engine when it was between the whistling post, east of the crossing, and the culvert, and about 400 or 500 feet from the crossing; and that the train was running at a speed of 18 miles or more per hour; and that some persons near by heard no whistle or bell till the engine was entering the culvert. *Held*, that the questions of the negligence of the railway company and the contributory negligence of T. were for the jury.

2. SAME—DANGEROUS CROSSING.

It is not necessarily a sufficient exercise of care on the part of a railway company, whose tracks cross a highway at grade, to sound the whistle and ring the bell of its engines, at the distances from such crossing prescribed by a statute requiring such warnings to be given; but such company is bound so to manage its trains, and to give such warnings of their approach, or take such other reasonable precautions, as not to cause unnecessary risk to persons on or about the crossing.

3. SAME—EVIDENCE—SIMILAR OCCURRENCES.

Following *District of Columbia v. Armes*, 2 Sup. Ct. 840, 107 U. S. 519, *held*, that it is not error, in an action against a railway company for damages for an accident at a grade crossing, to permit witnesses who are familiar with the locality to testify to narrow escapes they have had at the same crossing, in connection with descriptions of the locality, for the purpose of showing the nature of the crossing and the difficulties of travelers in passing over it.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action by Voclov Netolicky, as administrator of the estate of Joseph Tripkosh, deceased, against the Chicago & Northwestern Railway Company, to recover damages for the death of the intestate. The plaintiff recovered judgment in the circuit court. Defendant brings error.

N. M. Hubbard and Frank F. Dawley (N. M. Hubbard, Jr., on the brief), for plaintiff in error.

Charles A. Clark, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a railroad crossing case. The defendant in error, Voclov Netolicky, suing as administrator of Joseph Tripkosh, deceased, brought an action against the Chicago & Northwestern Railway Company, the plaintiff in error, for the death of his intestate, Joseph Tripkosh, who was killed by a freight train of the defendant company on December 1, 1892, at a point a few miles south of the city of Cedar Rapids, in the state of Iowa, where the defendant company's railroad crosses one of the main traveled thoroughfares leading from the south into the city of Cedar Rapids. The undisputed testimony in the case warrants the conclusion that the railroad crossing in question was more than ordinarily dangerous, for the following reasons: Owing to the location of the crossing near a large city, many vehicles pass over the crossing daily and hourly. For a considerable distance north of the crossing, in the direction of Cedar Rapids, the public thoroughfare runs parallel to and on the west side of the track of the Burlington, Cedar Rapids & Northern Railroad Company, hereafter spoken of as the "Burlington Road," which track is there laid on a high embankment. For at least 80 rods north of the crossing in question the public highway is quite close to this embankment, and in the lee thereof, so that the view to the east is entirely cut off. On the west side of the highway there is a grove, which also extends from the crossing for a considerable distance to the north, and effectually obstructs the view to the west. The track of the defendant company runs about due east and west, passes underneath the track of the Burlington road through a culvert in the embankment, and crosses the highway at grade, at right angles to it, and at a point not more than 120 feet west of the mouth of the culvert. Travelers on the highway approaching the crossing from the north cannot see a train on the defendant's road approaching from the east, until they are, as some witnesses say, within 10 feet of the crossing. The embankment of the Burlington road, at the culvert and for some distance both north and south, is

20 feet high. The culvert through the embankment is 29 feet wide. On some occasions it seems that it is quite difficult for a person on the highway north of the crossing to hear a train approaching from the east, until it emerges from the culvert, or, if the rumble of a train is in fact heard, to determine accurately whether it is approaching on the Burlington road or on the defendant's track. At the time of the accident, the plaintiff's intestate, who was a man then about 50 or 55 years old, was driving home from Cedar Rapids with a double team attached to an empty wagon, which was provided with a wood rack for the purpose of hauling wood. He was traveling south along the highway above described, and, as he reached the crossing, was struck and killed by an engine of a freight train that was running west on the defendant's track.

As is usual in this class of cases, there are two fundamental questions presented by the record. The first is whether the plaintiff's intestate was so obviously guilty of contributory negligence that the trial court should have directed a verdict for the defendant on that ground. The second is whether there was such an utter failure to produce evidence tending to show negligence on the part of the defendant company, its agents or servants, that the court should have directed a verdict in the defendant's favor for that reason.

The material facts, other than those heretofore stated, which the evidence tended to establish, and in the light of which these questions, particularly the first, must be determined, are as follows: The day of the accident was a cloudy winter's day. There was some snow on the ground, and the wind was blowing moderately from the north. For some distance before reaching the crossing, Tripkosh had driven along the road in company with a two-horse sleigh, which carried the mail, a driver, and one passenger. When the deceased reached the crossing, he was 15 or 20 rods in advance of the sleigh. The deceased had been driving at a trot a portion of the time, until he came within 15 yards of the crossing. The wood wagon in which he was riding made some noise. The two persons riding in the sleigh had heard the coming freight train for some little time before Tripkosh reached the crossing, but the deceased had given no outward indication, as these persons say, that he was conscious of its approach until the engine was heard by the driver of the sleigh to whistle for the crossing, when, as the driver says, Tripkosh looked first to the west, then back north along the Burlington road or track, and then east. When he first seemed to become aware of its approach on the defendant's track, as he looked east, his team was within 4 feet of the railroad track, and he was himself within 15 feet of it. The deceased then whipped his horses, and made an urgent effort to get across, but failed in the attempt. There was other testimony which tended to show the following facts: That, at a point 34 feet north of the track, the engine might have been seen 180 feet east of the crossing; that the freight train was running 18 miles an hour, and possibly at a higher rate of speed; that the first whistle heard by the driver of the sleigh, which the deceased apparently heard, was sounded when the engine was between the whistling post east of the culvert and the culvert, at a point about 400 or 500 feet from the crossing; and that when the



deceased first saw the engine, and became conscious that it was approaching on the defendant's track, it was much nearer to the crossing, and, at the speed it was running, would cover the intervening space in a very few seconds. There was also some negative testimony, given by persons who were in the immediate vicinity of the crossing, to the effect that they did not hear the engine sound its whistle or ring its bell until the engineer, on entering the culvert, discovered the deceased in the act of passing over the track.

On this state of facts, it is contended for the defendant company that, as the two persons riding in the sleigh heard the approach of the train some time before they reached the crossing, the deceased should also have heard it, and that, as the train might have been seen at a distance of 34 feet from the track, the deceased should have seen it, and should have stopped at that point until the train passed. For both of these reasons, it is claimed that the deceased was obviously guilty of contributory negligence, and that the court should have so declared as a matter of law. This contention, however, overlooks the fact that it was not conclusively shown by the testimony that the deceased might have seen the engine of the approaching train when he was 34 feet north of the crossing. One witness testified, from a personal examination of the place, that he could not have seen through the culvert, the east entrance of which was a little less than 180 feet from the crossing, until he was within 10 feet of the track; and that he did not in fact see the approaching train until his team was within 4 feet of the track, and he was himself within 15 feet of it, is a conclusion that the jury were entitled to draw from the testimony of all the persons who were eyewitnesses of the accident. Moreover, the apparent failure of the deceased to hear the rumble of the approaching train, as others heard it before they came in close proximity to the track, does not seem to us to be a circumstance which in itself conclusively showed that he was guilty of a want of ordinary care. He was riding in a wagon over frozen ground, which necessarily made more noise than the sleigh, and his sense of hearing, though not defective, may have been less acute than that of the persons in the sleigh. Besides, his action when the whistle was first sounded, as described by the driver of the sleigh, in looking first to the west, then to the north, and finally to the east, was sufficient to warrant an inference that the first signal heard did not indicate to the deceased from which direction the train was approaching, and that, for some reason, the first sound heard by him seemed to come from the west or north rather than from the east. Neither can we say that the conduct of the deceased in attempting to cross the track after he saw the approaching train was so manifestly negligent that the court should have denied the plaintiff's right to recover. It must be borne in mind that his team was then practically on the track; that he was confronted with a great peril; that he had no time for reflection; and that the average man thus situated would naturally obey the first impulse. It is not reasonable to predicate negligence of what a person acting on a sudden impulse, and without time for thought, may do under such circumstances. If he was

guilty of a culpable neglect of duty, it consisted, as we think, in getting into the dangerous situation last described, rather than in the attempt to cross the track after he saw the train; and, as we have already remarked, it does not occur to us that the mere fact of his near approach to the track before discovering the train was in itself a circumstance which conclusively established a want of ordinary care. The conditions surrounding him were such that it is by no means improbable that he may have been exercising his sense of hearing and his other faculties with as much diligence as the law exacts, and yet have remained utterly ignorant that a train was coming until it was too late. We are unable to say that all reasonable men, on the state of facts disclosed by the record, would necessarily reach the conclusion that the deceased was at fault; and, not being able to so declare, it follows that the issue of contributory negligence was properly submitted to the jury. *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679; *Sullivan v. Railroad Co.* (Mass.) 28 N. E. 911.

The second question, above stated, whether there was any evidence tending to show a want of ordinary care on the part of the railway company, can be best considered in connection with that portion of the charge wherein the trial court defined the degree and kind of care which the defendant company was bound to exercise in running its trains over road crossings. On that subject the circuit court charged the jury substantially as follows: First, that the railway company was in duty bound, in running its trains over highways, to so manage them, and to give such warning of the approach of trains, as not to cause unnecessary risk or hazard to persons who happened to be on or about the crossing; second, that the statute of the state of Iowa directing what signals shall be given with the bell and whistle as a railroad train approaches a grade crossing is not to be understood or construed as prescribing in all cases the full measure of the duty which a railway company owes to travelers upon the public highways, even at crossings outside of the limits of cities and villages; third, that a railway company may justly be expected and required, besides sounding the bell and whistle, to take such other reasonable precautions to prevent accidents as are fairly within its power, whenever a particular grade crossing is extra hazardous, being so situated that the statutory signals are not adequate to give a sufficient warning of the approach of a train to travelers upon the highway, who are themselves exercising ordinary care; and, fourth, that, while the law does not prescribe any fixed rate of speed at which trains shall be run over country crossings, yet that it does require that the rate of speed shall bear a reasonable relation to the kind of warning given, so that the warning may not be rendered inadequate or ineffectual to prevent accidents because of the speed of the train. Having given these directions, in substance, the circuit court left the jury at liberty to determine, in view of all the evidence as to the character of the crossing, the speed of the train, the manner in which it was handled, and the kind of signals that were actually given or that might have been given, whether the

defendant could be said to have been guilty of any fault or neglect of duty. It will be observed, therefore, from the character of these instructions, that, as the case was submitted to the jury, the finding with respect to the defendant's negligence was not made to turn solely on the question whether the statutory signals had been given at the proper distance from the crossing, but on the broader inquiry whether, in view of the location of the crossing in the lee of a high embankment, which cut off the view to the east, the defendant company had in fact taken all of the precautions to prevent accidents that it might reasonably be expected and required to take.

If the foregoing declarations of law were right, then it cannot be successfully maintained that the evidence was insufficient to support the verdict. It is contended, however, that the charge was erroneous, one objection to it being that there was no evidence to support the specifications of negligence contained in the complaint, and that the instructions broadened the issues raised by the pleadings so as to allow the jury to hold the defendant accountable for derelictions of duty that were not alleged in the complaint. This criticism of the charge does not appear to us to be well founded. The plaintiff did not complain merely of a failure to give the statutory signals as the train approached the crossing. He complained generally of the dangerous location of the crossing in the lee of an embankment, which, as he averred, cut off the view to the east, deadened the sound of approaching trains, and made it the duty of the defendant to station a flagman at the crossing, or to employ some other adequate means of warning travelers when trains were approaching. He also averred generally that the freight train in question was carelessly and negligently run, and at a dangerous rate of speed, and that there was a failure on the part of the defendant company to give such signals as the law required it to give. These allegations were sufficient to apprise the defendant that it would or might be claimed at the trial that reasonable precautions were not taken to guard the crossing, owing to its peculiar location; that the train was not handled or managed as it should have been at such a crossing; that the rate of speed, under all the circumstances of the case, was excessive; and that proper signals were not given. We think, therefore, that the complaint contained a sufficient statement of the grounds of recovery that would be relied upon to warrant a consideration of all the circumstances and conditions that the jury were allowed to consider under the instructions given by the trial court. No objection was taken to the introduction of any testimony on the specific ground that it tended to show acts of commission or omission that were outside of the case made by the pleadings. On the contrary, it seems to have been taken for granted that all of the evidence relating to the location of the crossing, and what was done or left undone on the occasion of the accident, was strictly relevant to the issues as they had been framed. For these reasons, we are unable to assent to the view that the circuit court went outside of the issues raised by the pleadings, and allowed the jury to find the defendant guilty of

derelictions of duty that were not sufficiently charged in the complaint.

Another objection to the charge seems to be that the court erred in the construction that it placed on the Iowa statute in holding, as it did, that a railway company, under some circumstances, may be guilty of a want of reasonable and ordinary care, in the manner in which it runs a train over a road crossing, although its employes comply with the terms of the statute in the matter of sounding the whistle and ringing the bell of the engine at a distance of 60 rods from the crossing. It is also suggested that the court erred in instructing the jury that the speed of a train when it approaches a crossing ought to bear a reasonable relation to the kind of signals given, or to the other precautions that are taken at the particular crossing, to warn travelers of the approach of trains. With reference to these objections, it is only necessary to observe that controlling authority for all that was said by the circuit court on these points is to be found in *Railway Co. v. Ives*, 144 U. S. 408, 420, 12 Sup. Ct. 679, and in *Improvement Co. v. Stead*, 95 U. S. 161, 164. In the latter of these cases, while considering the speed of trains at road crossings and the warnings that ought to be given at such places, Mr. Justice Bradley said:

"But what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if unslackened speed is desirable, watchmen should be stationed at the crossing."

In the case of *Railway Co. v. Ives* it was declared to be a well-established doctrine "that under certain circumstances a railway company will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given and other precautions to be taken by it for the safety of the traveling public at crossings." In the same case it was further held, in effect, that when a crossing is shown to be extra hazardous, either because the view is obstructed, or because the crossing is much frequented, and the sound of approaching trains is rendered indistinct, it is usually a question for the jury whether, in the exercise of ordinary care, additional precautions to prevent accident, other than those specially enjoined by the terms of a local statute or ordinance, ought not to have been taken. The same view was adopted and enforced in each of the following cases: *Railroad Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1; *Thompson v. Railroad Co.*, 110 N. Y. 636, 17 N. E. 690; *Shaber v. Railway Co.*, 28 Minn. 103, 107, 9 N. W. 575; *Winstanley v. Railway Co.*, 72 Wis. 375, 39 N. W. 856; *Louisville & N. R. Co. v. Com.*, 13 Bush, 388; *Weber v. Railroad Co.*, 58 N. Y. 451, 458; *Guggenheim v. Railway Co.*, 66 Mich. 150, 33 N. W. 161.

The several objections to the charge already noticed and considered embrace all of the specific exceptions thereto which were taken by the defendant, and what we have said with reference to these exceptions is sufficient to show that the charge was substantially correct, and that no material error was committed in refusing the instructions that were asked by the defendant company. Indeed, it is apparent from an inspection of the record that the fundamental propositions of law contained in the charge were conceived and framed with special reference to the two federal decisions heretofore cited, and that they are in harmony with the principles that were approved and applied in those cases. It is also obvious that the circuit court held that the case at bar was one in which the jury were entitled to decide whether, on the occasion of the accident, the defendant company had discharged its full duty to the deceased and to the public; and, in view of the location of the crossing and the testimony tending to show its extra hazardous character, we fully concur in that view.

One further assignment of error remains to be noticed. In the course of the trial three witnesses, who had often traveled over the crossing now in question, and who were familiar with its location and surroundings, were called by the plaintiff for the purpose of showing its dangerous character. After describing the crossing, its distance from the mouth of the culvert, and the various objects that interfered with the view in both directions, they were allowed to give instances in which they had themselves narrowly escaped being injured by trains while passing over the crossing in vehicles. In admitting the evidence, the court cautioned the jury that it was not admitted for the purpose of showing negligence on the part of the defendant company on former occasions, but solely for the purpose of showing the nature of the crossing and the difficulties that travelers upon the highway had encountered when passing over it, in discovering whether a train was approaching. An exception was duly taken by the defendant to the admission of this evidence. The most obvious objection to the testimony, and the one that is urged by the defendant, is that it had a tendency to introduce collateral issues into the case. No one, however, can doubt the great weight that men would ordinarily attach to such incidents as tending to show whether a crossing is safe or unsafe, especially when the incidents are narrated by persons who participated therein, who are familiar with the crossing, and who, in the same connection, describe the physical surroundings of the place. Taken in connection with the description given of such surroundings, the testimony illustrated in a practical way how the obstacles described inevitably tended to produce accidents.

Whatever doubt we might otherwise have entertained of the admissibility of this evidence, because of its tendency to raise collateral issues, must be resolved against the defendant on the strength of the decision in the case of *District of Columbia v. Armes*, 107 U. S. 519, 524, 2 Sup. Ct. 840, which seems to be on all fours with the case at bar. In that case, as in this, testimony was offered and admitted of other accidents which had occurred at a given place, and it was held to be admissible for the purpose of showing the dangerous character of the

place. The contention on the part of counsel that the evidence was held admissible in the case last referred to solely for the purpose of showing notice to the municipality that a street was out of repair is not tenable. The court expressly held that the frequency of accidents at the particular place was good evidence of its dangerous character, or, at least, that it was some evidence to that effect. The court also answered the objection raised in that case that the evidence tended to introduce collateral issues, by saying that in point of fact "no dispute was made as to these accidents, no question was raised as to the extent of the injuries received, no point was made upon them, no recovery was sought by reason of them, nor any increase of damages." The same remark may be made with reference to the evidence introduced in the case at bar. It did not in fact lead to the introduction of any collateral issues. That these several witnesses had narrowly escaped injury at the times stated and in the manner described was not denied; nor can the testimony be said to have misled the jury in any respect, because the court expressly cautioned the jury that the testimony should only be considered in so far as it tended to show the character of the crossing. Upon the whole, we have concluded that the admission of the testimony was not such an error as would warrant a reversal of the case. The judgment of the circuit court is therefore affirmed.

On Rehearing.

(May 13, 1895.)

PER CURIAM. The petition for a rehearing which has been filed in this case does not call our attention to any material fact or circumstance or to any controlling authority which was overlooked in deciding the case, or that has not already received careful consideration. Under these circumstances it is not our habit to file written opinions in overruling motions of this character. When all of the questions to which our attention was directed on the argument have been fully considered and decided, we cannot undertake the labor of restating our conclusions, or of elaborating our views, because we are invited to do so by a motion for a rehearing. We depart from our usual practice in this instance for the purpose of noticing briefly a suggestion, contained in the petition for a rehearing, that the deceased was, as a matter of law, guilty of contributory negligence in attempting to pass over the crossing after he was aware that a train was approaching. We recognize the rule declared in *Railroad Co. v. Houston*, 95 U. S. 697, and in other kindred cases, that where a person, without any excuse for so doing, undertakes to cross a railroad track in advance of a train, which he knows to be approaching rapidly, and in so doing sustains injury, he is guilty of such negligence as will preclude a recovery. The case at bar is clearly distinguishable, we think, from that class of cases. As we have already pointed out, there was evidence in the present case which strongly tended to show, and which probably induced the jury to believe, that when the deceased first saw the coming train his horses were practically on the railroad track, so that any course he might then see fit to pursue, whether he went forward or

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tried to turn backward, was fraught with great danger. We are unwilling to declare, as a matter of law, that a person who is called upon to act under such circumstances, and to act instantaneously, is guilty of negligence if he does not choose the safer course. In such a case the inference of contributory negligence, if it is a justifiable inference, should be drawn by the jury, rather than by the court. Nor are we able to say, as a matter of law, that the deceased was placed in the dangerous situation last mentioned by reason of his own want of ordinary care. In the opinion on file we have described the location of the crossing in detail, and further remarks on that subject are unnecessary. It is sufficient to say that the jury may have found, in view of the character of the crossing, that, without any culpable neglect on the part of the deceased, he remained utterly ignorant of the impending danger until he was placed in a position of great peril. Granting that at a point 34 feet north from the center of the track an engine could be seen entering the culvert from the east, at a distance of 180 feet from the crossing, yet at the rate of speed at which this train may have been moving it does not follow that the engine was at the point last mentioned, and in plain view, when the deceased was exactly 34 feet north of the track. He may have been, and the jury probably found that he was, much nearer to the track when the engine came first into view. The speed of the train, the precise distance that it would move in a second of time, the place at which it first gave warning of its approach, whether at the whistling post or between that point and the bridge, and the kind of warning actually given, were each questions of fact that have an important bearing on the issue of contributory negligence, and it is hardly necessary to observe that they were questions which the jury were entitled to consider and decide. We think, therefore, that the question of contributory negligence was necessarily submitted to the jury, and that that issue was submitted under instructions from the court which were substantially correct. In support of the conclusions announced in the opinion now on file we refer to a recent decision by the United States court of appeals for the Seventh circuit in the case of *Railroad Co. v. Austin*, 12 C. C. A. 97, 64 Fed. 211, which bears a strong resemblance to the case at bar. See, also, *Ernst v. Railroad Co.*, 35 N. Y. 9, 41. The motion for a rehearing will be denied.

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WILSON v. WARD LUMBER CO.

(Circuit Court, E. D. Missouri, E. D. May 13, 1895.)

No. 3,788.

1. RAILWAY LAND GRANTS—AID BONDS—LIEN—DESCRIPTION OF PROPERTY.

Act Mo. Dec. 11, 1855 (Local Laws 1855, p. 469), authorized the issue of bonds in aid of the Cairo & Fulton Railroad Company, and provided that the state should have a first lien on the road and its "appurtenances." Act Mo. March 3, 1857 (Laws 1856-57, p. 85), granted said railroad company additional aid, and provided that the bonds issued should constitute a first lien on the "road and property" of the company. *Held*, that the

state's lien covered lands granted to the state by Act Cong. Feb. 9, 1853, and by the state granted to said railway company to aid in its construction.

2. **FEDERAL COURTS—COMITY—FOLLOWING STATE DECISIONS.**

Where state statutes, affecting the title to large tracts of land, have been construed by the state supreme court, and the title so established has been reaffirmed by the United States supreme court, which decisions have remained unchallenged for many years, comity does not compel a federal court, when the title is again called in question, to follow a later decision of the state courts adverse to the title established by the earlier decisions.

**Action by Florence A. Wilson against the Ward Lumber Company for trespass.**

This is an action of ejectment, with consequential damages for cutting and removing timber from a large body of land in Mississippi county, in this state. The value of the timber being agreed upon, and a jury being waived, the case is submitted to the court on the single issue of title. The common source of title has its origin in Act Cong. Feb. 9, 1853, making a grant of the lands in question, for the purpose of aiding in the construction of the Cairo & Fulton Railroad, six sections in width on each side of said road. The said act provided, inter alia, that said lands so granted should be subject to disposal by the state legislature for the purpose in question. By Act Cong. July 23, 1866, the provisions of the first-named act were revived and continued for a period of 10 years. By an act of the legislature of Missouri of December 11, 1855, the governor of the state was empowered to cause to be issued and delivered to said railroad the bonds of the state, amounting to \$250,000, with interest not exceeding 6 per centum per annum. This act provided that the certificate of acceptance of such bonds by the company should constitute a mortgage on said road, and every part thereof, and its appurtenances, to secure the principal and interest of said bonds. On the 3d day of March, 1857, the state legislature passed an act to amend an act entitled "An act to secure the completion of certain railroads in this state, and for other purposes, approved December 10, 1855," granting to the said Cairo & Fulton Railroad thereby an additional loan of \$400,000. This latter act contained the following language: "All bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the road and property of the several companies so receiving them in the same manner as provided by the act approved February 22, 1851, to expedite the construction of the Pacific Railroad and the Hannibal and St. Joseph Railroad, and the act approved December 11, 1855, of which this is amendatory." By section 15 of said act of 1857, it was provided that, in the event of the failure by the company to pay any part of the principal or interest of the bonds of the state issued under said act, the governor could take such steps as might be necessary and proper to foreclose the state's mortgage, and enforce its lien upon the property incumbered. The president of the Cairo & Fulton Railroad Company on the 29th of June, 1857, filed with the secretary of state the required certificate of acceptance by the road under the provisions of the act of December 11, 1855, and a like certificate on the 19th day of October, 1857, accepting the provisions of the act of March 3, 1857. On August 5, 1857, the said president filed with the secretary of state his receipt for 100 state bonds, at \$1,000 each, and on October 17, 1857, he filed a like receipt for 80 state bonds of like denomination, and also receipts for the residue of said bonds, dated December 1, 1858, April 10, 1859, and July 25, 1859. After said enactments, and the said acceptances by the railroad company, and after the acceptance of a portion of the bonds of the state, the railroad company, by appropriate deed, conveyed to Moore, Wilson, and Waterman the roadway, stations, and depot, together with all its lands and real estate, in trust to secure the payment of certain bonds of the company. This deed of trust in its caption purports to be of date May 23, 1857, but was not acknowledged until May 28, 1858. By the recitations of this deed of trust it was made "subject to a prior first and only lien in the nature of a mortgage in favor of the state, made to secure and indemnify said state against the



payment of said bonds, as said state may from time to time issue and deliver," etc., "under and by virtue of the provisions of the several acts of the general assembly of Missouri entitled as follows: 'An act to expedite the construction of the Cairo and Fulton Railway Company, passed December 11, 1855;' and also, 'An act to amend an act to secure the completion of certain railroads in this state, and for other purposes, approved December 11, 1855, approved March 3, 1857.'" The amount of said bonds secured by said deed of trust was not to exceed the sum of \$1,600,000, with interest, with the proviso that nothing contained in said deed should have the effect or operate as a lien upon said railroad, nor any part nor section thereof, nor its appurtenances, prior or in derogation of, or in any way to interfere with, the lien of said state under the acts of the legislature aforesaid. The plaintiff in this case claims title under foreclosure proceedings instituted on a default in the said deed of trust to Moore, Wilson, and Waterman, by deed dated in 1859, to one Hamilton. Hamilton conveyed to one Stephens, and Stephens to Blakely Wilson, in 1860, under whom the plaintiff claims as heir. The defendant claims title as follows: The Cairo & Fulton Railroad Company having defaulted in the payment of said aid bonds, the legislature passed two acts, one of February 19, 1866, and the other of March 19, 1866, authorizing and directing the governor of the state to foreclose the state's lien, predicated of the acts of December 11, 1855, and March 3, 1857, providing for a board of commissioners to bid in the property at said foreclosure sale, with power in them to resell the property so purchased. Under these foreclosure proceedings the governor of the state, by deed October 12, 1866, sold and conveyed to the state "the said Cairo and Fulton Railroad, and every part and section thereof, so far as the same is constructed, completed, or projected, together with its appurtenances, rolling stock, and property, of every description, and all rights and franchises thereto belonging." By a like description, by deed January 17, 1877, the state conveyed the property to Reed, Mackey, Vogle, and Simmons, who conveyed the property to Thomas Allen. From Allen this title passed to the Cairo, Arkansas & Texas Railroad Company, which consolidated with the St. Louis & Iron Mountain Railway Company, organized in 1866, under the name of the St. Louis, Iron Mountain & Southern Railway Company, which last-named company, by appropriate deed, conveyed the land in suit, as a part of its claimed purchase, to the grantor of the defendant, by deed dated March 28, 1888.

H. J. Cantwell, A. W. Edwards, James A. Boone, and J. E. Burrough, for plaintiff.

M. L. Clardy, for defendant.

PHILIPS, District Judge (after stating the facts). From the foregoing statement of facts it is apparent that the question to be decided is whether or not the state of Missouri, by virtue of the two acts of 1855 and 1857, and the issue of the bonds giving the state's aid to said Cairo & Fulton Railroad Company, and its acceptance thereof, acquired a lien upon the lands granted to said railroad company, as well as to the railroad itself. If the state did acquire such lien, the title to the land in question unquestionably passed, under the foreclosure proceedings and mesne conveyances, to defendant's grantor. It is not contended by counsel for defendant that under the state's lien created by the act of December 11, 1855, title to the land passed by the foreclosure proceedings, as that lien applied only to "the road, and every part and section thereof, and its appurtenances"; the term "appurtenance" not being broad enough to extend to the lands outside of those used for and in connection with the location and operation of the road. But the whole controversy centers upon the construction to be given to the provision of the act of March 3, 1857, which extends the lien of the mortgage "upon

the road and property of such company." The act of 1855, in giving the state a lien for the first credit of \$250,000 given the road, having limited its operation to the road and its appurtenances, while the act of 1857 extended the lien for the additional loan of \$400,000 to the road and property of the company, it would naturally seem that some effect and operation ought to be given to this change in phraseology, because the term "property" has a much wider range in its embrace and application than that of an appurtenant. The term "appurtenant," in its legal common acceptance, implies a thing as belonging to, accessory, or incident to, some other thing. As used in connection with land, it means a thing used with the land and for its benefit, annexed to and connected therewith. So the appurtenant of a railroad implies that it is incidental to, connected and used with, the road, as a part of and essential thereto, such as depots, stations, switches, and switch yards, and the like. But the term "property," as commonly used, denotes "any external object over which the right of property is exercised. In this sense, it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in. Taking the word in the latter signification, property is broadly divided into real and personal property." Black, Law Dict. If A. should to-day loan B. \$250,000, and take as security therefor a mortgage on B.'s dwelling house and appurtenances, and next year make to B. an additional loan of \$400,000, and take an additional mortgage security on the dwelling house and property of B., the difference in phraseology would at once challenge attention, and the ordinary mind would intuitively perceive a good and sufficient reason for extending the lien for the additional loan to other and additional security, well expressed in the more comprehensive term "property."

The danger which any court encounters, in seeking out a technical possible reason for giving the second instrument no larger scope than the first, lies in selecting one less reasonable and natural than the one based upon the idea the greater the risk the greater the security. Courts are ever exposed to the just criticism of legislating and making contracts when they undertake to give to a plain, ordinary legal term a meaning different from that of its common acceptance. It is said that it would have been easy for the legislature, had it intended by the act of 1857 to extend the state's lien to the company's lands, to have used the term "lands." With equal force may it be replied that, in the act of 1855, the legislature having restricted the lien to the road and its appurtenances, if its purpose was to so limit the operation of the second mortgage lien, why did it drop so simple and explicit a term as "appurtenances," and employ one more comprehensive, and whose general import was so universally recognized? Had the legislature employed the language, upon the road and lands of the company, it is not too much to say, perhaps, that the special reasoning based upon supposed legislative intent and statutes in *pari materia*, by which it is sought to reduce the term "property" to the degree of an appurtenant, would be invoked to qualify the term "lands," by making it apply to those incidents essential to the operation of the railroad.

It is further urged against the construction that the mortgage of 1857 extended to the lands of the company; that it would thwart the legislative policy declared in the act of 1855, which contemplated that the lands should be applied solely to the construction of the road; that by placing a mortgage upon them for \$400,000, running for a period of 30 years, the sale of the lands for settlement would practically have been defeated. No such obstacle seems to have presented itself to the minds of the parties to the Moore, Wilson, and Waterman deed of trust, under which the plaintiff claims, for that trust was to run until 1882, nearly as long as the state's mortgage. Exactly how it is that the plaintiff, who must recover on the strength of his own title, and not on the weakness of the defendant's, can stand upon a mortgage of the lands which ran until 1882, while the defendant cannot defend under a mortgage from the same company anterior in time, running a little longer, is not apparent to my mind. So long as the proceeds of the bonds of the state loaned to the company were used in obtaining funds with which to build the road, it would hardly lie in the mouth of the company to say to the state, when it came to foreclose its mortgage, that your mortgage is void because the legislative acts and the congressional grant contemplated that the lands should be open to sale for the settlement of the country. Reduced to its logical substance, under plaintiff's contention, nothing passed under the "Sell-Out Act" of 1866, save the naked right to build the road, as no road of importance was then constructed. In other words, the state simply foreclosed a lien on a franchise to build a road to satisfy a claim of \$400,000.

It is further insisted that under defendant's position there is a repugnance to the manifest purpose of section 4 of the act of 1857, whereby the state was to guaranty certain bonds issued by the Pacific Railroad Company, receiving a lien on both its road and lands, subject to the right of the mortgage authorized by section 3 of the act of 1855, of which the act of 1857 is amendatory. The mortgage referred to in section 4 was to guaranty the bonds, not of the state, but of the Pacific Railroad Company, to aid in the construction of the southwest branch of that road; whereas, the bonds mentioned in section 17 of the act of 1857, constituting a lien "upon the road and property of the companies," were issued directly by the state. The latter bonds ran for 30 years, while the Pacific Railroad bonds ran for 20 years, and the liability of the state as to the latter was merely that of guarantor. The Pacific Railroad mortgage constituted a first lien on the lands of the Southwest Company and the road itself. Manifestly, therefore, they were not the bonds referred to in section 17. The two sections refer to two subjects-matter, and, of consequence, there is no repugnance in the two provisions.

The power conferred by the legislature in the act of March 3, 1857, authorizing the transfer of the state's securities to the Iron Mountain Railroad Company "upon such terms and conditions as may be agreed upon between such parties," by no permissible construction gave authority to the companies to so change the con-

tract with the state as to relieve the railroad of the state's lien. The manifest intent of the legislature was that, in case of a consolidation of the two companies, the new company should succeed to all the benefits intended for both, but not discharged from the burdens which each has assumed.

The precise question under consideration came before the supreme court of this state for determination in the case of *Whitehead v. Vineyard* (decided in 1872) 50 Mo. 30. Judge Bliss, who wrote the opinion, discussed the direct question raised in that case, as to whether or not the lands of the company were included in the state's lien, and passed under the foreclosure proceedings. After referring to the various acts of the legislature in question, the learned judge said:

"Under the provisions of these acts and subsequent legislation the railroad was sold out, and defendant claims that the land in controversy could not have been sold because not included in the term 'appurtenances,' used in the act of February 22, 1851; that land outside of and not necessary to the use of the road is not appurtenant to it. It becomes necessary in this case to consider how much would be included in the term, had not the legislative intention been otherwise made clear. Were we compelled to go into the questions, it might become necessary to inquire into the object for which the land was acquired,—whether it must be held subordinate to or might be acquired independent of the only object of the organization. But the act of March 3, 1857, giving further aid to the several companies, and which was expressly accepted by them, not content with the term 'appurtenances,' uses the more unambiguous and sweeping phrase, 'the road and property of the several companies,' etc., unequivocally showing the intention to cover by the lien of the state all corporate property of the companies named in the act. Subsequent acts expressly refer to and cover land like that in controversy, and leave the legislative intention without a shadow of a doubt. The act of February 15, 1864 (Sess. Acts 1863-64, p. 382), authorizes the St. Louis & Iron Mountain Railroad Company to sell and loan its lands not needed for the use and purposes of the road, and provides that their proceeds shall be paid into the state treasury on account of the interest due upon state bonds, and that the lien of the state upon such lands shall cease. Also the act of February 19, 1866 (Sess. Acts 1865-66, p. 107, § 6), provides that in the sale of the respective railroads the commissioners shall 'award the roads, and every part and section thereof, their franchises and appurtenances, and all lands and other property, real and personal, to the highest and best bidders,' etc. This land, therefore, was included in the lien held by the state upon the property of the St. Louis & Iron Mountain Railroad Company, and passed by its sale, as provided in the last-mentioned act."

The identical question was again raised and passed upon in the case of *Wilson v. Boyce* (decided in 1875) 92 U. S. 320. The record facts in the report of this last case do not support the contention of counsel that some of the questions raised in the case now at bar were not brought to the attention of the court. An examination of the skeleton brief of counsel for plaintiff in error shows beyond question that the principal matters now presented as new for the consideration of this court were urged upon the supreme court, in which the attempt was vigorously made to demonstrate that from all the acts of the state legislature, in *pari materia*, the intention was clearly to restrict the lien merely to the road and its appurtenances. And the contention was further made in that case that to create such lien on the lands of the company, and to attempt to pass the title thereto by the foreclosure proceedings, was a perver-

sion of the purpose and object of the congressional grant to the state. The court approved and followed the decision of the state court in *Whitehead v. Vineyard*, *supra*. After holding that the term "appurtenances" did not extend to the lands of the company, Mr. Justice Hunt proceeded to a consideration of the effect of the second mortgage under the act of 1857 for securing the additional aid of \$400,000, and said: "The question is, does the word 'property' in the statute create a valid lien on these lands?" and held that the term "property" was broad enough to and did embrace the lands of the company. Proceeding, the learned justice said:

"In the first mortgage, the state took its security upon the road and its appurtenances. In its second mortgage, it authorized and obtained security, not only upon the road of the company and every part thereof, but also upon its property, meaning its other property, and all of its other property. It is difficult to conceive any reason for this extension of language in the statute, except an intended extension of security. Time had passed without a completion of the road. A large additional loan was now made; and a desire to receive additional security gives a natural and logical explanation to the additional words inserted in the mortgage."

The opinion then proceeds to show that the decision in *Whitehead v. Vineyard* was not mere obiter dictum, but that "the point we are considering was the precise point before the court." And it was further held that the very mortgage under which the plaintiff claims in this action was subordinate to the state's lien under which the defendant claims; and in respect of the other question raised, as to such construction involving a perversion of the purpose of the congressional grant, the court said:

"It was quite within the competency of the railroad company to mortgage its lands not used for its track or appurtenances. It might be deemed prudent and judicious to raise money upon its collateral property rather than upon its road. It might lose its foreign lands, and still be successful as a railroad company. If it should lose its track, it must at once cease to exist."

The supreme court of this state in *Chouteau v. Allen*, 70 Mo. 327, 328, again expressly recognized that this question was settled in the cases of *Whitehead v. Vineyard* and *Wilson v. Boyce*. Chief Justice Sherwood said: "So far as respects the congress lands described in the deed of trust, it has been held that they passed in consequence of the sale which occurred October 1, 1866, and which was but the foreclosure of the first lien and statutory mortgage held by the state over all the property of the company,"—citing *Whitehead v. Vineyard* and *Wilson v. Boyce*. And then, proceeding to show that certain lands donated by the counties to the railroad were not affected by the mortgages in question, concluded with this language: "The title of Allen to the congress lands must therefore be regarded as free from flaw."

Thus stood the decisions of the courts, both state and federal, respecting this title, until 1893, when, for the first time in the history of the various litigations respecting these lands, the supreme court of the state in *Wilson v. Beckwith*, 117 Mo. 61, 22 S. W. 639, denied the validity of Allen's title obtained under the state's lien, and upheld the title under the trust deed to Moore, Wilson, and Waterman as paramount.

So this court is confronted with the suggestion that the decision in *Wilson v. Beckwith*, being the last expression of the highest court of the state, involving the proper construction of the legislative enactments of the state, is, on the doctrine of comity, binding and conclusive on the federal court, when the same question is again brought under review. No question is made by the court as to this being the generally accepted doctrine in the abstract. But, as applied to the history of this title and the facts of this case, a much deeper and broader question of sound public policy is presented. It is this: Involved in the construction of the state's mortgages and foreclosure sale thereunder are many thousand acres of land. For 21 years the decision of the state supreme court in *Whitehead v. Vineyard*, affirming the validity of the title to these lands acquired by Allen under the state's lien, stood unchallenged. This title was again reaffirmed by the supreme court of the United States 18 years prior to the decision in *Wilson v. Beckwith*. The decision in *Whitehead v. Vineyard* was again recognized, *nem. con.*, by the state supreme court in 1879. In the meantime the lands under Allen's purchase have largely been sold and resold, and in increased degree, as shown by the evidence in this case, after the affirmation of Allen's title by the supreme court of the United States in 1875.

Shall this court now surrender its right of opinion, and disregard the solemn and considerate judgment of the supreme court of the United States, affirming the earlier ruling of the state court, and thereby unsettle the titles to all this property, which have reposed in recognized and confident security for so many years? It does seem to me that, if the doctrine of *stare decisis* is to have any place in the jurisprudence of this country, it ought to find a footing here and now. In *Pease v. Peck*, 18 How. 595, in discussing the state of case where a long-settled rule of action had prevailed, and between the time of an adjudication in the United States circuit court and the submission of the case on writ of error in the supreme court the supreme court of the state of Michigan had made a decision which was a departure, Mr. Justice Grier, in delivering the opinion of the court, said:

"There are, it is true, many dicta to be found in our decisions, averring that the courts of the United States are bound to follow the decisions of the state courts on the construction of their own laws. But although this may be a correct, yet a rather strong, expression of a general rule, it cannot be received as the enunciation of a maxim of universal application. Accordingly, our reports furnish many cases of exceptions to it. In all cases where there is a settled construction of the laws of the state, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or further inquiry. But when this court have first decided a question arising under state laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a state court, as in the case of *Rowan v. Runnels*, 5 How. 139. When the decisions of the state courts are not consistent, we do not feel bound to follow the last, if it is contrary to our convictions; and much more is this the case where, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent. \* \* \* Nor do we feel bound in any case in which a point is first raised in the courts of the United

States, and has been decided in a circuit court, to reverse that decision, contrary to our own convictions, in order to conform to a state decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a state. Parties who, by the constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different states, has its foundation in the supposition that possibly the state tribunal might not be impartial between their own citizens and foreigners. The question presented in the present case is one in which the interests of citizens of other states come directly in conflict with those of the citizens of Michigan. The territorial law in question had been received and acted upon for 30 years, in the words of the published statute. It had received a settled construction by the courts of the United States as well as those of the state. It had entered as an element into the contracts and business of men. On a sudden, a manuscript statute different from the known public law is disinterred from the lumber room of obsolete documents; a new law is promulgated by judicial construction, which, by retroaction, destroys vested rights of property of citizens of other states."

In *Burgess v. Seligman*, 107 U. S. 33, 34, 2 Sup. Ct. 10, the court says:

"When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt. Acting on these principles, founded, as they are, on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In *Trust Co. v. Debolt*, 16 How. 416-433, Chief Justice Taney, speaking of the contention that the construction given to the act of the state legislature by the state supreme court concluding the federal tribunals, draws a distinction between ordinary acts of legislation and matters growing out of contracts based upon a legislative act. Notwithstanding the state supreme court held that the state constitution did not authorize its legislature to make certain exemptions in the contract, yet, as it was in conflict with the uniform construction which had long prevailed in the state, the supreme court of the United States declined to follow it. Chief Justice Taney (pages 431, 432) said:

"It is true that this court always follows the decision of the state courts in the construction of their own constitution and laws. But, where those decisions are in conflict, this court must determine between them; and certainly a construction acted on as undisputed for nearly 50 years, by every department of the government, and supported by judicial decision, ought to be regarded as sufficient to give to the instrument a fixed and definite meaning. Contracts with the state's authority were made under it; and, upon a question as to the validity of such contract, the court, upon the soundest prin-

ciples of justice, is bound to adopt the construction it received from the state authorities at the time the contract was made. It was upon this ground that the court sustained contracts made in good faith in the state of Mississippi under an existing construction of its constitution, although a subsequent and contrary construction given by the courts of the state would have made such contracts illegal and void [citing *Rowan v. Runnels*, 5 How. 134]. The sound and true rule is that if the contract, when made, was valid by the laws of the state as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decisions of its courts, altering the construction of the law."

The mortgage in question here, made between the state and the Cairo & Fulton Railroad Company, was, in effect, a contract. For over 30 years the legislature itself construed this enactment as covering the lands of the company (Sess. Acts 1863-64, p. 382; Sess. Acts 1865-66, p. 107, § 6), as did the state supreme court for over 20 years, and the supreme court of the United States for 18 years, on the faith of which confiding purchasers have invested their money in the purchase of these lands. To disturb titles thus acquired, after so long repose, is both harsh and disruptive. The supreme court of the state has by precept taught a better doctrine than by the example set in *Wilson v. Beckwith*, supra. In *Reed v. Ownby*, 44 Mo. 206, 207, the court, through Judge Wagner, said:

"The law has been settled for many years. It has become a rule of property, and titles have been vested on the strength of it. Under such circumstances, the error would have to be most palpable to justify this court in overruling previous decisions. The stability of judicial decisions is of the utmost consequence, as upon them reposes the security of property, and they are not to be tampered with to suit the views of different persons."

And its last utterance in *Dunklin Co. v. Chouteau*, 120 Mo. 578, 25 S. W. 553, is:

"That decision was pronounced over 30 years ago. It thereby establishes a rule of property which has been acted upon during all that period of time, and as to these lands it ought to be followed, whether, in our opinion, the judgment then rendered is right or wrong."

Even in the case of a single decision, long acquiesced in, a rule of property may be created; and where there is a series of decisions, pointing one way, the rule established ought to be regarded as absolutely impregnable, where rights have been bottomed on them. Wells, *Stare Decisis*, § 598; 23 Am. & Eng. Enc. Law, p. 28, § 3. The reasonable limitation to the doctrine of *stare decisis* is that, when a decision can be used only as an instrument of wrong and destruction, then "error ceases to be sacred, and principles and truths ought to be reasserted." The application of the latest decision of the state supreme court to the title in question is, in my humble opinion, retroactive and unjust. The issues are found for the defendant. Judgment accordingly.



**FOSTER et al v. GIVENS et al.**

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 222.

**1. JUDGMENTS—COLLATERAL ATTACK—PRESUMPTIONS.**

Where a bill to enforce a vendor's lien in a court of general jurisdiction alleged a sale to defendant of several parcels at a gross price, but the record does not show the location of such parcels, it will be presumed, in a collateral attack on the decree, that the land was within the territorial jurisdiction of the court.

**2. SAME—RECITALS—SERVICE BY PUBLICATION.**

The recital in a judgment by default that an order of publication had been "duly made and filed" is sufficient on collateral attack, in the absence of record evidence showing noncompliance with the statute.

**3. SAME.**

In a collateral attack on a judgment by default, an objection that the order of publication is not dated, and that, therefore, it does not appear that such order was made before publication, cannot be sustained, where the publisher's certificate is annexed to the order, and states that it was published, etc., as the order must have been made before it could have been published.

**4. SAME.**

A recital in a judgment by default that publication had been duly made and filed, and the publisher's certificate that the order was published "ten weeks," are sufficient, on collateral attack, to show publication for "two months successively," as required by the order and by statute.

**5. WRITS—SERVICE BY PUBLICATION—WHEN AUTHORIZED.**

Under Act Ky. Dec. 19, 1796 (1 Litt. Laws Ky. 592), authorizing service by publication in certain cases, on satisfactory proof that defendant is "out of the commonwealth," publication may be ordered on proof that defendants are not "inhabitants" of the commonwealth.

Error to the United States Circuit Court for the District of Kentucky.

Ejectment by Robert M. Foster and others against James G. Givens and others. There was a judgment for defendants, and plaintiffs bring error.

J. O'Hara and O'Hara & Rouse, for plaintiffs in error.

Wilkins G. Anderson, for defendant in error Pine Mountain Iron & Coal Co.

Wm. Ayres, for defendants in error F. Marimon and Monarch Coal & Timber Co.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. This is an action of ejectment brought by the plaintiffs in error who were plaintiffs in the circuit court. The action was for the recovery of a tract of land described as containing 50,000 acres, being the same patented by the state of Kentucky, February 28, 1779, to Abraham Morehouse. Plaintiffs claimed as heirs at law of Henry Banks, and, for the purpose of derailing title to their ancestor from the patentee, Abraham Morehouse, offered in evidence a transcript of a record from the circuit court

of Franklin county, Ky., wherein their ancestor was a complainant in equity, and Philip Henry Neving Tot Bastrop and the unknown heirs of Abraham Morehouse were defendants. They sought to show by the final decree in that cause that the land now in controversy had been sold, by and through commissioners therein appointed, to satisfy an equitable lien thereon in favor of Henry Banks for purchase money due from the said Morehouse and Bastrop; and that the said lands had been sold and conveyed by the commissioners who executed the decree to the said Henry Banks, by virtue of the power in them vested by the decree aforesaid. Upon the objection of the defendants, that record was excluded. There being no other evidence tending to show title in said Henry Banks, the court instructed the jury to find for the defendants. Plaintiffs assign this action of the court in excluding said record, and in the peremptory instruction, as error, and this is the only question for decision.

The defendants in error justify the ruling of the court, upon several distinct grounds, any one of which, if well taken, renders the decree void as to the heirs of Abraham Morehouse, and therefore inadmissible as a link in the chain of title sought to be established by the plaintiffs in error. The first objection to the decree was to the jurisdiction of the court over the tract of land involved in this suit. The transcript tendered in evidence purports to be a bill in chancery filed in the circuit court of Franklin county, Ky. That court was one of general jurisdiction in both suits at common law and in chancery. Under the statute organizing circuit courts, its territorial jurisdiction was limited to the body of the county of Franklin. It has not been contended that its jurisdiction was limited to cases involving lands wholly within the county. On the contrary, it has been properly admitted that if any part of a body of land, or one of several parcels of land, subject to a common mortgage or equitable lien, be within the county in which the suit is brought, the court will acquire jurisdiction over the entire body of land, or the several parcels subject to the common mortgage or claim of lien, and may effectively exercise jurisdiction with reference to the entire subject-matter of the suit. This principle of local jurisdiction is familiar law, and the Kentucky courts, at an early day, expressly so announced it. *Dunn v. McMillen*, 1 Bibb, 409; *Cave v. Trabue*, 2 Bibb, 444; *Brown v. McKee*, 1 J. J. Marsh. 476; *Owings v. Beall*, 3 Litt. 104. The circuit courts of Kentucky, being courts of general common-law and equity jurisdiction, and not courts of special and limited jurisdiction, are within the well-known rule which presumes, upon a collateral attack, that a jurisdiction actually exercised by such a court was rightfully exercised, until the contrary clearly appears. Such courts of record are competent to decide upon their own jurisdiction, and to exercise it to final judgment. This applies to both jurisdiction over the subject-matter and over the persons of the defendants, and, when a judgment of such a court is collaterally brought in question, every reasonable presumption will be indulged in favor of the rightful exercise of jurisdiction, and they are not required to spread upon their records the facts and evidences upon which their jurisdiction

was rested. *Freem. Judgm.* § 122; *Pope v. Harrison*, 16 Lea, 90. *Grignon's Lessee v. Astor*, 2 How. 337. In *Galpin v. Page*, 18 Wall. 366, Justice Field, in speaking for the court concerning the presumptions in favor of the rightful exercise of jurisdiction by courts of general, and not limited, powers, said:

"It is presumed to have jurisdiction to give the judgment it renders, until the contrary appears. And the presumption embraces jurisdiction, not only of the cause or subject-matter of the action in which the judgment was given, but of the parties also. The former will generally appear by the character of the judgment, and will be determined by the law creating the court or prescribing its general powers. The latter should regularly appear by evidence in the record of service of process upon the defendant, or his appearance in the action. But where the former appears the latter will be presumed."

As already stated, the circuit court of Franklin county was a court of general common-law and equity jurisdiction. If we turn to the decree pronounced in the cause of *Henry Banks v. Bastrop* and the *Heirs of Morehouse*, we find that the judgment rendered was in regard to a contract for the sale of numerous parcels of land, and that the court adjudged that Bastrop and Morehouse were indebted to the complainant, Banks, in a sum in excess of \$50,000, as purchase money for a large body of lands lying in distinct tracts, some of which were described as being in counties other than Franklin, while the locality of others did not appear. The court adjudged one contract, embracing many parcels lying in different counties, and adjudged to the complainant a common, equitable lien, embracing all the parcels sold, and that all the tracts should be sold for the satisfaction of a unit vendors' equity. Clearly, the power to hear and adjudge a cause presenting questions of the kind adjudged was within the jurisdiction of the circuit court for Franklin county.

"The power to hear and determine a cause is jurisdiction. It is *coram iudice* whenever a case is presented which brings this power into action. If the petitioner states such a case in his petition that on a demurrer the court would render judgment in his favor, it is an undoubted case of jurisdiction. Whether, on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites, and in the manner prescribed by law." *U. S. v. Arredondo*, 6 Pet. 709.

If we turn to the bill filed by the complainant Banks, we find that it substantially alleged: (1) That the complainant contracted and sold four tracts or parcels of land to Abraham Morehouse for the consideration of \$17,500, no part of which had been paid. One of those tracts is the one now involved. Concerning that tract, it was alleged that it had been located and surveyed by the complainant and one Phillip Barbour, and that Barbour had assigned his interest in the survey to the complainant; that Morehouse had caused a patent to issue to himself, and thereby acquired the legal title. (2) It alleged that, as a part of the same contract, the complainant had contracted to furnish the said Morehouse other lands to the aggregate value of \$32,500, these other lands "to be ascertained by the appraisement of good, disinterested men, on oath," reference being made to the contract itself for the details of the agreement. (3)

It further alleged that subsequently a contract was made with one Philip Henry Neving Tot Bastrop, by which said Bastrop agreed to receive, "in satisfaction" of the aforesaid agreement with Morehouse, certain parcels of land described, and to pay therefor \$32,500, and also to pay for the four parcels already conveyed to Morehouse the further sum of \$17,500 and further to pay to certain persons designated by Banks certain other sums of money mentioned in the bill, and that he engaged "to release and entirely exonerate the said Banks from the aforementioned contract with the said Abraham Morehouse." (4) The bill alleged that neither the said Morehouse nor the said Bastrop had paid any part of the \$50,000 which each had obligated himself to pay. Complainant therefore charged that he held "an equitable lien on the said several tracts or parcels of land, in the nature of a mortgage for the purpose of securing the payment of the aforesaid several sums of money, debts, and contracts. \* \* \*" (5) The bill claimed that both Morehouse and Bastrop were indebted to him in the full sum of \$50,000, of which \$17,500 was for the first four parcels assigned and transferred to Morehouse, and the remaining \$32,500 was for the other parcels engaged to be furnished Morehouse, and received by Bastrop, under the circumstances stated, in satisfaction of the Morehouse contract.

Without further going into the details of the bill, it is clear that a case was stated within the general equitable jurisdiction of the court. It may be admitted that no very clear case was alleged in regard to Morehouse's liability for the lands subsequently transferred to Bastrop. Neither is any very clear case stated in regard to any other or further liability, as against Morehouse, than that arising upon his agreement to pay \$17,500 for the four parcels originally transferred to him. The objection to jurisdiction concerns alone the locality of the parcels of land embraced within the common vendor's equity asserted against all the parcels, whether conveyed to Morehouse or Bastrop. The bill is silent as to the location of the four parcels transferred to Morehouse. As to those parcels transferred to Bastrop, it appears on the face of the bill that many of them were in counties other than Franklin. As to the remainder, there is no allegation by which the court could determine their situation. With reference to the four tracts sold and conveyed to Morehouse, and for which he was to pay \$17,500, evidence is found in that record that the large tract of 50,000 acres, being the one involved in this action, was wholly situated in Lincoln county, and the proof in this cause confirms that evidence. There is nothing in the record from the Franklin circuit court which throws any light upon the locality of the other three parcels sold to Morehouse. Neither does it throw any light upon the locality of many of the parcels transferred to Bastrop. The evidence submitted in the cause now on trial did establish that several of the parcels included in the Bastrop agreement were within the limits of Franklin county, as constituted at the time of the Banks suit. Now, on this state of facts, what are the presumptions with reference to the local jurisdiction? If complainant, Banks, has stated on the face of his bill facts sufficient to support his contention of a gross sale of lands to Morehouse

and Bastrop for a gross price, and sufficient to support his claim that the subsequent transfer of other lands to Bastrop was in satisfaction of his agreement to furnish lands to Morehouse, and that Morehouse was bound by Bastrop's action in receiving such other lands, then jurisdiction existed, for it is admitted that some of the parcels thus transferred to Bastrop were in fact within Franklin county, as then organized. But if it be admitted that the allegations of the bill do not state a case supporting the decree, in so far as it was adjudged that Morehouse's liability was for \$50,000, and that the sale to him was a gross sale for a gross price, and that each parcel was liable for the whole price, how then stands the case? Would that defeat the local jurisdiction of the court, in so far as the decree is relied upon as concluding the heirs of Morehouse? We think not. A case of a sale of four parcels to Morehouse was stated, for the gross sum of \$17,500. On the allegations of the bill, that sale was a unit sale, for a unit price, and furnished a foundation for a suit to have declared a vendor's equity as between buyer and seller. That equitable lien might be asserted against all the parcels in any county in which any one of the parcels, or any part of one parcel, might be found. Jurisdiction did not depend upon the locality of the lands embraced in either of the contracts set out being stated on the face of the complainant's bill. Good pleading undoubtedly required that the pleadings should state a case within the jurisdiction. But if no averment appears showing defect of jurisdiction, it will be presumed, upon a collateral attack, that the subject-matter of the suit was within the territorial jurisdiction of the court. "A court of general jurisdiction, proceeding within the general scope of its powers, is presumed, in an equitable proceeding, to have had jurisdiction in the case until the contrary appears. This presumption extends to all jurisdictional facts concerning which the record is silent." *Galpin v. Page*, 18 Wall. 350; *Grignon's Lessee v. Astor*, 2 How. 319; *Pope v. Harrison*, 16 Lea, 82. The record in a suit for foreclosure of a mortgage need not show that the land mortgaged lies in the county. In the absence of an averment to the contrary, this will be presumed until the contrary is shown. *Brownfield v. Weicht*, 9 Ind. 394; *Markel v. Evans*, 47 Ind. 326. These principles, applied to this case, would operate to raise a presumption that the four parcels of land sold by Banks to Morehouse were within the territorial jurisdiction of the Franklin circuit court, nothing contradicting that presumption appearing on the face of the pleadings or decree. The introduction of evidence of the fact that one of them was in another county will leave this presumption unaffected, for non constat that the others, or some part of the others, were not in Franklin county. The record should, therefore, be admitted until it is affirmatively shown that no part of the parcels transferred to Morehouse were within the territorial limits of Franklin county, as then constituted. Aside from this, we are of opinion that a sufficient case was presented by the pleadings to give the court jurisdiction to hear and determine the claim that Morehouse was liable to the full extent of \$50,000, and to hear and determine the claim that the sale to him was a unit sale, for a unit price. That general

question was presented, and the court acquired the power to adjudge the question thus involved, and jurisdiction is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action. *Hunt v. Hunt*, 72 N. Y. 217. It may be that the facts stated in the pleadings would not, when judicially weighed, be held sufficient to entitle the plaintiff to the full relief prayed. But the power to hear and determine as to the sufficiency of the facts stated as a basis is jurisdiction. An improper decision upon such facts would be merely erroneous. The decree would not be void. If, therefore, any one of the parcels upon which the plaintiff claimed a unit lien was within the county of Franklin, the territorial jurisdiction to try the question of the fact of any such lien existed. If, in the exercise of that jurisdiction, the court erred, the remedy was by appeal, or writ of error. The decree was not for that reason void.

Holding, as we do, that the presumptions favorable to the rightful exercise of jurisdiction with reference to the res have not been overcome by evidence, we pass to the question as to jurisdiction over the persons of the defendants. The questions for decision upon this branch of the case do not seem to have been expressly raised or decided by the circuit court. But inasmuch as it appears that the record was admitted by the court, subject to the objection we have already disposed of, and excluded at the conclusion of all the plaintiffs' evidence, without any specific reason being assigned, it may be assumed that, if excluded for any reason rendering the decree absolutely void, the judgment for the defendants, under instruction of the court, should not be reversed.

Banks' bill charged that Morehouse was dead, and that the names and residences of his heirs were unknown, but that they were not residents of Kentucky. It also charged that Bastrop was not an inhabitant of Kentucky, and prayed that the court "would direct a publication against the defendants, as nonresidents, as the law directs." The bill was marked as filed July 18, 1823. By an affidavit signed and sworn to by the complainant, Banks, and attached to the bill, it was averred that Bastrop was not "an inhabitant of Kentucky," and that "the heirs of Abraham Morehouse are not inhabitants of Kentucky, as he believes, and that he does not know the names or residences of said heirs." Following the bill and affidavit in the record appears what purports to be an order for publication, undated. This order is in these words:

"Commonwealth of Kentucky, Franklin County—Sct.

"Henry Banks, Complainant, v. Philip Henry Neving Tot Bastrop, or his Heirs, etc., Defendants. Chancery.

"This day the complainant, by his counsel, and the defendant, Philip Henry Neving Tot Bastrop, or his heirs, and the unknown heirs of Abraham Morehouse, dec'd, having failed to enter their appearance herein and answer the complainant's bill, and it appearing to the satisfaction of the court that the said defendants are not inhabitants of this commonwealth, therefore, on motion of the compl't, by his counsel, it is ordered that unless the defendants do enter their appearance herein on or before the first day of the next term of this court, and answer the complainant's bill, the same will be taken against them for confessed. And it is further ordered that a copy of this

order be forthwith inserted in some authorized newspaper printed in this commonwealth, for two months, successively.

"F. P. Blair, C. F. C. C."

None of the defendants appeared or defended, and on the 17th March, 1824, an order pro confesso was entered, in these words:

"The defendant having failed to answer the complainant bill, as required by law, it is therefore ordered that the same be taken for confessed, for default. And thereupon the complainant submitted the cause to the court for trial and decree."

On the day next ensuing, a final decree was rendered, which contains the following recital:

"At a court held on the 18 March, 1824, this cause came on to be argued by the counsel for complainant, and upon examination of the depositions, and it appearing to the court that an order of publication against the defendants has been duly made and filed according to law, the court doth order, adjudge, and decree," etc.

Then follows a lengthy decree upon the merits of the case.

Under any fair and reasonable construction of this recital, it must be conceded that this is to be taken as an adjudication of two facts: First, that an order of publication had been made, in pursuance of the statute; second, that due publication of that order had been made, and the evidence thereof filed. The statute then in force regulating publication for absent defendants was the Kentucky act of December 19, 1796 (1 Litt. Laws Ky. 592), as amended by the act of December 22, 1803, which repealed so much of the former act as required, in addition to newspaper publication, a publication at the door of the courthouse, and upon a Sunday, in some church or meetinghouse, during the hours of divine service, and also prescribed what should be sufficient evidence of the newspaper publication. So much of the act of 1796 as was still in force, and relevant to this controversy, prescribed that where a suit was brought in any court of chancery, concerning any "absent defendant," "the court may, on satisfactory proof to them made, that such defendant or defendants is or are out of this commonwealth, or that upon inquiry at his, her or their usual place of abode, he, she, or they could not be found, make any order similar to that which is directed to be made in cases of absent debtors, adapting the same to the nature of the case, a copy of which order shall be published in like manner as is directed in case of absent debtors, and thereupon, if the appearance of such absent defendant or defendants be not entered, the complainant may proceed in like manner as if an appearance had been entered." The other provisions of the act relate to the mode of publication for absent debtors, and prescribe that "the court shall appoint some day in the succeeding term for the absent defendant or defendants to enter his, her or their appearance to the suit," etc., "a copy of which order shall be forthwith published in the Kentucky Gazette or Herald, and continued for two months successively." By the act of 1803 it was provided "that a certificate of the printer in whose paper the said order shall have been published agreeably to the said act, that it has been so done, together with a copy of said publication, shall be deemed and held sufficient evidence of that fact."

Upon the very great weight of authority, it would seem that a judgment recital such as that found in the decree under consideration would be conclusive in a collateral attack, unless there shall be found in the record itself the evidence of the steps taken to obtain jurisdiction, and that evidence should contradict the recital. The cases are largely cited in *Freem. Judgm.*, at section 124 et seq. The cases of *Sidwell v. Worthington's Heirs*, 8 Dana, 77; *Pope v. Harrison*, 16 Lea, 82-92; and *Applegate v. Mining Co.*, 117 U. S. 269, 6 Sup. Ct. 742, are typical cases on this aspect of the question. In the case of *Sidwell v. Worthington's Heirs*, cited above, the record was offered in evidence as a link in the chain of title to one of the parties. The record was rejected by the court because the court was of opinion that there was not sufficient proof that the order of publication against the nonresident defendant therein had been published according to law. There was, however, a judgment recital in the record offered that the court had been satisfied by sufficient proof that the order of publication had been duly published according to law. Upon appeal the supreme court said:

"Although, as has been decided, the decree, as to Evans, may be deemed erroneous, on the ground that the record does not exhibit the evidence of publication, and thus show that it was legal and sufficient, yet this decree is not therefore void as to him, because the record shows the fact that there was some evidence of publication, deemed sufficient by the circuit judge, and we will not now presume that there was no regular publication."

The case of *Applegate v. Mining Co.*, heretofore cited, is peculiarly applicable, because it arose in Kentucky, and involved a construction of the same statute now under consideration. The record which had been excluded contained an order for publication, but no evidence of publication appeared, and there was no recital or finding by the court that there had been a due publication. After an elaborate review of the cases bearing upon the question, the court concludes by saying:

"The result of the authorities, and what we decide, is that where a court of general jurisdiction is authorized in a proceeding, either statutory, or at law or in equity, to bring in, by publication or other substituted service, nonresident defendants interested in, or having a lien upon, property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court orders such substituted service, it will be presumed, in favor of the jurisdiction, that service was made as ordered, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid. The case of *Galpin v. Page*, 18 Wall. 350, cited by counsel for defendants, is not in conflict with this proposition. The judgment set up, on one side, and attacked, on the other, in that case, was rendered on service by publication. The law permitted service to be made by publication only where certain facts were made to appear to the satisfaction of the court, and the court, by a precedent order, which must necessarily appear of record, authorized service to be made by publication. But the record showed no such order, and the publication, therefore, was the unauthorized act of the party, and appeared affirmatively to be invalid and ineffectual."

But it has been urged that this is not the case of a silent record; that, upon the contrary, the evidence as to the steps taken to acquire jurisdiction appears in the record; and that this evidence operates to contradict the recital in the decree, and must prevail. In *Galpin*



v. Page, 18 Wall. 366, the rule is thus stated concerning an inquiry, on collateral attack, as to the jurisdiction of the court over the persons of the defendants:

"But the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed, or the averment is made. When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point; and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer, or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appear, in like manner, that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so, it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face. The answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

In *Settlemier v. Sullivan*, 97 U. S. 444-448, Justice Field, who delivered the opinion of a majority of the court, said, as to the effect of a judgment recital of jurisdictional facts where the evidence as to the steps taken is found in the record:

"Here it is contended that the recital in the entry of the default of the defendant in the case in the state court, 'that, although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by the statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former. We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority,—that is, within the boundaries which the law assigns to it with respect to subjects and persons,—is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record gives the evidence, or makes an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

The first insistence of the defendants is that the order of publication is not dated, and that it does not, therefore, appear when that order was made, and that, if not made before publication, the publication would be nothing more than the private act of the parties, and invalid. For this position, counsel cite *Miller v. Hall*, 3 T. B. Mon. 242, 243, and *Galpin v. Page*, heretofore cited. While it is true that where it is sought to affect a defendant by constructive

notice, the plaintiff should be held to a strict compliance with the statute authorizing such publication, yet we are to give a reasonable and rational construction to the evidence relied upon to show the fact of publication. The order of publication found in the record is manifestly the copy returned into court with the certificate of the publisher, as required by statute. That certificate is statutory evidence of the fact of publication, and is to be treated as the return of an officer. *Miller v. Hall*, supra. The certificate was in these words, and is dated October 13, 1823:

"I, Jacob H. Holman, editor of the *Commentator*, a newspaper published at Frankfort, in Kentucky, hereby certify that the annexed order of court, Henry Banks against Philip Henry Neving Tot Bastrop, etc., was published ten weeks in said paper."

The "annexed order" referred to is the order we have heretofore cited, and that order is shown to have been published for 10 weeks in the official paper. It must follow that the order was made before it could have been published. There is therefore no contradiction of the recital that an order of publication "had been duly made."

The next objection is that it is not shown that the order had been published for "two months successively," as required by the order and by the statute. This objection is not well taken. It was published for "ten weeks,"—a time in excess of two months. The publication had been completed when the certificate was dated,—October 13, 1823. It could not have been begun before July 18, 1823,—the date when the bill was filed. If the order for publication was made on the day of the filing of the bill, and the last publication made on the day the certificate was filed, there would be an interval of 12 weeks. Now, of course, it is possible that the publication may have been begun, and then abandoned for one or two weeks, and again resumed. But there is no evidence which operates to contradict the judicial finding, possibly based upon a knowledge of the date of the order made, or of the first or last day of publication, that the publication had been duly made and filed. Where the evidence found in the record is not inconsistent with a recital of jurisdictional facts, the recital cannot be regarded as contradicted.

The next and last objection pressed upon us is that the order of publication is void, as not being authorized by the statute. The order recites that, "it appearing to the satisfaction of the court that the defendants are not inhabitants of this commonwealth \* \* \*." The statute provides for publication "on satisfactory proof \* \* \* that such defendant or defendants is or are out of this commonwealth," or could not be found on inquiry at his or their usual place of abode. The argument advanced is that one may not be "an inhabitant of this commonwealth," and yet be temporarily in the commonwealth, in such way as not to be "out of this commonwealth," in the sense of the statute. We think the legislative meaning of the words "out of this commonwealth" imply and embrace the case of one who is properly described as not "an inhabitant." "In law, the term 'inhabitant' is used technically with varying

meaning in respect of permanency of abode." Century Dict. To be an inhabitant does not imply the relation of the inhabitant to the commonwealth. It refers primarily to one's abode or residence for the time being. If one is not an inhabitant, it is understood that he has no abode in the place spoken of. To be "out of this commonwealth" implies, as we think, one permanently out, as a nonresident or noninhabitant, and that the act, by authorizing constructive service of notice upon one "out of this commonwealth," meant one who had neither domicile nor habitation within it. The other clause of the act, authorizing publication for one who could not be found at his "usual place of abode," was intended to cover all cases of absence of an inhabitant from his abode. The order in this case seems to have followed the usual wording of such orders, and to have been heretofore treated as a compliance with the statute. The order of publication sustained in *Applegate v. Mining Co.*, cited heretofore, was in the very terms now criticised. For the error in excluding the record offered, the judgment must be reversed, and a new trial awarded.

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NEW YORK LIFE INS. CO. v. SMITH.

(Circuit Court of Appeals, Ninth Circuit. January 21, 1895.)

No. 169.

1. PARTIES—ACTION ON LIFE INSURANCE POLICY.

In an action at law on a life insurance policy, by the administratrix of the insured, who has possession of the policy, a person who claims the policy under an alleged assignment by the insured, in his lifetime, is not an indispensable party.

2. EXECUTORS AND ADMINISTRATORS—RIGHTS OF REPRESENTATIVES APPOINTED IN DIFFERENT STATES.

An administrator of the deceased holder of a life insurance policy, appointed in the state where the policy is, and having possession of the policy, is entitled to recover the amount due thereon, as against an administrator appointed in any other state, including that in which the decedent resided at the time of his death.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action by Eudora V. Smith, administratrix with the will annexed of William F. Smith, deceased, against the New York Life Insurance Company, on a policy of insurance. The circuit court gave judgment for the plaintiff. 57 Fed. 133. Defendant brings error.

This is an action at law brought by Mrs. Eudora V. Smith, as administratrix with the will annexed of the estate of Dr. William F. Smith, deceased, to recover of and from the New York Life Insurance Company the sum of \$5,800, alleged to be due and payable on a life insurance policy which was issued and delivered to Dr. Smith on the 18th day of July, 1887. The record shows: That Dr. Smith died on April 7, 1891, at Chicago, Ill. That at the time of the issuance of the policy, and at the time of his death, he was a resident of the state of Illinois. That he left, surviving him, a widow, the defendant in error, a resident of San Francisco, Cal., and two sons,

Larz Anderson Smith, a minor, residing in San Francisco, and Paul Smith, of age, residing at Springfield, Ohio. That he had formerly resided in California. That, before leaving said state, financial and domestic difficulties had arisen between himself and wife. That, under the laws of California (section 137 of the Civil Code), she had brought an action and obtained a judgment against him in the superior court of the city and county of San Francisco for maintenance and support, upon which judgment there was due at the time of his death the sum of \$10,000. That prior to his death the policy of insurance, together with the sum of \$5,000, had been sent by him to San Francisco, in order to enable him to comply with the terms of a certain agreement which had been entered into by himself and wife, to the effect that the policy in question should be delivered to her in trust for their son Larz, and that the \$5,000 should be paid to her upon her obtaining a divorce from him. That the policy was sent to his counsel, E. L. Campbell, and the money to his agent, Jeremiah Lynch. That no action for a divorce had ever been commenced. That, after his death, Mr. Campbell delivered the policy to Mr. Lynch, and it was thereafter, by an order of the superior court of the city and county of San Francisco, delivered to Mrs. Smith, as the special administratrix of her husband's estate. That on April 4, 1891, three days prior to his death, Dr. Smith, being then indebted to one Dr. J. B. Murphy in the sum of \$3,400, made, executed, and delivered to said Murphy the following instrument, in writing:

"Chicago, April 4, 1891.

"For value received, I hereby sell, assign, and transfer to John B. Murphy all of the property, effects, choses in action, and things of value hereinafter mentioned, and all my right, title, and interest therein: A judgment note made by Morris J. Allberger for \$8,700.00 or thereabouts; a policy in the N. Y. Mutual Life Insurance Company for \$5,000.00 or thereabouts; accounts due me as shown by my books, and said books; my horse and buggy; all my stock bonds in all corporations and associations; all my library, books, instruments, office furniture, household furniture, and effects of every kind soever. And I hereby authorize said Murphy to take immediate possession thereof, or possession thereof at any time thereafter.

"Wm. F. Smith. [Seal.]"

—That this document was executed and delivered to, and was accepted by, J. B. Murphy, in payment of the indebtedness of Smith to him. That Murphy thereafter took possession of all the property therein described that was in the city of Chicago. That, after this instrument was executed, Dr. Smith made his will, wherein he bequeathed to John B. Murphy, to be first paid out of his estate, the sum of \$3,400, to his son Larz Anderson Smith the sum of \$50, to Eudora Bascom (the defendant in error), designated "as formerly my wife," \$50; and, subject to these bequests, he devised and bequeathed all of his estate to Elizabeth C. Merrill. That the party named as executor of the will declined to act, and thereafter, upon proceedings regularly had in the proper court in Cook county, Ill., letters of administration upon said estate were issued to the Jennings Trust Company, a corporation duly organized and existing under and by virtue of the laws of the state of Illinois; and that said company, under its letters of administration, made a demand upon the insurance company for payment of the amount due on the policy, which was refused; and the trust company thereupon commenced an action to recover the said amount, which action is still pending and undetermined in the circuit court of Cook county, Ill. It is claimed that said action was brought and is being prosecuted for, on behalf of, and at the request of, J. B. Murphy. The policy in question has never been paid. Judgment was rendered in favor of Mrs. Smith.

Edward J. McCutcheon and Charles A. Shurtleff, for plaintiff in error.

Henry N. Clement, for defendant in error.

Before GILBERT, Circuit Judge, and HAWLEY and MORROW, District Judges.

HAWLEY, District Judge (after stating the facts). The position and contention of the plaintiff in error is somewhat novel and peculiar. It admits its liability on the policy, but denies the right of the defendant in error to recover, unless Dr. Murphy is made a party to the action, on the ground that, unless he is made a party, it is liable to be twice compelled to pay the policy. Instead of paying the money due on the policy into court, and having notices served on all parties claiming the money or any part thereof, and asking that such parties be compelled to appear and present their claims, so that the court may decide their respective rights, it assumes the position of a partisan as between the respective claimants; and in its answer, as a defense to this action, alleges, after stating the facts as to the assignment of the policy, "that the said John B. Murphy is the owner of said policy and is entitled to the money due thereon; \* \* \* that the plaintiff is not the real party in interest in this action"; and prays for judgment for its costs.

It is earnestly argued by the plaintiff in error that J. B. Murphy is an indispensable party as a defendant, and that this action cannot be maintained without his being made a party, and that, in the event that he could not be brought within the jurisdiction of the court, the action should be dismissed. Ergo, if this position is sound, the same objection could be made to any action brought by Murphy, and the insurance company would go Scot-free, and obtain a judgment in both cases for its costs. Nevertheless, if the law casts upon the defendant in error the burden of procuring the presence of Murphy, it would be her misfortune if she has not or could not do so. We are of opinion that the law imposes upon her no such burden. For the sake of the argument, it may be admitted that, if this was a suit in equity to determine the rights of the respective claimants, it could not be maintained without bringing them all before the court. It may likewise be admitted that, if Dr. Murphy had made any application, he would have been granted the right to intervene and assert his rights, if any he had, to any portion of the money due upon the policy, and that in either of these events the respective rights of Mrs. Smith and of Dr. Murphy might have been heard, litigated, and determined herein.

This is not, however, a suit in equity. It is simply an action at law to recover the amount due on a policy of insurance. There is an essential difference between the practice at law and in equity in determining who are proper and necessary parties to the litigation. *Mahr v. Society*, 127 N. Y. 460, 462, 28 N. E. 391; 1 Pom. Eq. Jur. 114; *Fost. Fed. Prac.* § 4. Under the pleadings, the insurance company took upon itself the burden of proving that Dr. Murphy had the legal right to recover from it the amount of money due upon the policy, but the evidence fails to establish such right. It is not shown that the policy of insurance was ever delivered to him; that he ever made any demand for its delivery; that he ever made any demand upon the insurance company for the payment of the money due upon said policy; that he ever brought any suit to recover the money, or took any legal steps whatever to assert any

right to the policy or any part of the money due thereon. It affirmatively appears that the time within which actions could be commenced against the insurance company, under the terms and conditions of the policy, has long since expired. The policy was an executory contract,—a chose in action,—available only as a legal contract to Dr. Smith and his personal representatives. The sale or assignment thereof, as made by Dr. Smith, did not vest any such interest therein in Murphy, either legal or equitable, as would authorize him to bring and maintain an action thereon against the insurance company. To constitute such an assignment, "two things must concur: First, the party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation in which the chose in action consists, and, as far as practicable, place the assignee in the condition of the assignor, so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable." *Palmer v. Merrill*, 6 Cush. 286. See, also, *Holyoke v. Insurance Co.*, 22 Hun, 77; 2 May, Ins. § 389. Under the decisions of the supreme court in the state of Illinois, it is evident that Murphy could not bring an action there in his own name.

In *Insurance Co. v. Ludwig*, 103 Ill. 312, the court said:

"Policies of insurance are but choses in action, and governed by the same principles applicable to choses in action in general. They are assignable in equity only; and, in this state and in others where the strict rules of the common law prevail, courts of law will not recognize the assignment, so as to allow the assignee to sue on the policy in his own name. *Insurance Co. v. Wetmore*, 32 Ill. 221; *Insurance Co. v. Hervey*, 34 Ill. 62; *Insurance Co. v. Robinson*, 98 Ill. 324; *Bliss, Ins. § 325*; *May, Ins. § 377*; *Jessel v. Insurance Co.*, 3 Hill, 88."

The policy is personal property, and was in the state of California. The issuance of letters of administration to Mrs. Smith in California was legal. She had the possession of the policy, and was entitled to recover the money due thereon. The law is well settled that the administratrix in California, as against the Jennings Trust Company or any other administrator in any other state, is entitled to recover the money from the insurance company. *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364; *Holyoke v. Insurance Co.*, supra; *Morrisson v. Insurance Co.*, 57 Hun, 99, 10 N. Y. Supp. 445; *Stevens v. Gaylord*, 11 Mass. 262.

The views already expressed are deemed conclusive of this case, and render it unnecessary to review other assignments of error that appear in the record. Upon the facts, we are of opinion that the defendant in error is clearly entitled to the judgment which she obtained against the plaintiff in error. The judgment of the circuit court is affirmed, with costs.

## UNITED STATES v. CASSIDY et al.

(District Court, N. D. California. April 1 and 2, 1895.)

No. 3059.

## 1. CONSPIRACY TO COMMIT OFFENSES AGAINST THE UNITED STATES—REV. ST. § 5440.

The statute relating to conspiracies to commit offenses against the United States (Rev. St. § 5440) contains three elements, which are necessary to constitute the offense. These are: (1) The act of two or more persons conspiring together; (2) to commit any offense against the United States; (3) the overt act, or the element of one or more of such parties doing any act to effect the object of the conspiracy.

## 2. SAME—CONSPIRACY DEFINED.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. *Pettibone v. U. S.*, 13 Sup. Ct. 542, 148 U. S. 203, cited.

## 3. SAME—MANNER OF CONSPIRING.

The common design is the essence of the charge; but it is not necessary that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or the means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a common and unlawful design.

## 4. SAME—PARTIES TO CONSPIRACY.

Where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part any one was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators.

## 5. SAME.

Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. *U. S. v. Babcock*, Fed. Cas. No. 14,487, 3 Dill. 586, cited.

## 6. SAME—EVIDENCE—ACTS OF ONE PARTY.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of them, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the conspiracy.

## 7. SAME—DECLARATIONS BY PARTIES.

Any declaration made by one of the parties, during the pendency of the illegal enterprise, is not only evidence against himself, but against all the other conspirators, who, when the combination is proved, are as much responsible for such declarations, and the acts to which they relate, as if made and committed by themselves. This rule applies to the declaration of a co-conspirator, although he may not himself be under prosecution.

## 8. SAME—CONSPIRACY AS DISTINCT OFFENSE.

The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy to commit crime requires an additional restraint to those provided for the commission of the crime itself. It therefore makes criminal the conspiracy itself, with penalties and punishments dis-

ting from those it attaches to the crime which may be the object of the conspiracy.

9. SAME—MEANS CONTEMPLATED—ALLEGATIONS AND PROOFS.

It is not incumbent upon the prosecution to prove that all the means set out in the indictment were in fact agreed upon to carry out the conspiracy, or that any of them were actually used or put in operation. It is sufficient if it be shown that one or more of the means described in the indictment were to be used to execute that purpose.

10. SAME—OVERT ACTS.

While at common law it was not necessary to aver or prove an overt act in furtherance of a conspiracy, yet, under the statute relating to conspiracies to commit an offense against the United States, the doing of some act in pursuance of the conspiracy is made an ingredient of the crime, and must be established as a necessary element thereof, although the act may not be in itself criminal. *U. S. v. Thompson*, 31 Fed. 331, 12 Sawy. 155, cited.

11. SAME.

It is not necessary, however, to a verdict of guilty, that the jury should find that each and every one of the overt acts charged in the indictment was in fact committed; but it is sufficient to show that one or more of these acts was committed, and that it was done in furtherance of the conspiracy.

12. OBSTRUCTING THE MAILS—REV. ST. § 3995.

Although the law, which now appears in Rev. St. § 3995, and which makes it an offense to obstruct and retard the passage of the United States mails, was originally passed prior to the introduction into the United States of the method of transporting mail by railroads, and the phraseology of the law conforms to conditions prevailing at that time (March 3, 1825), yet it is equally applicable to the modern system of conveyance, and protects alike the transportation of the mail by the "limited express" and by the old-fashioned stagecoach.

13. SAME.

The statute applies to all persons who "knowingly and willfully" obstruct and retard the passage of the mails or the carrier carrying the same; that is, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the mail, and who perform the acts with the intent that such shall be their operation. *U. S. v. Kirby*, 7 Wall. 485, cited.

14. SAME.

The statute also applies to persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, an intent to obstruct and retard the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S. v. Kirby*, 7 Wall. 485, cited.

15. SAME—MAIL TRAINS.

A mail train is a train as usually and regularly made up, including not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such train, as a mail train, would include the Pullman car as a part of its regular make up. Therefore, if such a train is obstructed or retarded because it draws a Pullman car, it is no defense that the parties so delaying it were willing that the mail should proceed if the Pullman car were left behind. *U. S. v. Clark*, Fed. Cas. No. 14,805, 23 Int. Rev. Rec. 306, followed.

16. SAME.

Any train which is carrying mail, under the sanction of the postal authorities, is a mail train, in the eye of the law.

17. SAME—INTENT.

It is not necessary that defendants should be shown to have had knowledge that the mails were on board of a train which they have detained and disabled. On the contrary, they are chargeable with an



intent to do whatever is the reasonable and natural consequence of their acts; and as the laws make all railways postal routes of the United States, and it is within every one's knowledge that a large portion of the passenger trains carry mail, it is to be presumed that any person obstructing one of those trains contemplates, among other intents, the obstruction of the mail. *U. S. v. Debs*, 65 Fed. 211, followed.

18. COMBINATIONS TO OBSTRUCT INTERSTATE COMMERCE—ACT JULY 2, 1890.

The word "commerce," as used in the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, and in the constitution of the United States, has a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.

19. SAME.

While the primary object of the statute was doubtless to prevent the destruction of legitimate and healthy competition in interstate commerce, by the engrossing and monopolizing of the markets for commodities, yet its provisions are broad enough to reach a combination or conspiracy that will interrupt the transportation of such commodities and persons from one state to another. *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995, cited.

20. SAME—PULLMAN CARS.

Pullman cars in use upon railroads are instrumentalities of "commerce." *U. S. v. Debs*, 64 Fed. 763, cited.

21. CONSPIRACIES—COMBINATIONS OF RAILROAD EMPLOYEES — UNIONS AND PROTECTIVE ASSOCIATIONS—STRIKES.

The employes of railway companies have a right to organize for mutual benefit and protection, and for the purpose of securing the highest wages and the best conditions they can command. They may appoint officers, who shall advise them as to the course to be taken in their relations with their employer, and they may, if they choose, repose in their officers authority to order them, or any of them, on pain of expulsion from their union, peaceably to leave the employment because the terms thereof are unsatisfactory. But it is unlawful for them to combine and quit work for the purpose of compelling their employer to withdraw from his relations with a third party, for the purpose of injuring that third party. *Thomas v. Railway Co.*, 62 Fed. 817, followed.

22. SAME.

A strike, or a preconcerted quitting of work, by a combination of railroad employes, is, in itself, unlawful, if the concerted action is knowingly and willfully directed by the parties to it for the purpose of obstructing and retarding the passage of the mails, or in restraint of trade and commerce among the states.

23. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt is one arising out of the evidence; not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon or decline to act upon when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based upon the evidence or want of evidence.

24. SAME—PROVINCE OF JURY—CREDIBILITY OF WITNESSES.

The jury are the exclusive judges of the credibility of the witnesses. A witness is presumed to speak the truth, but this presumption may be repelled by the manner in which he testifies, by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives, and by contrary evidence. But the power of the jury to judge of the effect of evidence is not arbitrary; it must be exercised with legal discretion, and in subordination to the rules of evidence.

This was an indictment against John Cassidy, John Mayne, and others, under Rev. St. § 5440, for conspiracy to commit offenses against the United States, namely, the offense of obstructing the

mails of the United States, and the offense of combining and conspiring to restrain trade and commerce between the states of the Union and with foreign countries. The prosecutions grew out of the great Pullman strike, which occurred during June and July, 1894, and which was mainly supported and carried on through the organization known as the "American Railway Union." The charge delivered by Judge MORROW in this case is believed to be the longest ever delivered in a criminal case in this country, and only exceeded in any case by the charge of Lord Chief Justice Cockburn in the Tichborne Case. While only two of the defendants were tried, the case was treated as a test case, both by the government and by the strikers, and it involved, as a practical result, the disposition of some 132 other cases. Most of the defendants were recognized leaders of the strike in California. The character of the charge—conspiracy to retard the United States mails and restrain interstate commerce—brought up the entire strike, so far as the Pacific coast was concerned. Two hundred and sixteen witnesses were examined, and the trial occupied five months, beginning November 12, 1894, and ending April 6, 1895. The testimony covered nearly 6,000 pages of typewritten matter, and was practically a record of all the incidents relating to the strike. The charge was delivered on April 1 and 2, 1895.

H. S. Foote, Special Asst. U. S. Atty., and Samuel Knight, Asst. U. S. Dist. Atty.

Geo. W. Monteith, for defendants.

MORROW, District Judge (charging jury). Gentlemen of the Jury: I congratulate you on the approaching termination of this case. For five months you have been required to give your constant, and, I might say, exclusive, attention to the daily proceedings in this court. The trial of the case has been protracted, but I am not prepared to say that any greater time has been occupied than was necessary, under the circumstances, to secure the testimony of the 216 witnesses who have appeared before you upon the stand. The nature of the charges against the defendants now on trial, covering, as they do, the whole field of the railroad strike of last summer in this district, necessarily involves the closest scrutiny into every feature of that affair. In this examination you have displayed a patient interest of such a commendable character as to call for the special acknowledgment of the court. You are, indeed, entitled to the gratitude of every good citizen of the community for the sacrifices you are making, and for the service you are rendering in the faithful performance of a public duty.

In submitting the case to your consideration, it becomes my duty to call your attention to the character of the charges against the defendants, and the provisions of law under which the prosecution is being conducted. It is the duty of the court to declare the law; it is your exclusive province and responsibility to apply the law so declared to the facts as you, upon your conscience, believe them to be established.

The indictment contains two counts, which, in general terms, charge that the defendants conspired, combined, and agreed together, and with divers other persons, to obstruct and retard the passage of the United States mails, and the carrier carrying the same, and also that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States, and with foreign countries. The crime of conspiracy is based upon section 5440 of the Revised Statutes of the United States, which provides as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment, in the discretion of the court."

To make this statute as clear to you as possible, I will call your attention to its three essential provisions. The first element is the act of two or more persons conspiring together; the second is to commit any offense against the United States; and the third is what is termed the "overt act," or the element of one or more of such parties doing any act to effect the object of the conspiracy. With respect to the first element, we find that a conspiracy has been described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself unlawful or criminal, by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 203, 13 Sup. Ct. 542. The common design is the essence of the charge, and while it is necessary, in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. A combination formed by two or more persons, to effect an unlawful end, is a conspiracy, said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. *U. S. v. Babcock*, 3 Dill. 586, Fed. Cas. No. 14,487. Furthermore, where several persons are proved to have combined together for the same

illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy. It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proved, are as much responsible for such declarations and the acts to which they relate as if made and committed by themselves. This rule, you will understand, applies to the declaration of a co-conspirator, although he may not be under prosecution, his declaration being equally admissible with those of one under indictment and prosecution.

The confederacy to commit an offense is the gist of the criminality under the law. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederacy of two or more persons, to commit crime, requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments distinctive from those prescribed for the crime which may be the object of the conspiracy. You will readily understand why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionately demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong.

The second essential element in the offense described by the statute is the purpose of the conspirators to commit an offense against the United States. The indictment charges that the defendants conspired with others to commit two offenses against the United States,—one to obstruct and retard the passage of the United States mail and the carrier carrying the same; and the other, that they engaged in a combination and conspiracy in restraint of trade and commerce among the several states of the United States and with foreign countries. The first charge is based upon the provisions of section 3995 of the Revised Statutes, which provides as follows:

"Any person who shall knowingly and willfully obstruct and retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars."

This section of the Revised Statutes was originally section 9 of the act of March 3, 1825 (4 Stat. 104), and, having been passed prior to the introduction into the United States of the method of transporting mail by railroads, the phraseology of the law conformed to the conditions prevailing at that time, but it is equally applicable to the modern system of conveyance, and protects alike the transportation of the mail by the "limited express," as it does the carriage by the old-fashioned stagecoach. There are, however, certain

provisions of law directed specifically to the transportation of the mail by railroad trains, to which I desire to call your attention.

Section 3964 of the Revised Statutes provides as follows:

"The following are established post-roads: \* \* \* All railroads or parts of railroads which are now or hereafter may be in operation."

Section 3, Act March 3, 1879 (20 Stat. 358), provides "that the postmaster general shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed." Section 4000 of the Revised Statutes provides that:

"Every railway company carrying the mail shall carry on any train which may run over its road, and without extra charge therefor, allailable matter directed to be carried thereon, with the person in charge of the same."

There is still another provision of law applicable to the transportation of mails on the Pacific railroads, which is as follows:

"That the grants aforesaid are made upon the condition that said company shall \* \* \* transport mails \* \* \* upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service), and all compensation for services rendered to the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." Act July 1, 1862, to aid in construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, § 6 (12 Stat. 493).

Recurring, now, to section 3995 of the Revised Statutes, making it an offense to obstruct and retard the passage of the mails, and you will observe that the statute applies to those persons who "knowingly and willfully" obstruct and retard the passage of the mails, or the carrier carrying the same; that is to say, to those who know that the acts performed, however innocent they may otherwise be, will have the effect of obstructing and retarding the passage of the mail, and they perform the acts with the intention that such shall be their operation. *U. S. v. Kirby*, 7 Wall. 485. "It would be no defense under this statute," said an eminent judge in a recent case, "that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment." *Thomas v. Railway Co.*, 62 Fed. 822.

The statute also applies to those persons who, having in view the accomplishment of other purposes, perform unlawful acts, which have the effect of obstructing and retarding the passage of the mails. In such case, the intention to obstruct and retard the passage of the mails will be imputed to the authors of the unlawful act, although the attainment of other ends may have been their primary object. *U. S. v. Kirby*, *supra*.

The second offense, which, it is charged in the indictment, was the object of the conspiracy, was to restrain trade and commerce among the several states and with foreign nations. This offense is described in an act of congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890 (26 Stat. 209), which provides as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile v. Kimball*, 102 U. S. 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. Pullman cars in use upon the roads are instrumentalities of commerce. *U. S. v. Debs*, 64 Fed. 763. The primary object of the statute was, undoubtedly, to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S. v. Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities and persons from one state to another. *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995, 1000.

We come, now, to consider the third element involved in the crime of conspiracy, as it is declared in the statute under consideration; that is to say, the overt act, or the element of one or more of the parties to the conspiracy doing any act to effect its object. At common law, it was neither necessary to aver nor to prove an overt act in furtherance of a conspiracy. *Bannon v. U. S.*, 15 Sup. Ct. 467. The offense was complete when the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. It was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. *U. S. v. Walsh*, 5 Dill. 58, Fed. Cas. No. 16,636. But, under the statute of the United States now under consideration, the doing of some act in pursuance of a conspiracy is an ingredient of the crime, and must be established as a necessary element of the offense, although the act need not be in itself criminal or amount to a crime. *U. S. v. Thompson*, 12 Sawy. 155, 31 Fed. 331.

With this general statement and explanation of the statute involved in this case, I will proceed to consider the allegations in the indictment, which, as I said before, contains two counts.

The first count charges that the defendants conspired both to obstruct and retard the passage of United States mails, and to unlawfully engage in a combination and conspiracy in restraint of trade and commerce, while the second count charges a conspiracy in re-

straint of trade and commerce alone. Otherwise, both counts are, in substance and form, identical. In general terms, the two counts charge: (1) Formation of the conspiracy; (2) legal corporate existence of the Southern Pacific Company, and its means, manner, and methods of transporting the mails and interstate commerce; (3) means conspired to be used in effecting the object of the conspiracy; (4) overt act charged; (5) concluding with an allegation of unlawful intent.

Bearing these general features of the indictment in mind, you will now be able to understand the meaning of the various allegations of the indictment, as I proceed to refer to them somewhat more in detail.

**Taking up the first count:** The formation of the conspiracy is alleged, and it is charged that John Cassidy, John Mayne, Fred Clarke, and James Rice, with divers others, names unknown, did conspire to obstruct and retard the passage of the mails of the United States, and to restrain trade and commerce among the several states and with foreign nations. (2) The legal corporate existence of the Southern Pacific Company, and its means, manner, and method of carrying the mails and interstate commerce, are set out. It is averred that the Southern Pacific Company was a railroad corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, express matter, and other commodities, comprising and constituting trade and commerce, within the meaning of the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies, approved July 2, 1890." The lines of railroad over which it carried on its mail and interstate commerce; the manner and means employed and necessary to its doing so, viz. yards, depots, tracks, trains of cars, and other equipment suitable for the transportation of the United States mails, passengers, freight, and express matter, and other commodities,—are also set out. (3) Then follow the means conspired to be used in effecting the object of the conspiracy. These are, briefly: First. By forcibly taking and keeping possession and control of all yards, depots, tracks, and trains of cars upon said lines of railway, and by forcibly holding and detaining the same. Second. By causing to be assembled, and assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places upon said lines of railway, in said state and Northern district of California, to wit: 1. At the city and county of San Francisco. 2. City of Sacramento. 3. City of Oakland. 4. City of San José. 5. City of Stockton. 6. Town of Red Bluff. 7. Town of Dunsmuir, county of Siskiyou. 8. City of Vallejo, county of Solano. 9. Town of Lathrop, county of San Joaquin. 10. Town of Palo Alto, county of Santa Clara. By gathering in great numbers in said yards and depots, and other places, around, in, and upon the trains, cars, and engines of the said Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains. Third. By threats, intimidation, personal assaults, and other force and violence, to prevent the engineers, firemen, conduct-

ors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating said engines, trains, and railways. Fourth. By forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight. Fifth. By putting out the fires in the engines drawing the same. Sixth. By throwing switches, in order to prevent the passage of such trains through depots and stations. Seventh. By opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railway cars were situated. Eighth. By burning and destroying bridges, trestles, and culverts, over which such trains necessarily and usually would pass. Ninth. By loosening, removing, and displacing the rails of the tracks of said railroads. Tenth. By greasing the rails of the said tracks. Eleventh. By stopping trains upon railway crossings and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches. Twelfth. By compelling the employés of said railroad company to leave their trains, shops, and the work of said company, while in the performance of their duty. Thirteenth. By using all such other forcible means as to them should seem expedient to prevent, for an indefinite period, the use of the said railways for the transportation of the mails of the United States and interstate commerce.

It will be well to observe, at this point, that the indictment does not charge that the defendants did, in fact, use or put in operation the means herein set out, in effecting the object of the conspiracy; the charge is that such were the means conspired to be used for that purpose. Now, when you come to consider the testimony, you will probably find that some of it tends to show that certain persons did, in fact, use such means to prevent the movement of railway trains. This testimony was admitted, not to prove that such acts had been committed, but because of the relevancy of such testimony to the charge in the indictment,—that such means were to be used in effecting the object of the conspiracy. In other words, it tends to show that a conspiracy was formed to obstruct and retard the passage of the United States mails, and to restrain trade and commerce among the several states and with foreign nations, and that such means were to be used to carry the conspiracy into effect.

This brings us to a feature of this charge of conspiracy which you will bear in mind. It is not incumbent upon the prosecution to prove that all of the means set out in the indictment were, in fact, agreed upon to carry out the conspiracy, or that any of them were actually used or put into operation. It will be sufficient if it be established to your satisfaction, and beyond a reasonable doubt, that one or more of the means described in the indictment were to be used to execute that purpose.

After stating the means by which the conspiracy was to be effected, the indictment then sets out the overt acts; that is to say, it charges the doing of certain acts to effect the object of the conspiracy. They are as follows: That on the 6th day of July, 1894, the defendants, at Palo Alto, (1) forcibly took possession and control of the yards, depots, buildings, tracks, engines, and cars, and other appliances and



property, of the Southern Pacific Company: 1. By causing to be assembled, and assembling with, a large crowd of persons in said depots, buildings, and yards of the Southern Pacific Company; and by gathering with said crowds of persons in said depots, buildings, and yards, around, in, and upon the aforesaid trains, cars, and engines, and upon the tracks of the railways. 2. By threats, intimidations, personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employés of said company having charge of said depot, buildings, and other property, etc. It is further charged (2) that, on the 6th day of July, 1894, said defendants, at Palo Alto, forcibly and violently prevented the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto: 1. By gathering in crowds, etc. 2. By placing physical obstructions upon said track. 3. By displacing the switches. 4. By forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employés, while engaged as aforesaid. 5. By uncoupling the cars of said trains and disconnecting the same. 6. By removing said cars from said tracks. 7. By withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein. 8. By displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails. 9. By other violent, forcible, and unlawful acts and means to the grand jurors unknown. It is further charged (3) that said defendants, at the time and place above indicated, unlawfully, forcibly, and violently occupied and held possession and control of said yards, depots, tracks, engines, trains of cars, and other appliances and property of the Southern Pacific Company, by the means aforesaid, and by said means excluded the Southern Pacific Company and its employés from the possession, use, and control thereof, and by said means prevented the movement of said trains from and including July 6 to and including July 10, 1894.

The same observation, which I have just made to you with respect to the establishing of one or more of the means alleged to have been concocted and conspired to be used, is applicable to the overt acts charged. It is not necessary to a verdict of guilty that you should find that each and every one of the overt acts charged have, in fact, been committed. If you are satisfied beyond a reasonable doubt that one or more of these overt acts have been committed, and that they were done in furtherance of the conspiracy alleged to have been entered into by and between these defendants, and to carry out or effectuate in some way the object of the conspiracy, that is all that the law requires. The indictment concludes with allegations of intent, viz.: That the defendants, by the acts and means aforesaid, knowingly and willfully obstructed and retarded the passage of the mails and the carrier carrying the same, and restrained interstate commerce from the 6th of July to and including the 10th day of July, 1894, at Palo Alto. The second count, as stated above, is confined to charging a conspiracy to restrain trade and commerce

alone; otherwise it is identical in form and substance with the count just elaborated upon.

Having directed your attention to the different provisions of law involved in the charges against these defendants, and having also stated to you, in brief terms, the several allegations of the indictment, you are now prepared to consider the testimony in the case in its proper light, for the purpose of determining the guilt or innocence of the defendants; but in referring to the testimony you will distinctly understand that you are the exclusive judges of the facts, and that it is not my province or purpose to intrude upon your jurisdiction in any particular or to any degree. If, in any of my rulings during the progress of this trial, I have appeared to indicate that any controverted fact has been established, or if I now assume or appear to consider or treat any fact as proved, unless it may be an admitted fact, you will disregard such assumption, and act entirely upon your own judgment and conscience in determining the facts of the case.

From what has been stated, it will appear to you that you are brought to the consideration of three questions which may be properly suggested to you as a guide for your deliberation: (1) Has the government proved the existence of a conspiracy alleged in the indictment? (2) If it did exist, were any of the alleged acts performed by one or more of the parties to the conspiracy? (3) If such a conspiracy existed, were the defendants parties to it?

Taking these questions in their order, you will first consider whether the conspiracy charged in the indictment has been established.

#### General Conspiracy.

This is the important question in this case, and is a question of fact for you to determine, subject to such rules of law as the court will give you to assist you in arriving at a correct conclusion. The evidence on this point is largely circumstantial, and involves a consideration of the acts of members of the American Railway Union; the course and methods of the association in boycotting the Pullman cars, and subsequently declaring a strike against the Southern Pacific Company; and, generally, the attitude and conduct of the strikers and those acting with them during the time the strike was in operation.

#### American Railway Union.

The evidence tends to show that the American Railway Union is a fraternal organization, composed of railroad employes below a certain grade. The headquarters of the association are located at Chicago, Ill. In June and July last Eugene V. Debs was its president; Geo. W. Howard, vice president; and Sylvester Keliher, secretary. The union is divided up into local unions. In the constitution of the order, introduced in evidence, the principles and purposes, so far as they are pertinent to this feature of the case, are stated as follows:

"It is a self-evident truth that 'in union there is strength,' and, conversely, without union weakness prevails; therefore the central benefit to be derived from organization is strength,—power to accomplish that which defies indi-

vidual effort. The American Railway Union includes all railway employes, born of white parents, organized within one great brotherhood. There is one supreme law for the order, one roof to shelter all, and all united when unity of action is required. The reforms sought to be inaugurated and the benefits to be derived therefrom, briefly stated, are as follows:

"First. The protection of members in all matters relating to wages and their rights as employes is the principal purpose of the organization. Railway employes are entitled to a voice in fixing wages and in determining conditions of employment. Fair wages and proper treatment must be the return for efficient service, faithfully performed. Such a policy insures harmonious relations and satisfactory results. The order, while pledged to conservative methods, will protect the humblest of its members in every right he can justly claim; but, while the rights of members will be sacredly guarded, no intemperate demand or unreasonable propositions will be entertained. Corporations will not be permitted to treat the organization better than the organization will treat them. A high sense of honor must be the animating spirit, and even-handed justice the end sought to be attained. Thoroughly organized in every department, with a due regard for the right wherever found, it is confidently believed that all differences may be satisfactorily adjusted; that harmonious relations may be established and maintained; that the service may be incalculably improved; and that the necessity for strike and lockout, boycott and black-list, alike disastrous to employer and employe, and a perpetual menace to the welfare of the public, will forever disappear.

"Second. In every department of labor, the question of economy is forced to the front by the logic of necessity. The importance of organization is conceded, but, if it costs more than a workman is able to pay, the benefits to accrue, however great, are barred. Therefore, to bring the expenses of the organization within the reach of all is the one thing required,—a primary question which must be settled before those who stand most in need can participate in the benefits to be derived; hence to reduce the cost to the lowest practical point is a demand strictly in accord with the fundamental principles of economy, and any movement which makes it possible for all to participate in the benefit ought to meet with popular favor.

Third. The organization will have a number of departments, each of which will be designed to promote the welfare of the membership in a practical way and by practical methods. The best thought of workmen has long sought to solve a problem of making labor organizations protective, not only against sickness, disability, and death, but against the ills consequent upon idleness and those that follow in its train. Hence there will be established an employment department, in which it is proposed to register the name of every member out of employment. The department will also be fully informed where work may be obtained. It is doubtful if a more important feature could be suggested. It evidences fraternal regard without a fee, benevolence without alloy."

Section 54 of the constitution of the American Railway Union (entitled "Laws of Protection") provides for what is called a "board of mediation," and defines its powers. It is as follows:

"The board of mediation of each local union shall elect a chairman. The chairman of the local board of mediation shall be a member of the general board of mediation of the system or line on which they are employed. The general board of mediation shall elect a chairman and secretary. The general board of mediation shall meet on the second Tuesday of September of each year at the headquarters of the road on which they are employed, for the transaction of such business that may emanate from the local board of mediation. All complaints and adjustments of a general character shall be handled by the general board of mediation. All complaints and adjustments must be taken up first by the local union; if accepted by a majority vote, it shall be referred to the local board of mediation for adjustment; and, if failing, the case shall be submitted to the chairman of the general board of mediation; failing in which, they shall notify the president of the general union, who shall authorize the most available member of the board

of directors to visit and meet with the general chairman of the board of mediation, and issue such instructions as will be promulgated by the directors."

The right of employes of railway companies to organize in this way for their own benefit and protection is not questioned. They are entitled to the highest wages and the best conditions they can command, and they may organize an association or union for that purpose. There is no controversy on this point. It is a benefit to them, and it is not prejudicial to the interests of the public, that they should unite in their common interests and combine for such lawful purposes. In *Thomas v. Railway Co.*, 62 Fed. 817, Judge Taft, in the circuit court of the United States for the Southern district of Ohio, speaking of the relation of railway employes to the American Railway Union, says:

"If they (the employes) stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, they may order them, upon pain of expulsion from their union, peaceably to leave the employ of their employer, because any of the terms of their employment are unsatisfactory."

This is clearly the law; but there is a just and reasonable limitation to the power and privilege of railway employes, even under the protection of such an organization. They are not entitled to interfere with the rights and property of others, and by force and intimidation compel a carrier of United States mails or of interstate commerce to suspend the operations of such necessary and lawful business; or, to state the proposition a little more exactly, they have no privilege or right to violate a law of the United States.

Now, with respect to the general charge of conspiracy contained in this indictment, I will direct your attention to some of the testimony which the government claims tends to establish that element of the case.

#### Time When the Boycott Took Effect.

It is admitted that in the latter part of June, 1894, a convention of the American Railway Union, assembled at Chicago, resolved to boycott the Pullman Company; this boycott to take effect in five days, should the difficulties existing between that company and its employes not be settled at the expiration of that period. On June 26, 1894, the president of the general union sent the following telegram, which was received by the American Union Lodge, known as "Local Union No. 310," having its headquarters in Oakland: "Pullman boycott in effect to-day noon, by order of convention." The telegram was signed by E. V. Debs, the president of the union. G. D. Bishop, secretary of local union No. 310, at Oakland, identifies

this telegram. The boycott was therefore declared at noon of June 26, 1894, which fell on a Tuesday.

Mr. Knox, who was an employé of the Southern Pacific Company at Sacramento, and a member of the American Railway Union at that place, being called as a witness for the defense, testified that he was chairman of the mediation committee; that the duties of the committee were to settle the differences between the employés and the corporation. He relates the circumstances connected with the commencement of the boycott, as follows:

"On the 26th of June we were asked to boycott the Pullman cars, and the union took action on it, and the mediation committee were ordered to call at Mr. Wright's office,—this was about 11:20 at night,—and notify him of the action of the union. Mr. Knox, Mr. Compton, and Mr. Mullen composed the mediation committee. We went down, and saw Mr. Wright, and told him what action the union had taken, and went back and reported again to the union. We were authorized then to lay off from our work, and to attend to this boycott; to notify the members, and the like. I went down and asked Mr. Halloran for leave of absence until the trouble was over with, and it was granted me. I was laying off at the time of the strike. Obtained leave of absence about two o'clock or 2:30 in the morning of the 27th of June. The object of the boycott was this: That the American Railway Union had a big lodge at Pullman, Illinois. The Pullman Company had reduced the wages of their employés so that they could hardly live. \* \* \* Received a message from President Debs, asking us to boycott the Pullman cars, and the mediation committee went down to the depot after the meeting. We ordered the boycott. We decided to boycott Pullman cars. We were notified to go down and tell Mr. Wright of the action of the union, which we did. Then we reported back to the union again, and told them what Mr. Wright said, and, after that, the meeting was adjourned, and we went from there to the depot to carry out our instructions. We were given full power to act in the matter. When we got to the depot, or shortly after we arrived there, Mr. Halloran, the yardmaster, and Mr. Small, and several of the officials, showed up around there, and wanted to know what the trouble was. Mr. Halloran called me off to one side, and asked me, as a favor, not to ask the men to boycott the Pullmans on 2, 4, and 16. He said that if we did not wish to handle the Pullman cars, if we would agree not to call him a scab, he would switch the cars. After consulting with the balance of the mediation committee, it was decided to let the Pullman cars on 2, 4, and 16 go through to their destinations without boycotting them. We told him we would switch the cars instead of him. We did not ask him to do any work. On the morning of the 27th, about 8:30, I went through the shops,—there were a great many shopmen belonging to our union,—to see what action they had taken in reference to working on Pullman cars. I found a great many of the men idle. They were not working on the Pullman cars. We told them to go and complete their work; to never mind boycotting the work; to keep on with it. \* \* \* After going through the shops, and notifying the men to keep on with their Pullman work, we then went back to the depot. There was a train due to leave there at 10:25 in the morning, known as 'No. 84.' She has a Pullman car off of No. 2, that comes from Chicago, and another one to put on there at Sacramento. There is a first-class car put on at Sacramento. The other is a tourist car. The one that came through from Sacramento was loaded and the other one was empty. We asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. We thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. Mr. Halloran then came to us, and said he would take the engine and go to couple on, and we should come up and ask him not to couple on, and tell him we did not want him to scab on us, and he would not couple on. With that understanding he took the engine, and went around on the track where the Pullman car was, and started to couple on. We went over, and told him we did not like to have the yardmaster

scabbing on us; it did not look well. He said, 'Of course, I will have to yield,' and he went up to the office, and asked us if we would go with him. We went with him. Mr. Jones asked him if he could not get some one else to put on the Pullman cars. He said, 'No; they are all A. R. U. men.' Mr. Jones said, 'Cannot you hire some one else?' He said, 'No; they are all A. R. U. men.' That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office, and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. They refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be no parties to holding the mail. He refused. We went to him, and asked him if he would not let this other Pullman car go on 104, because the passengers were very anxious to get through. He said they would, and they switched the loaded tourist car off of 84, and put it on 104. That is about all that happened on the 27th.

\* \* \* That train was made up at Sacramento. It runs between Sacramento and Oakland, by Tracy, and around that way. The Pullman cars go to Los Angeles. They carry the Pullmans down to Lathrop, and then they go to Los Angeles. The balance of the train comes into Oakland. It starts from Sacramento. The Pullman car, though, that goes through, that comes from Chicago,—that loaded one,—the tourist car. They sent it out on another train at night, 5:30. '104' it is called. Sent it out in the evening,—on the same day. There was nothing left of that train, then, except the mail, baggage, express, and passenger cars. There was no one in the passenger cars. They went off on the next train,—the passengers; the through passengers from Chicago that went on the next train. There were a good many of the local that went on the next train, too. That only runs to Tracy. It does not come clear around to San Francisco, but stops there. Know C. A. Newton. I had a conversation with him on the night of the 26th, and I might have had on the 28th. I would not say for certain. Had a conversation with him on the night of the 26th, at which I showed him a telegram. The telegram read: 'Boycott declared on Pullman cars. E. V. Debs.'

C. A. Newton, called for the United States, night yardmaster at Sacramento, for the Southern Pacific Company, contradicts Mr. Knox on this point, and says that Mr. Knox handed him a telegram, which he read. That the telegram read: "H. A. Knox, Sacramento. Boycott declared against Pullman. Hold all Pullmans. E. V. Debs." That he handed the telegram back to Knox, who left the room where they had met, with the exclamation, "That is hell." The witness Knox further states:

"About 12:30, I think it was, on the morning of the 28th, I received a message from Los Angeles, saying that some men were discharged for refusing to handle Pullman cars, and saying that the Los Angeles Union had decided to strike for the reinstatement of those men, and asked us to participate in the strike. The committee having full power to act, we considered the matter, and came to the conclusion it was a just fight, and we would take it up and help them out. In that message from Los Angeles they asked us if we would notify all concerned, which we did. I went down to the depot, and that special that Mr. Newton was testifying about—the officers' special—was just pulling out of the depot. I had had a conversation with the engineer and the fireman before that, and they told me if there was any strike they wanted a finger in the pie, so I ran up and got on the engine, and told the engineer and fireman about what had occurred. They said, 'Well.' Some one stopped them; I don't know who. They were stopped from the hind end of the train, and they said, 'Cut us off, and we will go to the house,' so somebody cut the engine off. I don't know who it was. No one was with me on the cab of the engine,—only the engineer and fireman. Did not offer any threats or intimidation or violence. \* \* \* The

engine was cut off, and the engineer was taking it around to the roundhouse. I was in the depot by that time. Mr. Wright wanted to know what was the matter with the special. I told him, as near as I could find out, the engineer was going to strike with us. He had Mr. Newton stop him there in front of the depot, and he had a conversation with the engineer, and they finally agreed to go on with the special, and asked us if we would couple on. We told him, 'Yes; if they wanted to go.' I told Mr. Wright I thought it was foolish for them to go. They would go just as far as Rocklin, and that was no place to stay. There were no accommodations there at all. He said, 'For God's sake, let them go out of Sacramento, if they don't get over the American river bridge.' I thought to accommodate him. We would not ask the conductor and brakeman to boycott the officers' special. We would let them go as far as Rocklin. I knew they would not get any further than that, because the men had already quit up there. I got on the engine, and rode up through Sixth street yard with them, to see that the switches were all set, and everything ready to go. I rode with the engineer on the engine. After I got back from Sixth street the committee then went up to the Western Union & Postal Telegraph Company, and we sent a good many dispatches notifying them that we had struck."

(These telegrams will appear further on.)

Newton testified as follows with relation to the special car,—or officers' special, as it was called,—and with reference to the statements made by Knox at the time:

"I know Mr. Knox personally. He used to work for me. Mr. Mullen, I knew him personally, too. Mr. Compton I did not know until after the strike. I saw Mr. Knox about the 26th of June. \* \* \* The first train that came into the yard after that conversation I had with Mr. Knox (referring to above) was a special that came from Oakland. It got in about 12:25 on the morning of the 29th. It was a special passenger train, that ran out of its ordinary time. It was composed of two officers' cars and the engine. \* \* \* Saw Mr. Knox on the arrival of the officers' train, a little while after it got in, when it got ready to leave. Knox came running through the depot, and hollered out: 'Stop that train! Stop that train! Not a son of a bitch of a wheel will turn on the system.' This was on the morning of the 29th, about 12:25."

This, it will be observed, flatly contradicts Knox as to what occurred at that time.

The witness Newton testifies further as to Knox's attitude, as follows:

"Did not have any direct conversation with Knox. When No. 3 came in, going east, there was quite a number of shopmen around there, standing in groups, I guess to the extent of forty or fifty. They came in charge of United States Marshal Long. This was along in the morning, about daylight, probably four o'clock, on the 29th. That was a mail train,—the regular Eastern overland,—the Atlantic express; the 'fast mail,' they call it. After No. 3 pulled out, the groups got moving towards the depot,—after she pulled out,—and some one in the groups made the remark to Mr. Knox why he did not hold the train,—what he let her go out for. He said he did not have force enough to hold her, but when seven o'clock came he would call out the shop men, and he would have force enough to hold anything that came along."

Knox testifies that:

"The strike was formally declared about 12:30 or 1 o'clock on the morning of the 29th of June by the Los Angeles Union. In Sacramento it was left in the hands of the committee. The committee had full power to act. The committee decided to strike to have those men in Los Angeles reinstated. As soon as they got the message they consulted probably for 25 or 30 minutes, and went on and did as requested by the message, to notify all those concerned. That was about 12:30 or 1 o'clock on the morning of June 29th. Had not at that time received any notification from Oakland. Did not act

on anything but the notification from Los Angeles. The members that were out on the road,—we notified all the unions along, Truckee, and Rocklin, and Dunsmuir, and all over the system,—we notified them that we had struck; that we had ordered a general strike in Sacramento, and those in Sacramento—the shop men—were all notified the next morning after they went to work, perhaps 8 o'clock or 8:30."

The attitude of the mediation committee, as representatives of the American Railway Union, is stated by Knox as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them that, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did. Consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

Again he says:

"I told Mr. Baldwin our men would not work on Pullman cars. That is all I told him. \* \* \* We were doing nothing with reference to preventing the movement of trains; only quit work, that is all. \* \* \* We were trying to induce the men that showed up to strike with us. That was the understanding between Mr. Wright and myself. \* \* \* I told Mr. Baldwin that our men would not work on Pullman cars. Did not make the statement that we would not allow Pullman cars to move."

As to the power possessed by the mediation committee, Knox says:

"The committee had full power to act. The union had given them full power to act."

On cross-examination Knox testifies as follows:

"We discriminated between Pullmans that were full of passengers and Pullmans that were empty, on the 27th and 28th of June. After the strike was ordered, we did not. All Pullmans were treated alike, and everything else, except mail. It grew from the Pullman cars to every other form of cars except the mail cars. After those men were discharged it did; did not matter what the destination of the cars was. We thought that we could control the A. R. U. organization, and we did. Anything that we knew anything about we controlled their action, through the strike. Anything that was done by any of the officers of the A. R. U. organization during the strike was done with the full consent, and was under the policy of our organization, as far as Sacramento was concerned. We were given full power to act. That power has never been taken away from us yet. Had control on the 3d of July, but do not know whether there was an A. R. U. man who moved the Pullman cars on that day or not. Could not swear to it. I do not think there were very many of them."

It appears that on July 5th, and during the strike, Knox, Comp-ton, and Mullen, of the mediation committee, appeared before the Citizens' Protective Association of Sacramento, and made a statement concerning the attitude of the American Railway Union. Cornelius C. Howell, who was present at the meeting, testifies as follows:

"Was in Sacramento the latter part of June and the early part of July last. I was employed by the Industrial Improvement & Manufacturers' As-



sociation of Sacramento. I was looking up manufacturers' industries to locate at Sacramento for that company or association. Became a member of the Citizens' Protective Association, I believe, on the 3d of July. That association formed for to get together and see if they could not do something to open up the commerce connected with the city, and such other business as might be necessary, owing to the condition that things were in at that time from the cause of the strike that had been ordered on the 29th of June, or the strike that occurred on the 29th of June. I was secretary of the organization from the day that we organized, up until, I think, the 15th or 20th of July; somewhere along there. Performed the duties of secretary at meetings. Recollect a meeting held on or about the 5th day of July last. It was called by the association to see if they could not do something in order to open up the commerce. Members of the mediation committee of the A. R. U. were present at that meeting. They were Mr. Knox, Mr. Compton, and Mr. Mullen. After discussing the ways and means to adjust matters, it was decided that it would be better to bring these people before the association, this mediation committee, and find out the condition of affairs,—what the causes were of all the trouble,—and see if we could not do something to adjust matters; and in that connection it was agreed that we would admit them, and see what they had to say; they having, I believe, made a proposition to some member of the association that they would like to come before the association, as the mediation committee of the American Railway Union. They came before the meeting and made a statement. Parts of their statement were reduced to writing. This is a part of the record of the meeting of the Citizens' Protective Association held on the 5th of July. Not the entire statements, but I took down part of what they said, and then we dictated it out, and took the minutes to Mr. Knox in his room. Mr. Compton was present when I went there with the minutes. I asked them to read them over, and see if they were correct; that I did not wish to have them quoted as saying something before the association that they did not say, and, before they would become a part of the record, I wanted them to see if they were right. I read the minutes to them. These two were present at the time. They looked them all over; and wherever they wanted any changes made I run the pencil through them, as it appears here, and when they got through—they looked it all over and read it—I wrote this certificate attached, and Mr. Knox signed it, and Mr. Compton signed it, in my presence,—both of them in my presence. I left the paper with them so that they might show it to Mr. Mullen, another member of the committee. He returned, as I understand, after I left, signed the paper, and they sent it down to my office. We had offices in the same building. The interlineations or erasures were made just before that was signed, while Mr. Compton and Mr. Knox were standing at my side. I think they were made—in fact, I know—at the request of Mr. Knox. He did the talking."

This document reads as follows:

"Sacramento, July 7th, 1894.

"When the committee returned and had introduced the mediation committee from the A. R. U. to the chairman, Mr. Katzenstein, he in turn introduced Mr. Knox, Mr. Mullen, and Mr. Compton to the association, and invited Mr. Knox to address the association, which he had come to meet. Mr. Knox, among other things, after thanking the association for allowing him to be heard, stated among the grievances that the original cause for this strike was on behalf of the wage-earners at Pullman, Illinois. Mr. Geo. Pullman had been grinding down his men with such small wages that it was impossible for them to get along. Mr. Knox went into detail as to treatment of the employes received at the hands of the Pullman Car Co., at Pullman, Ill. That through the president of the A. R. U. order he had declared a boycott against the Pullman cars, and to effectually accomplish the object he had ordered the strike, and it had now resolved itself to this: That the A. R. U. order, which he represented, demanded that Pullman restore his men in Chicago to their old places, with the same scale of wages paid to them in 1893; or that the S. P. R. R. Co. purchase the one-quarter ownership of the Pullman Co., paint out the Pullman name from the cars, and restore all the men on the railroad and in all shops to their old position and wages. Senator Cox inquired of Mr.

Knox if he did not think this committee of citizens could be interested to an extent that something might be done to adjust matters between them and the railroad. Mr. Knox said it had gone so far that nothing could be done until the whole question was settled, and that he had given his ultimatum. Mr. McClatchy asked Mr. Knox what condition affairs were in at this time or what the situation was. Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger cars or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with. Mr. Mullen said, in part, after Mr. Knox had taken his seat, that this was a fight between capital and labor, and that from the chief justice of the United States down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation. Mr. Cox then asked what he could suggest. To this Mr. Knox replied that they might intercede with the government, and see if they could not move the mails and express to accommodate the business of the country. He said that that would help us out. 'We are in this fight to win, but we are as anxious to have it settled as you are, and we want to go to work, but will not until this question is settled as I have outlined. There is a revolution going on in this country. To-day it is a principle that we are contending for. Should we give up, they would make us crawl on our bellies after them.' Mr. Compton stated, among other things, that the A. R. U. organization would not resort to any desperate means, so long as the Railroad Co. would deal with them without using armed force. That their organization was composed of law-abiding citizens, and would not commit any overt acts. At this point Mr. Ray tried to have his resolution read, but was declared out of order, and the resolution remained on the table. Several attempts were made by others, but without effect; whereupon Mr. Avery moved that a vote of thanks be tendered this committee for having made this association of business men so frank and fair a statement in relation to their position with the railroad company and this general boycott. The motion being seconded, it was unanimously carried, after which the committee retired.

"We have read the foregoing statement of the records kept by Mr. Howell of our statements, and certify to their correctness.

"Committee: H. A. Knox, Chairman.

"Thos. Compton.

"Jas. Mullen."

Mr. Knox was asked if he signed the statement produced by Howell. He said he did; that there were some alterations, but they were not material.

Continuing, Howell further stated:

"Saw Knox after the 7th. I had no conversation with him, although I saw him a number of times, after the time I went to his room and he signed that paper, until the 9th of July. I saw him then before the executive committee of the Citizens' Protective Association, at the Orangevale office in Sacramento. George B. Katzenstein, Mr. Van Vorhees, Gen. Llewellyn Tozier, Mr. Frank Miller, Mr. J. V. McClatchy, of the Sacramento Bee, and I am not sure but I think Senator Cox was present at that meeting. The executive committee was composed of nine members, but they were not always there. Mr. Knox was there. I was there. I think Mr. James Mott was there. He is the manager of the Crocker Company up there. During the time of this strike we were in the habit of meeting every day, sometimes twice a day, and we had received information from some source that the government was going to take charge of affairs, and we had heard a good many rumors. We sent for Knox. We brought him there to see what position he was going to take in view of the fact that the troops were to be expected there. This was the 9th of July. These gentlemen met Mr. Knox in the capacity of the executive board of the Citizens' Protective Association. Mr. Katzenstein, the chairman of the executive committee, asked Mr. Knox some questions in relation to the position that his

association expected to take or that he expected to take after the troops got there. My recollection is that Mr. Katzenstein in one of the questions said that it was reported, and so published, that Mr. Debs, of Chicago, had issued a proclamation advising all men to keep away from these public places, from collecting at the depots, and so forth, and he asked him why that rule could not be enforced by the A. R. U. here. Mr. Knox handed Mr. Katzenstein a telegram. The telegram, as near as I can remember,—the substance of the telegram,—was about this: To pay no attention to newspaper rumors; that they were sure to win; that everything was progressing all right in their interests, or words to that effect. Mr. Katzenstein asked him this further question: That in view of the fact that the troops were ordered there, and would probably be there the next day, or the morning after, and as the matter was passing out from the civil authorities to the military, and in view of the fact that he was a citizen, the same as the balance of the people he had come there to meet, what position he would take; to which he said, as near as I recollect, that, so far as he was concerned himself, he could not do anything, for there were two or three injunctions against him. But, so far as his men were concerned, which was over 2,000, he had no control of them, and he did not believe they would allow any train to go out of the depot with Pullman cars attached. Then Mr. Katzenstein further asked him, as near as I can recollect, \* \* \* that in view of the fact of the military coming there, and if it would be a question between the principles of his order and the protection of the citizens and his family and so forth, which course he would pursue. He said that the principles of the order of the A. R. U. stood first with him in relation to this business, or in relation to this strike. Mr. Katzenstein, as near as I can remember, called his (Knox's) attention to the proclamation, as it was published in the paper. I don't remember Mr. Knox saying anything in relation to the cause of the proclamation. He produced that telegram. It was read. He handed it out, and talked in about the same strain that was expressed in the language of the telegram. I would not undertake to repeat what he said. I remember distinctly he stated you could not depend on the proclamation. He did not believe there was any truth in it, and used this telegram as evidence to corroborate his statement."

V. S. McClatchy, called on behalf of the United States, testified:

"I am one of the proprietors and business manager of the Evening Bee, Sacramento."

A paper being shown the witness, he said:

"That paper is a statement made by the secretary of the Citizens' Protective Association, under instructions from its executive committee. \* \* \* The paper was drawn up by Mr. Howell, secretary of the Citizens' Protective Association, under instructions of its executive committee, and purported to embody the statements made by the mediation committee of the American Railway Union before the Citizens' Protective Association at its meeting, I think, of July 5th. Mr. Howell was instructed to draw this paper up and present it to the mediation committee for their approval and signature. \* \* \* I saw it signed by two gentlemen. I did not see the third member of the committee sign it. \* \* \* Mr. Knox, who was chairman of the committee, signed it, and, as certain as I can be at this time, the second one was Mr. Compton. The third member, who I think was Mr. Mullen, was not present. \* \* \* At this time I saw those two names signed Mr. Howell was present. He then left it with Mr. Knox, who was to obtain the signature of the third gentleman. \* \* \* I have in my possession another statement signed by Knox, relative to the strike. \* \* \* Mr. Knox made certain statements before the executive committee of the Citizens' Protective Association, I think about July 9th,—I do not want to be certain of the date,—and under instructions I prepared a report of Mr. Knox's remarks before the committee, or some of them, and submitted it to him for approval prior to its being published in the newspaper. Mr. Knox approved it, after minor amendments, and it was published. \* \* \* Mr. Knox signed it in my presence. \* \* \* Mr. Knox's signature was obtained in the afternoon, shortly before the Bee would go to press. In order to insure its publication

that day, it had to be cut up in what printers call 'short takes.' \* \* \* It was signed before being cut up. It can be readily pasted together."

After further testimony tending to identify the document, it was introduced, and is as follows:

"Chairman H. A. Knox, of the Sacramento mediation committee of the A. R. U., had a short conference this afternoon with the executive committee of the Citizens' Protective Association, at the request of the latter. The work of the committee so far had been directed towards preventing a conflict at Sacramento that could only result in bloodshed, without settling the main issue, and to this end had brought influence to bear on both the Southern Pacific Company and its striking employees to prevent any aggressive measures on either side. The position of the United States government, however, in ordering the opening of the road and the use of federal troops for such purpose, has practically taken all discretion out of the hands of the railroad company and the United States marshal. Mr. Knox was asked, therefore, if the United States government insisted on taking charge at Sacramento and running trains, would the A. R. U. permit it to be done without obstacle, or would it oppose by force the government officials and troops? Mr. Knox stated that personally he would do all he could to prevent a conflict with the government, and, if it moved trains, would not oppose, whether with Pullmans attached or not, and would so advise his men. He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him—over 2,000 strong—that they would not obey orders in that event, and would engage the troops. He said the position of the A. R. U. was in no way changed. It would not permit the running of any trains unless the demands of the organization, as outlined at a former conference with the citizens' committee, and published in the Bee of Friday last, were complied with. His attention being called to the declaration of Eugene V. Debs, head of the A. R. U., calling on all members not to attempt interference with trains or railway property, Mr. Knox said that he had not received officially any such notice, and had been warned by Debs to pay no attention to newspaper reports, unless officially reported to him. He could not, therefore, take any notice of the proclamation referred to, and doubted its genuineness. [Signed] H. A. Knox."

Mr. Knox denies having signed the statement produced by Mr. McClatchy. In this regard he testifies as follows:

"I never signed that statement in the world. That statement, or part of it, was when they called me before their committee in the afternoon, I think, of the 9th. It was simply said verbally, part of it, and part of it was not. I never signed the statement, and they have got more in there than I ever said. \* \* \* The statement is about correct, until we get down to where it says: 'He said, however, that if the government insisted on moving Pullmans without a settlement of the main question, he could not control the men under him, as they had notified him, over 2,000 strong, that they would not obey orders in that event, and would engage the troops.' I never made any such statement as that."

Barry Baldwin, the United States marshal for the Northern district of California, was at Sacramento during the strike, and testifies as follows respecting statements made to him by members of the mediation committee and others, in relation to the attitude of the American Railway Union:

"I know Mr. Knox, Mr. Compton, and Mr. Mullen. Know Mr. Worden. I saw them on the evening of the 1st of July at the depot, in a caboose, in the yard there, right at the depot, on the tracks. I was told that they were a committee; that they were the leaders of the committee of the strikers. Found Mr. Worden there at the time. \* \* \* I went there officially, in order to protect the mails,—to protect the trains carrying the mails; in

order to allow the railroad officials to run the trains carrying the mails. We heard that they were being prevented from doing so. This was Sunday evening, the 1st of July, about eight o'clock in the evening. \* \* \* It was a caboose on the tracks adjacent to the depot building,—the yard at Sacramento; possibly a hundred yards from the river,—fifty to a hundred yards. The parties in the car went to find Mr. Knox. Mr. Knox was not in the car at the time. They found Mr. Knox, and Mr. Knox came in presently, after a little; and they requested a number of people there, who had no business with their committee, to withdraw. A number of people in there withdrew, leaving, I suppose, some six to ten inside the car. It was dark in the car. It was lighted afterwards, but poorly lighted. Mr. Knox was present, and also Mr. Worden, and I believe Mr. Compton, and Mr. Mullen, and several others whom I don't know,—did not recognize at the time. \* \* \* I stated to them the purpose for which I had come to Sacramento, and they asked me whether Pullman cars were to be moved with the train. Knox was the spokesman, and did most of the speaking. The others spoke a little, some of the others, and especially Mr. Worden, who was continually talking and interrupting. I told them who I was, and my purpose in going to Sacramento. \* \* \* My business there was to see them and talk to them, and see what the trouble was, and why these trains could not be moved, and why they were preventing them from being moved. They objected to Pullman cars being moved, claiming that they were willing that the trains should go with the mails and other passenger cars, but not with Pullman cars. They said they had advice that Pullmans were no part of a train,—no part of a mail train; and they gave me to understand that they would not be allowed to go,—to be moved. They said they had eminent legal advice. That they had paid \$250 for the advice. They did not state who had advised them. \* \* \* I told them that I should perform my duties, and see that the trains were moved. I told them that the trains should be moved as often as made up, with Pullman cars attached where it was customary to place them. I told them that I was certain they were not right in doing it,—in opposing the proper authorities and defying the law. They continued in the attitude that they could not allow Pullman cars to move. I told them my purpose in being there was to protect those mail trains, and trains carrying the mails,—United States mails. \* \* \* Had conversation with Mr. Worden on my way up from the caboose out across the tracks. He asked if we knew who he was, and I then first learned his name. He said that his name was Worden; that every one knew him there, and he was prominently connected with the movement. \* \* \* It was the A. R. U. people that were organized there. They were the mediation committee of the A. R. U. They were the committee. I treated them officially as leaders of the movement,—ostensible leaders of the movement."

The same witness further testifies, as to the action and attitude of the mediation committee, substantially as follows:

"I saw the members of the mediation committee again (the second time) on the evening of the 2d, at the Golden Eagle Hotel, at my room. Saw Knox, Mullen, and Compton. They came to see me as the mediation committee of the A. R. U. They came to see me as U. S. marshal. They came to see me at the room I occupied. I informed them that it was my intention to go down the next day, and clear the depot grounds of the crowds that were there, in order that the railroad company could move their trains,—the mail trains, or trains carrying the mails,—and that I hoped that the strikers would not offer any resistance; that I was there by lawful authority to do this; it was my duty to do it. Then we talked the matter over. They said that they had no wish to use any violence. They asked me to go down. They said they would do all they could to get the strikers to vacate the depot grounds. They asked me to go down myself, or with as few deputies as possible, for they thought there was less danger of a conflict if I did that; that I could get on better alone than to take down a number of deputies; that it might irritate the people, and we would not get on well. But they said they would assist me as much as they could in inducing the crowd to clear away from the depot, and allow the trains to be operated.

They said that if they did this they wanted me to allow them to send a committee of three to induce the engineers, or those that were to work the trains, in together, to persuade them not to go out with the Pullman cars; to go inside of the line I might form. I told them that I did not know that I would object to their doing that, so long as they did not intimidate them,—so long as they were not too persistent, and would not continue to talk to them too long, or in any other way threaten them, by numbers of talk; and also, if the people they were talking to did not wish to hear them, did not wish to listen to them, and requested them to leave, why, they should leave. But I told them that I could not promise even that I would let them do that; that I could not say at that moment; that there might be some objection arise at the time on the part of the railroad company, and I might have to further consider the question as to their right to be present at the depot grounds, but at that time I did not see any objection to it, as long as they did it peaceably."

Mr. Knox, in his testimony, details this interview in the caboose as follows:

"Mr. Baldwin and Mr. Knight wanted to know our position that we had taken in the matter, and between us we explained it as thoroughly as possible to them, and told them, in the first place, we had boycotted the Pullman cars on legal advice; and, if I am not mistaken, I told them who our advice was from,—Mr. Ingersoll; and Mr. Knight said that a Pullman car, as long as it was attached to a mail car regularly made up, was part of a mail car. Of course, we had an opinion from a very eminent lawyer and attorney, and we thought he knew as much about it as Mr. Knight did; consequently we told him we would not handle any trains with Pullman cars attached during the boycott, and, now that the strike had been ordered, we would not handle any trains at all, except mail trains, until those men that had been discharged had been reinstated. That was about the gist of our conversation all the way through. It was repeated several times."

T. W. Heintzelman, master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the United States, testified as follows:

"I know Knox and Compton. They were out on a strike. Before the strike, Knox was a switchman, and Compton was a machinist working in the shop. \* \* \* I was present during a part of a conversation between Knox and Mr. Small at the roundhouse on June 30th. Mr. Small was the superintendent of motive power. \* \* \* I heard Knox remark that they were in the strike to win, and they were going to win by any means."

E. C. Jordan, locomotive engineer at Sacramento, called for the United States, testified to attending a meeting on June 29, 1894, at which Knox was present, as follows:

"In relation to a telegram he said he would get, it was asked him as to what his jurisdiction was in this matter; and he stated that his jurisdiction extended from Sacramento to El Paso and to Portland and to Ogden, out of Sacramento. \* \* \* There were three orders present,—Conductors, the Engineers, and Mr. Knox, of the A. R. U. \* \* \* The meeting was held for the purpose, as I understood it, of taking some action to bring the strikers or the A. R. U. men and the company together, in order to devise some means by which the strike could be adjusted in some manner to start the road."

The following telegrams, purporting to have been signed and sent by H. A. Knox to various unions within his jurisdiction, respecting the state of affairs at Sacramento, and transmitting advice to other local unions with reference to the action they should take, were in-

roduced by the prosecution for the purpose of showing the concert of purpose and action among the different branches of the American Railway Union.

"June 27, 1894. To I. B. Hoffmire, Portland, Or.: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To E. V. Debs, Pres. A. R. U., Chicago: Will we stop loaded sleepers? Ans. H. A. Knox."

"June 27, 1894. To W. H. Clune, Los Angeles: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 27, 1894. To J. M. Wagner, Ogden, Utah: Stop all Pullman sleepers. Answer. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir, Cal.: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To E. V. Debs, Chicago, Ill.: The ORC and BRI are going to take train out to-night. We are going to stop everything. Answer. H. A. Knox."

"June 28, 1894. To J. M. Wagner, Ogden, Utah: Be ready to go out at moment's notice. H. A. Knox."

"June 28, 1894. To M. C. Roberts, Dunsmuir: Don't know, but if any, you hold. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: Yes; stay in Rocklin. H. A. Knox."

"June 29, 1894. To C. B. McClintock, Truckee, Cal.: Hold Nos. 4 & 2 sure. H. A. Knox."

"June 29, 1894. To G. W. Lindsay, Wadsworth, Nev.: Hold No. 4 there sure. H. A. Knox."

"June 29, 1894. To E. P. Condrey, Rocklin: General tie up ordered. Notify all concerned. Answer. H. A. Knox."

"June 29, 1894. To McClintock, Truckee: General tie up ordered. Notify all concerned. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago: General tie up ordered on S. P. system. All out. H. A. Knox."

"June 29, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Everything on system at standstill. Company makes their death struggle to-night. H. A. Knox."

"June 30, 1894. To F. Almas, Summit, Cal.: No; stop at once. H. A. Knox."

"June 30, 1894. To J. C. Church, Carlin, Nev.: Ice until further orders. Everything stopped. H. A. Knox."

"June 30, 1894. To J. T. Roberts, Oakland, Cal., A. R. U.: Have any troops left, and where are they going? H. A. Knox."

"June 30, 1894. To J. T. Roberts, A. R. U., Oakland: Has train left with deputy marshals? Rumor here. H. A. Knox."

"June 30, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: This motion was adopted by B. of L. E. and O. R. C.: That the basis of the settlement be that all discharged men who have taken part in the Pullman boycott be reinstated, and guaranty given men won't be discharged for same cause. Pullman boycott to remain in force, and strike declared off. This is the grandest victory ever won, and everybody is on our side. H. A. Knox."

"July 1, 1894. To A. W. Wallace, Rocklin, Cal.: There was, but we stop at other points. Not wheel moving. H. A. Knox."

"July 1, 1894. To J. T. Roberts, A. R. U., Oakland, Cal.: Keep me posted on everything that leaves there. H. A. Knox."

"July 1, 1894. To W. H. Clune, Sec., Los Angeles, Cal.: How are engineers and conductors standing with us down your way? H. A. Knox."

"July 2, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Did you give permission to move Mrs. Stanford? H. A. Knox."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: She can go via Davis, not by Sacramento."

"July 2, 1894. To H. L. Walthers, Dunsmuir, Cal.: Troops coming here. Stand firm; we are. Ans. H. A. Knox."

"July 3, 1894. To E. E. Barton, Ogden, Utah: We understand Co. tried to brake block, but we fooled them. H. A. Knox."

"July 3, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Hunt up the National Pres. of the Marine Engineers. Confer with him. Steamers are a terrible damage to us. H. A. Knox."

"July 4, 1894. To McClintock, Sec. A. R. U., Truckee, Cal.: Big army here. You come with all guns and volunteers. Come by train without orders at once. H. A. Knox."

"July 4, 1894. To E. E. Barton, Ogden, Utah: Good. Same here. We have 4,000 beside the city. Stand firm. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Soldiers on this end of American river. Don't stop. Bridge O. K. H. A. Knox."

"July 4, 1894. To Arthur Wallace, Rocklin, Cal.: Come. Bring all hands. Rush. H. A. Knox."

"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

"July 4, 1894. To W. H. Walthers, Dunsmuir, Cal. Don't close the Western Union office. That will hurt our cause. And take guard away from the Postal office. H. A. Knox."

"July 4, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: We have the troops on our side. They have refused to obey commands, and we are stayers from away back,—bound to succeed. H. A. Knox."

"July 5, 1894. To C. B. McClintock, Truckee, Cal.: Please allow merchants to take perishable freight from cars, but agent must check it to them. H. A. Knox."

"July 5, 1894. To Madden & Turner, Dunsmuir, Cal.: All quiet here. We are sure to win. H. A. Knox."

"July 5, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: It is reported the U. S. marshal and Gen. Dimond, of state troops, has turned our affair over to Washington. Have attorney there to work on it. We have everything our own way, and have not broke the law, only by keeping about 5,000 men in sight. Please advise us what to do. Not a wheel moving. H. A. Knox."

"July 6, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Any truth in report of strikers and soldiers having battle in Chicago? Please ans. We are as firm as rock. H. A. Knox."

"7/7/189. To J. M. Wagner, Ogden, Utah: All quiet. Stand firm. H. A. Knox."

"July 7, 1894. To Wm. O. Leary, Pres. Miners' Union, Virginia City, Nev.: Resolutions received, and return thanks. We are bound to win. We are as solid as rock. H. A. Knox, Chairman."

"July 8, 1894. To W. H. Clune, Los Angeles, Cal.: Force them to stop, or tell them when we settle, their firemen will run their engines. We done that, and you bet it brought them to time. All quiet here. We are solid as rock. H. A. Knox."

"July 9, 1894. To W. H. Clune, Los Angeles, Cal.: Everything very quiet here. Nothing moving here. How is things there? Stand firm, and don't let nothing go. H. A. Knox."

"July 9, 1894. To Chas. Fink, Oakland, Cal.: We sent Geo. Hale to Valjejo, but if there at Oakland he is O. K. H. A. Knox."

"July 11, 1894. To W. G. Boyce, Pres. Miners' Union, Silver City, Nev.: Thanks for sympathy. We are under heavy expense. Financial aid would be gratefully received. H. A. Knox, Chairman."

"July 11, 1894. To Chick Featherson, Summit, Cal.: I received orders from E. V. Debs to order strike on entire system. Hence my order. Sacto. is solid yet. H. A. Knox."

"July 11, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: Sorry you are in jail, but be strong, and we will carry the strike on if they put all of you in jail. Lots of soldiers here, but everything quiet so far. Every man out here, but a few scab engineers. H. A. Knox."

"July 11, 1894. To J. S. Walton, Oakland, Cal.: Adopt code. Lots of soldiers here, but everything quiet yet. H. A. Knox."

"July 12, 1894. To J. Balder, Truckee, Cal.: Train of soldiers getting ready to leave here for Truckee. Everything quiet. H. A. Knox."

"July 12, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: I will stand



by A. R. U. as long as life lasts. I refused to run for railroad commissioner, because I thought so much of the fight. We are doing nothing but what is proper. We are going to fight it out on this line. We have 1,800 soldiers here, but no trains out yet. H. A. Knox."

"July 13, 1894. To Chairman A. R. U., Truckee, Cal.: Reports all fake. Stand pat. Freight left here, under protection of soldiers, for the East. H. A. Knox."

"July 13, 1894. To Clune, Chairman A. R. U., Los Angeles, Cal.: Reports all fakes. Strike is on in full force. Stay with them to the last. All O. K. here. H. A. Knox."

"July 13, 1894. To J. C. March, Carlin, Nev.: 1,800 soldiers here for two days, but have only got freight out east. Reports are all false. Stand pat. H. A. Knox."

"July 13, 1894. To F. M. Gillett, San Luis Obispo, Cal.: Reports all false. Stand pat. 1,800 troops here, but got only one train out in two days. Sure to win. H. A. Knox."

"July 13, 1894. To E. V. Debs, Pres. A. R. U., Chicago, Ill.: United Press dispatch says you have declared strike off. I have sent messages all over denying it. Answer. H. A. Knox."

Telegrams have been introduced purporting to have been signed by H. A. Knox, addressed to E. V. Debs, at Chicago, and to other persons, in relation to the strike, dated July 14th, and subsequent dates; but Knox testifies that he was arrested on July 14th, and was in jail for three weeks, and he denies specifically having signed the 11 telegrams dated July 22d, which bear his name. It is possible that some member of the mediation committee, or other officer of the American Railway Union at Sacramento, acting for the committee, may have signed these telegrams in the name of Mr. Knox; but as the testimony in the case, and particularly the telegrams sent out by T. H. Douglass, who appears to have been chairman of the mediation committee after July 14th, indicate that the strike was declared off on July 21st, telegrams purporting to have been signed by Knox, and dated after July 14th, and particularly those dated July 22d, are certainly discredited, and I will not, therefore, refer to them further in this connection. In any view, they do not appear to be important.

George Vice testified, on the part of the defense, that he had been a locomotive fireman for the Southern Pacific Company in June last; that he belonged to the American Railway Union at Sacramento; was the vice president of it; thinks he was present the night that the telegram came from Chicago, announcing the fact that there was going to be a Pullman boycott. He admits signing the following telegram:

"Sacto., July 6, 1894. H. F. Michaels, Master Cactus Lodge, 94, Tucson, Ariz.: Firemen of following lodges out with A. R. U., to the man: 260, 143, 312, 91, 97, 19, 58, 98, 366, 193, and Roseburg. If you tie division up, will guaranty full protection of A. R. U. Not a wheel turned here for six days. Answer. Geo. Vice, Master 260."

Also the following:

"Sacramento, Cal., July 16, 1894. J. Friant, Fresno, Cal.: Firemen here stand firm. Scabs scarce. We are winners. Geo. Vice."

Also the following:

"Sacto., July 16, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Firemen here all firm. Scabs scarce. We're winners. You stand firm. Geo. Vice."

He also admits sending the following:

"Sacramento, Cal., July 17, 1894. R. E. Nobel, Summit: Quit immediately, and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

The witness, being questioned about the wording of the telegram, testified further as follows:

"A Juror: Q. What did you mean by 'tie up everything'? A. Leave their work. Q. You said, 'Quit and tie up everything.' What do you mean by 'tie up everything'? A. Just to leave work. The Court: Q. You say, 'Quit and tie up everything.' 'Quit' seems to be your definition for 'tie up.' A. I meant the same thing by it. Q. 'Quit' and 'tie up' are the same thing? A. Yes, sir. Mr. Knight: Q. By 'tie up everything,' you mean leave work from everything? A. Leave the service. Q. From everything? A. Yes, sir. Q. What is the meaning of the word 'everything'? You said, 'tie up everything.' A. I suppose there is a whole lot of meaning to 'everything.' Q. What is your meaning in that connection? A. If a man is on a job, according to that,—if he is on an engine,—he will leave his work."

He also admits sending the following telegram:

"Sacramento, Cal., July 17, 1894. J. J. Brennan, Rocklin: Stand. Do not allow anybody to report for work. Stronger here than ever. We're sure winners. Geo. Vice."

The witness states:

"When this telegram was sent, it was only meant for the firemen. There were lots of firemen that did not belong to the A. R. U."

Admits writing and sending this telegram:

"Sacramento, Cal., July 17, 1894. Geo. W. Lindsay, Wadsworth, Nev.: Still firm, and will stay to last. Sure winners. Gaining recruits from scabs. Fillmore weakening. He interviews mediation board, and makes concessions. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. H. F. Michaels, Tucson, Ariz.: State situation. Tied up here tighter than ever. Use all means to do same there. We're winners. Geo. Vice."

Also this one:

"Sacramento, Cal., July 18, 1894. W. J. Featherson, Summit, Cal.: Quit immediately, and tie up everything. Come to Sacramento. We're sure winners. Answer. Geo. Vice."

Also this one:

"Sacramento, Cal., July 21, 1894. F. P. Sargent, Terre Haute, Ind.: Eastern B. L. F. men taking our jobs. For God's sake, save us. S. P. will not re-employ us. Use all means to save us. Answer. Geo. Vice, Master 260."

The witness states that he had no authority to send telegrams for the American Railway Union; that he sent them by virtue of his being a master of the Brotherhood of Locomotive Firemen. He admits, however, that he was also an officer of the American Railway Union, being its vice president.

H. B. Breckenfeld, called for the United States, testified that he was chief train dispatcher for the Sacramento Division of the Southern Pacific, at Sacramento; that he knew Terry Douglass; that he knew that Douglass was connected with the A. R. U. during the recent strike, because Douglass appeared before Mr. Fillmore, or in his rooms, on one or two occasions, in connection with the strike;

that on one occasion Douglass came in an official capacity; that, when he did come in an official capacity, Douglass announced that they had decided to declare the strike off. This was in the latter part of July. Douglass' position in the American Railway Union was a member of the mediation committee. Douglass was not a member of the mediation committee right through the strike. The witness understood that they (Douglass and the two men who accompanied him on the occasion just referred to) took the place of the original mediation committee at Sacramento. On the occasion referred to they came into the rooms of Mr. Fillmore, and requested the stenographer who was present to prepare upon the typewriter a statement to that effect, which was read to them by the stenographer, and was signed by them. The witness was present when this was done. Witness knows the handwriting of Douglass. Identifies the signature of Douglass on the following telegrams:

"Sacto., July 14th, 1894. To F. P. Cox, Rocklin, Cal.: Men are determined. Situation good. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: A committee of fruit growers has waited on us. Are you any nearer a settlement? Ans. quick. T. H. Douglass."

"Sacto., July 16, 1894. To S. Brennan, Rocklin, Cal.: Message from Debs. Situation everywhere good. Switchmen have all quit here. T. H. Douglass."

"Sacto., July 16, 1894. To R. A. Battenfield, Rocklin: Four trains tied up at Red Bluff. No crews to move. T. H. Douglass."

"Sacto., July 16, 1894. To E. V. Debs, Chicago, Ill.: Scabs coming from East. With few exceptions, men solid here. T. H. Douglass."

"Sacramento, Cal., July 17, 1894. To R. A. Battenfield, Rocklin, Cal.: Situation better than yesterday. Prospects brighten every hour to A. R. U. T. H. Douglass."

"Sacto., July 18th, 1894. To R. A. Battenfield, Rocklin: Did any train leave Rocklin this morning? T. H. Douglass."

"Sacto., July 18th, 1894. To W. Balder, Truckee, Cal.: Received message from James Hogan. He states situation firm everywhere. T. H. Douglass."

"Sacto., July 18th, 1894. S. J. Brennan, Rocklin: Situation has not changed. No work for shopmen. T. H. Douglass."

"Sacto., July 18th, 1894. To E. E. Barton, Ogden, Utah: Committee waited on J. A. Fillmore. Nothing satisfactory. Men remain firm. T. H. Douglass."

"Sacto., July 19, 1894. To G. W. Lindsay, Wadsworth, Nev.: No change in situation here. Remain firm. T. H. Douglass."

"Sacto., July 20, 1894. To James Hogan, Chicago, Ill.: True situation men wavering in many places. Give your views affairs. T. H. Douglass."

"Sacto., July 21st, 1894. To F. P. Cox, Rocklin, Cal.: Probably strike will be declared off at 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To W. Balder, Truckee, Cal.: Expect strike to be settled by 2 p. m. T. H. Douglass."

"Sacramento, Cal., July 21st, 1894. To G. W. Lindsay, Wadsworth, Nev.: This lodge has declared strike off by unanimous vote. T. H. Douglass."

"Sacto., July 21, 1894. To S. J. Brennan, Rocklin, Cal.: This lodge has declared strike off. T. H. Douglass."

"Sacramento, Cal., July 21, 1894. To W. Balder, Truckee, Cal.: Strike has been declared off Pacific, unconditional. T. H. Douglass."

T. H. Douglass, called for the defendants, testified: That he was a brakeman last June and July, running between Sacramento and Truckee. That he belonged to the American Railway Union and Order of Railway Conductors. That he acted as chairman of the mediation committee, he thinks, from the 12th or 13th or 14th.

of July. That the occasion of his so acting was because the original members on that committee were arrested. That John Hurley and G. H. Hale were on the committee with him. That he continued in that capacity until the strike was declared off. That he does not remember the day when the strike was declared off, but he thinks it was the 25th day of July. He attended a meeting of the American Railway Union on the 26th of June. There was a message read from E. V. Debs, declaring a boycott on Pullman cars. The union took action on the matter, and declared a boycott. Was in Truckee when the strike was ordered. First heard of it about 6:30 in the morning. "The train master asked the crew if they would go out on No. 20. They told him, 'Yes.' After he [the train master] left, seven or eight men came in, and told us there was a strike ordered, and we had not better go. Well, we did not go." Douglass admits having received and sent a number of dispatches during the strike.

#### Beginning of the Strike at Oakland.

Thomas J. Roberts, a witness for the defendants, testified that he resided in West Oakland; that he had been employed for six years as a locomotive engineer for the Southern Pacific Company; that he was president of local union No. 310, of the American Railway Union, which was organized in May, 1894; that the first he knew of any trouble was a communication he received from Mr. Worden, who was delegate to the convention in Chicago. He says:

"I received a letter from him stating that the Pullman boycott had been declared, to take effect in five days, unless the trouble between the Pullman Company and their employes was settled. On the same day a telegram was read in our meeting—that was Tuesday, June 26th—from the president of our general union, saying, 'Pullman boycott in effect to-day noon, by order of convention.'"

He further says:

"It was the evening before we received the telegram, and, that being our regular meeting night, the secretary held the telegram until the meeting opened; and after the meeting had opened, and we got through with our preliminary work, the telegram was read, and the matter was discussed, and I think the telegram said the Pullman boycott was in effect that day at noon. Still we did not want to take any snap judgment on the company, and we decided not to put it into effect until 12 o'clock the following day, June 27th. That would be Wednesday. A motion was put and carried to that effect, and our secretary was instructed to notify the Southern Pacific officials that after Wednesday, June 27th, at noon, we would not handle any Pullman cars, or do any Pullman work."

Continuing, the witness testified:

"June 27th the boycott took effect, at noon. That afternoon we had some trouble in the passenger yard where I was employed. Some of the boys that were cleaning cars were instructed by some foreman that they were working under to clean some certain Pullman cars, and they refused to do so. They told him that they belonged to the American Railway Union, and that there was a boycott in effect, and that they could not clean the Pullman cars. He told them that if they did not want to do that there was nothing else for them to do, and that they could go home."

The men were reinstated at his request. They went on with their customary work. The strike was to take effect the morning of the 29th, at 12:30. It was for the reinstatement of the men who had

been discharged. By "strike," he means that the men were all to withdraw from the service of the company, and refuse to work. In case the men were reinstated, they would be returned to work. By "the men," he means the strikers. There was no resolution. That was the understanding,—his understanding. The secretary was instructed to notify all the unions on this system, or in this state; he is not sure which. All the action that was taken was that they advised the men to try and keep men from going to work and taking their places; to persuade those that were at work to quit. "Tie up" is a railroad phrase. It means to cease work. It is used by officials and train dispatchers. Perhaps a train at Port Costa may get orders, "Train No. 18 will tie up at Tracy." That means that they will not go any further.

The witness was shown a number of telegrams, among others the following, which he admits having sent:

"West Oakland, Cal., June 28, 1894. To F. P. Sargent, Terre Haute: Firemen's lodge here indorsed Pullman boycott. Will not handle their cars. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To W. H. Russell, Secretary B. R. T., Bakersfield, Cal.: What is situation? Define position of B. R. T. T. J. Roberts."

"Oakland, Cal., June 30, 1894. To H. A. Knox, A. R. U., Sacramento, Cal.: No troops sent out from here. T. J. Roberts."

"Oakland, Cal., June 29, 1894. To E. H. Leon, San José, Cal.: Firemen out here. Do not work. Come home. T. J. Roberts."

"West Oakland, July 14, 1894. To F. P. Sargent, Terre Haute, Ind.: Authorized American Railway Union strike here. Shall B. L. F. men work during strike? T. J. Roberts."

"West Oakland, July 18, 1894. To F. B. Porter, Reno, Nev.: Solid here. Do not waver. Victory is ours. T. J. Roberts."

He was in frequent correspondence with the officers of different lodges of the American Railway Union throughout the state, and in some instances with the American Railway Union headquarters at Chicago, during the strike. Does not know particularly that he sent them by virtue of his official position as president of the American Railway Union in Oakland. It was merely for information. The union sent a great many official notifications of the strike throughout the state. He did not. The secretary sent them. The union ordered the secretary to notify the different local unions in the state of the strike here. They had no authority to send them in his name. They related to the strike. He got some messages from Knox, of Sacramento, and sent him some.

G. D. Bishop, called for the defense, testifies that he was the secretary of the American Railway Union at Oakland. The secretary was instructed, the night of the boycott, to notify other unions in reference to the boycott.

#### Beginning of the Strike at Red Bluff, Truckee, and Dunsmuir.

John Kelly testified, as a witness on behalf of the government, that he went out on strike on June 28th or 29th; that he had been a fireman for the Southern Pacific Company; that he went out at Red Bluff; that he was a member of the American Railway Union; that that had to do with his going out on a strike.

J. P. Heaney, a witness called for the defendants, states that he

went to Red Bluff from Sacramento on June 28th; that he lived at Sacramento, and belonged to the Sacramento lodge of the American Railway Union; that he had been braking for the Southern Pacific Company; that there was no American Railway Union organization at Red Bluff. He testifies as to being advised of the strike by a telegram from Mr. Knox; that he had asked Mr. Knox if there was a strike ordered, and the latter had replied, "Yes, there is a general strike ordered by Eugene V. Debs." The witness states that he was appointed chairman of a committee at Red Bluff. The committee were composed of railroad employes who had struck. Although the witness is very uncertain as to the purpose of the meetings, and the appointment of the committee of which he was chairman, he admits that at least one of its objects was in order that there might be some authorized person to receive and send dispatches for the men out on strike at other points, and be a channel of communication between Mr. Knox and the men at Red Bluff. He received quite a number of dispatches from Mr. Knox, and from other places. Although Heaney admits having received a great many telegrams, his recollection as to their contents is extremely vague. But one of these telegrams was introduced on the part of the prosecution. It is as follows:

"3:15 p. m., July 3/94. Red Bluff, Cal. Received at Sacramento, Cal. Jack Heaney: Trains switched by official. Coaches detained by three thousand people. H. A. Knox."

One from Heaney reads as follows:

"Red Bluff, Cal., July 2, '94. H. A. Knox, Sacramento, Cal.: Shall we let Adams, engineer that brought No. 15 in, go back with Mrs. Stanford's special? He has no fireman. Heaney."

The following is a telegram from Dunsmuir, purporting to be signed by M. C. Roberts:

"Dunsmuir, Cal., June 28th, 1894. H. A. Knox, S. P. Depot, Sacramento, Cal.: Has Portland boycotted Pullman? Answer. M. C. Roberts."

Mr. Knox replied:

"Sacramento, Cal., June 28, '94. M. C. Roberts, Dunsmuir, Cal.: Don't know. But if any, you hold. H. A. Knox."

From Truckee comes the following telegram:

"Truckee, Cal., July 4, 1894. H. A. Knox, Sac.: Do you still want us? Train on mail line ready to go. C. B. McClintock."

Mr. Knox replied:

"July 4, 1894. To C. B. McClintock, Truckee, Cal.: Come without fail; coming from all points. H. A. Knox."

The following telegram purports to have been sent by F. H. Almus to Mr. Knox:

"Summit, Cal., June 30/4. Harry Knox, Chairman of A. R. U. Committee, Sac.: Will I continue service on work train or not? Answer. F. H. Almus."

Almus testified for the defendants, and stated that he was a member of the American Railway Union. Knox's reply is as follows:

"June 30, 1894. To F. Almus, Summit, Cal.: No. Stop at once. H. A. Knox."

The following telegrams are from Los Angeles, signed by W. H. Clune:

"June 27/4. Los Angeles, Cal. G. D. Bishop, Secretary A. R. U. 310, W. Oakland, Cal.: Stand firm. Will boycott at Los Angeles this p. m. W. H. Clune, Sect. No. Eighty."

"L. A. 7/2, 1894. To T. J. Roberts, Prest. A. R. U., Oakland, Cal.: Resolutions in press is fake. Out of one hundred engineers here, ninety-seven are with us till the end. Trainmen, firemen, carmen, shopmen, section and bridge men,—solid. W. H. Clune, Secty."

#### Strike in San Francisco by A. R. U: Lodge 345.

It is admitted by the defense that the defendants John Mayne and John Cassidy were members of this lodge at the time of the strike. Rice and Clark, the two other defendants charged in the indictment, but who are not on trial, were also members of the same lodge. Charles Ault, called for the government, testified: That he was a member of the American Railway Union. That the number of his lodge was 345, San Francisco. It was the same lodge to which the defendants belonged. One Bradley was president, and another person, by the name of Elliott, was on the executive committee. This lodge went out on the strike, as a body, on June 29th,—the night of June 29th. It also appeared from the testimony of H. J. Bederman, a witness for defendants, that one J. E. Riordan was its secretary. McClintock was also a member of this lodge. The purpose which prompted the lodge to join the strike is stated by the testimony as follows: T. J. Roberts, president of the Oakland lodge, American Railway Union, testified that the union of which he was president authorized the secretary to send telegrams to different unions, as follows:

"American Railway Union three hundred ten declared strike. Takes effect twelve thirty a. m. to-day."

A telegram to this effect was sent to the lodge in San Francisco:

"Oakland, Calif., June 29, 1894. J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike. Takes effect twelve thirty a. m. to-day. T. J. Roberts, President."

Mr. Roberts, when examined, said that he had not personally authorized the sending of telegrams of such purport, and knew nothing about them. Some 21 others of a similar character were sent to different places.

Mr. Bishop, the secretary of the same organization, testified that these telegrams were sent out by direction of the union. They were authorized by the union. It will be noticed that the dispatch claimed by the government to have been sent to Riordan, of the San Francisco union, of which the defendants were members, is practically to the same effect. This witness acknowledged receiving the following telegram, purporting to come from J. E. Riordan:

"San Francisco, June 30, 1894. G. D. Bishop, Oakland: Committee out on organization Narrow Gauge. Your assistance required. J. E. Riordan."

He testified that he authorized the sending of the following telegram to J. E. Riordan on June 30, 1894:

"Oakland, Cal., June 30th, 1894. To J. E. Riordan, 118 6th St., S. F.: Will send men at once to confer with you. G. D. Bishop, Sec."

H. J. Bederman, a witness called for the defendants, and employed as a switchman by the Southern Pacific Company last spring, testifies, substantially, that he belonged to Lodge 345, San Francisco, of the American Railway Union; that the defendants belong to the same lodge; that the occasion of the strike by his union was on account of some of the members being discharged for not handling Pullman cars; that an executive and press committee was appointed; that the executive had charge of almost everything concerning the strike of the men; that most of the men belonging to his union worked on the Coast Division; that the committees were appointed on the evening of June 29th; that all the power regarding the strike was delegated to the executive committee, so that this committee had charge of the strike; did not seem inconsistent to him in striking on a division where there were no Pullman cars; not a question of sympathy; they were members of the union; they were supposed to do what was right by every member; if one was discharged for a cause he was not guilty of, they would try and protect him; the union protected them; Mr. Riordan was secretary of the union.

George Elliott testified, on being called as a witness for the defendants, that he was a foreman switchman in the passenger yards of the Southern Pacific Company, at Fourth and Townsend streets; that he joined the American Railway Union (Lodge 345, San Francisco) on the night of the 29th of June, or the 30th; that he became chairman of the executive committee; that this committee were to do everything that was to be done in connection with the strike; they had full power; the question of Pullman cars never, to his knowledge, came up; they struck for the reinstatement of employés that had been discharged. On cross-examination he states that he struck because of the discharged employés; he believes some were discharged in Los Angeles, and some in Sacramento; simply struck to see justice done. On redirect examination, he said that he first got some information about the strike from Mr. Bederman; that he believes that Bederman read a message to him; he doesn't know whether it came from Oakland or Sacramento.

Edward F. Gerald, a witness called for the government, gave testimony tending to prove the handwriting of Mr. Riordan. He states, respecting the following telegrams, that he "thinks they are all Mr. Riordan's signatures":

"San Francisco, 6/29, 1894. To Chas. E. Bradley, Engineer S. P. Co., Pajaro: Strike ordered to-day noon. Let trains come north. Notify San José and along the line. J. E. Riordan."

"June 29, 1894. F. Gillett, San Luis Obispo, S. P. Co. Caboose: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. C. E. Bradley, Tres Pinos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. A. E. Pratt, Pacific Grove, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."

"June 29, 1894. E. B. Stanwood, Castroville Station, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #354, A. R. U."

"June 29, 1894. G. W. Gillett, Aptos, S. P. Co.: Strike ordered immediately. Tie up everything. J. E. Riordan, Secretary #345, A. R. U."



"F. W. Clark, Pac. Grove: Greer O. K. Keep on good work. Tie up strong. J. E. Riordan."

"San Francisco, 6-30, 1894. G. D. Bishop, Oakland Yard S. P. Co. Committee out on organizing Narrow Gauge. Your assistance required. J. E. Riordan."

It is admitted on the part of the defendants that the following telegrams were signed by George Elliott, although, when the latter was cross-examined, he could not recollect as to whether he signed some of them, and denied that he signed others. The witness J. E. Dillon identified his handwriting.

"San Fran., 7/1, 1894. To R. Gillett, Aptos, Cal.: Not a wheel turning between here and Chicago. It is our fight sure. Will keep you posted. George Elliott, Chairman."

"7/2, 1894. To Ed Stanwood, Castroville Station: Everything is coming our way. Not a wheel moving between here and Chicago. Victory is certain. George Elliott, Chairman A. R. U."

"7/2, 1894. To Ed Pratt, Pacific Grove: We are gaining strength rapidly. The fight is ours. Everything is coming our way. George Elliott, Chairman A. R. U."

"San Fran., 7/3, 1894. To R. W. Gillett, Aptos: No, sir. Allowing no trains to run we can help. Geo. Elliott, Chairman."

"San Francisco, 7/3, 1894. To J. Morehead, Pacific Grove: No, sir. Out to win, and going to. Will advise when settled. George Elliott, Chairman."

"7/3, 1894. To W. H. French, Aptos: You are all in to clear. Eugene V. Debs wires giving you full protection. Tie up everything at once. George Elliott, Chairman."

"7/3, 1894. To J. M. Smith, Tres Pinos: Fight is ours, and win we must. George Elliott, Chairman A. R. U."

"7/3, 1894. To W. Johnson, San José, Care Eureka Hotel: Do not move. Committee will see you to-morrow morning. George Elliott."

"7/3, 1894. To F. W. Gillett, San Luis Obispo: You are a brick. Debs wires that we will win. George Elliott."

I have now directed your attention to some of the testimony that tends to show the communications that passed between the various lodges of the American Railway Union and their members concerning the boycott and strike, and the concert of action that was had in pursuance of such communications. I have also called your attention to some of the statements of Knox and others as to the purpose of the boycott and strike, and the purpose they had in view in taking the action they did. To review all the testimony in the case bearing on this point would take too much time, and will not be necessary, in view of the argument of counsel for the defendants, who admits the concert of action claimed by the government, but denies that it involved a criminal purpose. With respect to these telegrams, and the testimony I have referred to in connection therewith, you will bear in mind that many of them have been admitted in evidence with the consent of counsel for defendants; the genuineness of others has been denied; and the testimony as to still others is, by reason of the contradictory nature of the testimony, involved in more or less uncertainty. As you are the sole judges of the credibility of the witnesses, and of all the evidence introduced in the case, whether it be oral or written or documentary, you will determine the genuineness of such of these telegrams as are in controversy, and this you will do from all the circumstances in the case. In passing upon the telegrams not admitted as genuine, you will be justified in resorting to all

those facts and circumstances in the case which will tend to establish their genuineness, or, on the other hand, serve to show their want of genuineness. For example, you may consider the occasions and occurrences to which the telegrams purport to relate; whether they would have been sent, but for such occurrences; the relation they bear to the events which you may deem the evidence establishes to your satisfaction, and beyond a reasonable doubt; their tenor and subject-matter; the fact that the sender or the recipient, as the case might be, was connected with the American Railway Union. In fact, all those circumstances and incidents which may be rationally and naturally connected may be considered by you in passing upon their authenticity, and the probability of their having been sent and received by the parties whose names appear upon said messages. The importance and materiality of these telegrams as showing, or tending to show, that the conspiracy charged in the indictment did in fact exist, is for you to determine. There are two important facts, however, to which it is proper for the court to call your attention, in your consideration of this question, and these are that most, if not all, of these telegrams were sent, or purport to have been sent,—whether they were or not is, as I have stated, for you to determine,—by and to members of the American Railway Union, and in the greater number of instances by those in authority in that organization, and who the testimony I have referred to, and other evidence adduced during the trial, tends to show were actively concerned in the strike, and took part in it with the avowed purpose of preventing the movement of all Pullman cars. Another significant circumstance, to which I call your attention, is that you are to consider whether these telegrams related to any of the facts charged in the indictment as constituting the conspiracy to commit the acts with which these defendants are accused, and whether they had any bearing or connection in any way with the acts charged in the indictment as means to effect the object of the conspiracy, and with reference to which—or some of which—acts the prosecution has introduced evidence showing, or tending to show, the conspiracy and overt acts, and the connection of these defendants with such conspiracy and acts. If you are satisfied from the evidence that these messages related to, formed a part of, or had any bearing upon the object of the conspiracy, and the means to effectuate such object, charged in the indictment, and the overt acts alleged to have been committed in furtherance of such conspiracy, it is a circumstance which you may consider in determining the existence of such conspiracy. You will consider whether they establish, or tend to establish, the concert or purpose and action which constitute important elements in this case as to the existence of the conspiracy charged; particularly, where a number of telegrams of similar purport and tenor are sent to different places at or about the same time, and all proceeding, or purporting to proceed, from the same person or local lodge of the American Railway Union. Thus, the telegrams sent by Knox, who, as testified to, was chairman of the mediation committee at Sacramento,

and whose jurisdiction as such extended over a good part of the Pacific coast, or of Roberts, the president of the Oakland lodge or union, or of Bishop, its secretary, or of Douglass, Vice, Elliott, Riordan, and such others as the evidence shows, or tends to show, sent telegrams of the same general character, these persons being officially connected with the American Railway Union,—whether these show, or tend to establish, a unity of design, a community of purpose, an express or tacit understanding to do the acts charged in the indictment.

It is claimed by the defendants that, while there may have been some concert of action on the part of the members of the American Railway Union with respect to the boycott and strike, the purpose of such concerted action was merely to advise members of that organization to quit work until the controversy between Pullman and his employés should be settled. As I have explained to you before, even this purpose would become a criminal conspiracy, if the concerted action were knowingly and willfully directed, by the parties to it, for the purpose of obstructing and retarding the passage of the mails of the United States, or in restraint of trade and commerce among the several states. The government claims, however, that the concerted action on the part of the American Railway Union had something more to it than merely advising its members to quit work. It is claimed that the language of the telegrams, to which reference has been made, indicates that it was the purpose of the strikers to prevent the movement of railway trains belonging to the Southern Pacific Company, by actual and unlawful obstruction; and in this connection the question will arise in your minds, if these telegrams were intended merely to advise members of the American Railway Union to quit the service of the company, why did they not so state that purpose in plain language? It would have been an easy thing to have said, "We advise you to quit work." Why, then, telegraph such instructions as these,—if these telegrams were sent: "Stop all Pullman sleepers." "Tie up everything." "Hold Nos. 4 and 2 sure." "Tie up strong." Furthermore, if it were simply the purpose of the American Railway Union to advise its members to quit work, why did Mr. Knox use this language in his statement of the situation to the Citizens' Protective Association of Sacramento on July 7th, last? "Mr. Knox then stated that he would allow the mail and express to be moved, but that no passenger or freight cars of any kind or description would he consent to have moved until such time as the demand he made had been complied with." Why did Mr. Mullen, on the same occasion, say "that this was a fight between capital and labor, and that from the chief justice of the United States, down through all the branches—judicial and legislative departments—of the government, they were corrupt, and that labor could not get its just dues, and that his association had taken this way of forcing justice to assist their fellow men in obtaining for honest labor a proper compensation"? And why did Mr. Compton, at the same time, say "that the A. R. U. organization would not resort to any desperate means, so long as the railroad company would deal

with them without using armed force"? Was this language used on those occasions consistent with the peaceful and lawful methods of procedure now claimed by Mr. Knox to have been the purpose and action of the members of the American Railway Union during the period of the strike?

But it is claimed by the prosecution that the purpose of the strikers to interpose actual and unlawful obstructions to the movement of railway trains, both passenger and freight, is further shown by certain acts alleged in the indictment and concerning which testimony has been introduced. I will therefore now direct your attention to that feature of the case.

One of the means alleged, in the indictment, that was adopted to promote, carry out, effect, and execute the conspiracy, was (1) that the conspirators were to "forcibly take and keep possession and control of all yards, depots, tracks, and trains of cars on said lines of railway and to forcibly hold and detain the same."

#### Sacramento.

The following testimony relates to what occurred at Sacramento, and it is claimed that it tends to prove the feature of the charge now under consideration:

Felix Tracy, agent of Wells, Fargo & Co. at Sacramento, called for the government, testifies on direct examination that: On the 27th of June, train No. 84, which ran from Sacramento to San Francisco by the way of Stockton, on which the express was, was held in Sacramento, and not sent out. The main office in Sacramento was at Sixth and K. He went down to the depot office to ascertain why it was not sent out. He ascertained that the train was not going out, and that the express was held there. The express was taken out of the train and held until they could send it away by different modes of conveyance. The express matter was destined for points between Sacramento and San Francisco, also Los Angeles; and matter for New Orleans also goes out on that train, connecting at Lathrop or Tracy. He could not tell positively whether there was or not any express matter on that train for New Orleans without examining the record. On the morning of the 29th, the express on train No. 4, which is the overland train from the East by the way of Ogden, was held at Sacramento, and he transferred the express from this train to the steamer. Sent it from Sacramento; that is, that portion of it for San Francisco, down on the steamer from Sacramento. This train was held at Sacramento about 10 o'clock in the morning. His recollection is that there was some freight or express matter on this train from New York for one place. The witness thus relates the manner in which he transferred this express:

"I saw that the train was held there and not moved. I saw a large crowd there, and the time for the steamer to leave Sacramento was about ten o'clock; that is, the regular time. I was satisfied, if I was going to get that express to San Francisco, that I must act very quickly. I did not know whether the steamer would be permitted to leave, or whether I would be permitted to transfer the express from this car to the steamer. Consequently I ordered two wagons—the large two-horse wagon and the single wagon—to

the express car, with the idea that we might carry that express up to 6th and K. \* \* \* I did not tell only one or two employes. I did not state to them what I was going to do. We loaded it in as quick as we could, and took the express over to the steamer, and transferred it to the steamer. There was a great deal of excitement both at the depot and the steamer landing. I heard men at the steamboat landing ask the employes of the steamer not to go out."

The witness further states: That a train which left San Francisco on the 28th of June was delayed at Rocklin. He sent up several days afterwards, and had the express brought back to Sacramento, and he saw himself that there was express there going to Ogden, and east of that, from San Francisco and other points. He saw the waybills. With reference to the detention of train No. 84 on the 27th of June, as testified to above by Tracy, Mr. Knox gives the following version of the cause of its detention, which I have heretofore referred to in another connection: He states that there was a train due to leave there at 10:25, known as No. 84. They asked the switchmen not to handle the Pullman car, because it was empty, and it was not necessary for it to go. They thought it was proper to boycott the empty Pullmans. They refused to put Pullman cars on. That train stood there until leaving time. Then it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks. As to the detention of train No. 4 on the 29th, Mr. Knox testifies, in substance, that Mr. Saulpaugh, the engineer, declined to go out on the train, and that the fireman also refused to go with the Pullman cars, and that this was the cause of its not going out.

Barry Baldwin, United States marshal, who was at Sacramento from the 1st of July until the middle of August, called for the United States, testified, on direct examination, upon being asked in what condition the tracks and the cars and engines in and about the depot at Sacramento were on the evening of Sunday, July 1st, that they were in great disorder. Engines were driven head to in places, and wheels blocked, and obstructions—cars—placed across the tracks. The cars were placed in such a manner as to impede the business. Saw no steam arising from any of the engines. They were in such a position that the trains and engines could not have free movement. Mr. Knox denies the truth of this statement, and in answer to the question: "Q. What was the condition of the yard?" says:

"It was simply trains had been run in there, and the men refused to put them away, because they would not work until those men had been reinstated, and they simply died on the track of their own free will. No one injured them at all. So far as any obstruction on the track, there were none at all, except that one block I spoke of under that engine to keep her from running down hill into another engine."

Mr. Baldwin further testified on his direct examination that the depot was constantly overrun with men; that it was in the possession of the strikers. Mr. Knox states that this is not correct; that the depot was in the possession of the railroad officials all the time.

Mr. Baldwin further states, in relation to the effort made on July 5th to couple the engine to delayed train No. 4, that it was standing on the track. It had come in there and had been stopped there. In the morning before commencing at all, he went to the mail car, and saw the postal clerk there, and made him open the car, and went into the car, and saw that the mail was there in the car, and that it was the mail that was ordinarily carried on that train, and had come down from the post office, and that is the way he ascertained. The crowd surged in through the depot. The crowd was heaviest around the engine, and standing in the way of the engine, and obstructing its coming up to the train. He had to get down and move them foot by foot to get the engine through. He got on the engine again, and it was moved up to the train, and, just as they reached the train, the crowd broke past and swept through the depot, and broke the train and rolled back the cars,—the passenger coaches. There were some seven cars rolled back. Possibly 500 people took part in rolling back these coaches. They rolled them back at once with their hands, without any difficulty, there were so many of them.

Greenlaw, a witness for the defendants, testifies: That he heard cheering and hollering down at the east end of the depot. That he went down there. That when he got there the Pullman cars had been uncoupled. That there was quite a crowd around Marshal Baldwin when he got there. That he saw they were trying to get at Baldwin, and he did his best to defend him. That a fellow—he thinks it was Jack Harris—picked Marshal Baldwin up and started to carry him out of the crowd. While he was up in the air on Jack Harris' shoulder he drew his revolver. He said, "Let me down." Jack Harris let him down on the ground, and he shoved the pistol up under Greenlaw's nose. Greenlaw states that he said: "Don't point that thing at me. I have been trying to defend you." Marshal Baldwin said: "I will shoot the first man that lays his hand on me." Just then Mr. Galliner broke into the crowd,—a great, large man,—and he said: "What's the matter, Marshal Baldwin?" or, "Baldwin." Baldwin said: "These boys won't leave me alone." Galliner then said: "Leave him alone. He is all right, boys. Go away and leave him alone." That the crowd then dispersed and went over to the depot and Third street bridge. Mr. Baldwin also further testifies: That on July 4th there were larger crowds at the Sacramento depot than on the previous day. Nothing had been done towards cleaning up the yard; no work had been done from the previous day up to that time. That an attempt was made on that day by the militia to take possession of the depot. That at the termination of the militia's efforts the depot was still in the possession of the strikers. That from that time on to the 11th of July, in the morning, the depot, grounds, and tracks and yards around the depot were in the possession of the strikers. The witness Greenlaw, called for the defense, contradicts Mr. Baldwin's testimony on this point, and states that there were more outsiders at the depot than there were strikers; that the strikers were doing the same that the crowd was,—looking on. No effort was made to

keep them out. They just stood there in the depot. He did not see the militia make any effort to get in. In relation to the stoppage of the movements of all trains between the 3d and 11th days of July, Mr. Baldwin states that there was nothing moved out (of the Sacramento depot) between those dates.

### Red Bluff.

The following testimony relates to the possession taken by the strikers of the yard, depot, and trains at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, called for the government, testified as follows: That he was roundhouse foreman at Red Bluff for the Southern Pacific Company in the months of June and July last; that he recollects an attempt to move the Sacramento local No. 12 from Red Bluff on or about the 29th day of June last; that it was composed of the day coach, smoker, and mail car; that he and Mr. Jones and Mr. Robb, the conductor, endeavored to move this train. After explaining the position of the train on the track by means of a diagram on the blackboard, he states:

"We were on the back of the mail car,—myself, Mr. Jones, and Robb. We set the levers to couple on. When we got very near there, Mr. Ray threw one of the levers down onto the coach, so that we could not couple it. There was Ray, Clodtfelder, and Shepler. He told us we could as well give it up. We had done our part, and they would do theirs. That we could not couple that train together. Clodtfelder was the man that made that remark. We stayed there and talked quite a while. Mr. Robb made the remark they were too many for us. We could not make it up. We would have to give it up. The engine stood there for about an hour, and the engineer brought her back to the roundhouse. The mail car stayed there a few feet away from the coach, not coupled."

J. P. Heaney, a witness called for the defense, testified: That he was a brakeman for the Southern Pacific Company in June and July last. That he belonged to the Brotherhood of Railroad Brakemen and the American Railway Union at Sacramento. That he went to Red Bluff on the 28th of June. The following morning (the 29th) he went to the depot. As he turned the corner he saw no engine there. He walked along leisurely, and when he got down to the depot he inquired why the engine was not out. He was told that a strike had been declared. He saw the fireman, and asked him what he thought about it. The latter said he did not know. The witness said: "Will we go, or will we not?" and he told the fireman that he would like awful well to go, but that he would hate to go into Sacramento and have the boys holler "Scab" at him when he got there. That he would not do that for all the jobs he ever saw. That they talked around there a little while, and finally concluded not to go out. He took off his cap and uniform and gave the job up then. He was told that they were obstructing the mail; that that was a mail train. In answer to the question, "Who told you that?" he states:

"I don't know. I think it was some of our men who spoke to me about it. I think it was Montanya and Harper. They said it was a mail train, and we ought to go on it. I says: 'All right. If it is a mail train, we will go.' I went down and says: 'I will go with the mail car, and nothing else.' I

told Mr. Jones and Mr. Robb so,—that I would go with the mail car. I spoke to the fireman about it, and asked him what he thought. He says: 'Yes, we ought to go with the mail, anyhow.' I asked him to get the engine. He started to get the engine, came down,—the train was in on the side track,—and I let the engine in, and went up and cut the mail car from the coaches, and backed the engine up on it, coupled on, and pulled out on the main line. Put my uniform on again, and told Robb and Jones that I was ready to go. They said that I could not go with that train; to put the whole train on, or there would be nothing go. I says: 'That is all I intend to go with. If you won't let me go with that, I won't go.'"

J. C. Shepler, called for the defense, admits that he was present upon the occasion, on the morning of the 29th of June, related by the witness Day. He states that he had nothing to do with the uncoupling the mail from the rest of the train,—the Sacramento local No. 12.

The persons Ray and Clodtfelder, who are implicated by Day in the uncoupling of train No. 12 on the 29th of June, were not called as witnesses.

Day further testifies, with relation to the stoppage of the Oregon express, train No. 15, on the 1st day of July: That he was not down at the train when she came in. After she was there a little while he went down. He saw the train had been cut in three different parts. This was somewhere about 9. He went down to the rear end of the train to see Mr. Kilburn. He saw the two sleepers were cut off and backed down over one crossing, the two coaches and a tourist car were cut in another section and standing on the crossing, and the two mail cars and engine standing in front of the depot, on the main track. At the south end there were two Pullmans; next came a tourist car, day coach, and smoker, and an express car and baggage car was with those coaches and smoker, and the next was two mail cars and engine,—one a mail car and the other a box car. Men were working there taking off the appliances for connecting the train. He saw Mr. Shade there at work; also saw Richard Roe, and a fireman of the name of Hill. Hill's first name is Joe. Mr. Heaney was around there. He did not see him doing anything. There was probably a couple of dozen around there. He saw Mr. Shade and Clodtfelder cut the hose and the Miller hooks behind the mail car. They did that in his presence, when he went down to get the engine to pull her up. He looked at the couplings in the afternoon. He saw the safety chains taken off, and the nuts and keys at the back of the Miller hooks had been taken off.

J. C. Shepler, the same witness whose testimony has been previously referred to on the part of the defense, denies that he assisted in taking any nuts or chains or bolts, or in any way interfering with the Portland express which came in on the 1st of July; that he saw no one in any way interfering with the couplings or brake chains, or any of the nuts or bolts connected with the train. He admits, however, that he saw a couple of chains lying on the ground there. He admits, also, that he was at the station when the train came in, and that there was a crowd about the train. He states that he does not know who uncoupled the train.

Joseph B. Hill, called for the defense, and the person referred to by the witness Day as the fireman who was engaged, with others,



in taking off the appliances for connecting the Portland express on July 1st, states that he was present when the express train came in; that there was quite a crowd about there. He denies that he ever did anything to prevent the coupling of the engine and mail car to the coaches of the Portland express.

J. P. Heaney, called for the defense, testifies that he was around the depot on the 1st of July when the Portland express came in, or shortly after it came in. He gives the following version of the uncoupling of the train:

"Mr. Jones came up there and wanted to know if we would put the train away. I believe I spoke up and said that we would put the train away if he would tell the engineer to obey our signals. He said he would. He went up there and told the engineer. After he told the engineer, we gave him a back-up signal, and cut the train in three pieces, so as to clear the different crossings there. There are three crossings there that have got to be cut. If we would run the train all down there, we would stop the wagon transportation. We cut the train in three pieces, and let it stand there."

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified that on June 29th an attempt was made to move the Red Bluff and Sacramento local. This train carried coaches, the ordinary baggage car, and a mail car. It carried no sleepers. This train is due to leave Red Bluff at 5:15 in the morning. He attempted to move the train. The strikers had cut the train in two,—cut the mail car off. He could not say who cut it off. He did not see them cut it off. He attempted to put it on again and start the train in regular form. Mr. Clodtfelder and Mr. Ray prevented him from coupling it. Mr. Day and Mr. Robb, the conductor, assisted him in trying to put that train together. Mr. Day is the foreman of the roundhouse. They backed the train together. He set the Miller hooks to couple; set one of them to couple, and stepped over to the other platform to couple the other hook. Threw the lever up, as it were. Clodtfelder held it and prevented him from doing it. Mr. Ray got onto the other platform and threw back the other lever, so that it would not couple. The effect of this was that they could not couple the cars together. They were endeavoring to couple the mail car and the coaches. The mail and express and baggage were all in the one car at that time. He knows that that train had not been cut in two in that manner under the authority of the company. At the time that he endeavored to put this train together, Clodtfelder told him: "You cannot couple this train. You have made your attempt. You have done your part. Now we will do ours." The witness told him that his overpowering force—there were 50 to 2 of them—prevented them from coupling it. There was quite a large crowd about at that time. They were all opposing the railroad. They sympathized with the men who were stopping the train. They refused to assist the witness in starting the train, although he called on quite a number of them. They said they would not move any trains until the matter was settled. Clodtfelder and Ray said that the mail car could go. He thinks it was Clodtfelder who said that, or Demmick. Demmick was one of the leaders. They said the mail car could go by itself; no other cars of any kind,—Pullmans or day coaches,—none but the mail car.

Knows a man named Joe Hill. He was a fireman. He was on strike at that time. He went to couple this train together on the morning of the 29th. Hill also took an active part in preventing that. As they started the engine and mail car to couple onto the coaches, Hill tried to apply the air. By "applying the air" the witness means that he opened the automatic air valve of the air hose at the rear of the mail car. That would set the brakes if there had been air enough on the car, but there was not enough pumped, and they went ahead.

As previously stated, Hill denies that he interfered with this train in any way.

It is to be noticed that this testimony of William H. Jones is corroborative of that of J. C. Day, the preceding witness.

#### South Vallejo.

The following testimony related to the possession by the strikers of the yard, tracks, and trains at South Vallejo:

Michael Keefe, yard engineer for the Southern Pacific Company at South Vallejo, called for the United States, testified as follows:

"The engines and yards of the Southern Pacific Company on the 10th and 11th of July were not in a condition for service. All the engines were killed; there was no steam in them."

The same witness further testifies:

"The number of my engine was No. 1. It was a switch engine. Some men took the engine away from me. One of them was Thomas Kelly; another was named Laurie; another was named Smith; another Hale. These men ran the engine off an open switch. They ran it off the track. This was on Tuesday, July 10th; about that time. They then hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose."

It would be hard for him to state the particular parts each man played. He did not exactly locate them at the time, or what they were doing, because he was talking with them. He tried to get on his engine. He got on the side. They would not let him get on. He thinks it was Smith who would not let him get on. He prevented him getting on. Kelly was a fireman for the company up to the time of the strike. He was out on strike. Laurie also went out on strike. He was a fireman. Smith was a stranger to him. He was the man that came there. Smith and Hale were the ones that came to Vallejo and made that trouble. Does not know where Smith came from. Thinks Hale told him he came from Folsom. Thinks Hale said he was a baggage man, a train man. He did not say why he came to Vallejo. The same witness further testifies that on the following day, he thinks it was, engine 1,190 was killed at South Vallejo. She came from Calistoga that morning. She pulled a mail train. Does not think that there were any Pullman cars on that train. He saw the engine killed. He was on the engine. He ran the engine. Smith came there, with a good many others, and took the engine away from him, and killed it. They took it right

on the main track. They put the fire out, also disconnected the hose, and let the water out; also out of the boiler.

San Jose.

The following testimony relates to the possession taken by the strikers of the depot, yard, tracks, and trains at San Jose:

James Hewitt, called for the United States, testified: That he was the engineer of the San Jose train No. 19, running between San Francisco and San Jose. That he left San Francisco at 5:10. Was due at San Jose at 7 o'clock in the evening. That it was a mail train, having a combination mail and express and baggage car. That it carried no Pullmans. That he arrived on time. Going into the yard, people rushed from the depot onto the track, and he had to stop. This happened about 400 or 500 feet this side of the depot. The people rushed up the track, and he had to stop or else run over them. Knows a man named McClintock, and also a man named Runyon. When he stopped, Mr. McClintock came up on the front part of the engine, and came through the window on the left-hand side. The window was open. He came in and stepped over to him, and says: "I will take charge of this engine, Jim." Then Hewitt said to him: "Harry, you have got the main track blocked. This is as far as I am going. Let me put this train on the side track and put the engine in the roundhouse." Mr. Runyon stepped up and said: "No, sir. We will kill her right here." During this time there was a deputy United States marshal on the engine with the witness,—one on each side in the gangway. They tried to keep the crowd off. They overpowered the one on the left-hand side. McClintock asked him what business he was doing there, or what he was doing there. He said he was a deputy United States marshal, and showed him his badge. At that time they were trying to get hold of the fireman. McClintock, after he asked him to show his authority, which he did, says: "We can't help that. Boys, take him away." They took the fireman off of the engine. That left the witness and McClintock and Runyon on the engine, and a lot of boys came up over the baggage car and came up on the tender. After that the witness had some conversation with McClintock with regard to putting the engine away and putting the train on a side track. He told him they had the main track blocked. It was not necessary to hold him there. Wells-Fargo's agent stepped up on the right-hand side, spoke to McClintock, and asked him to pull the train down to the crossing, where they could get out their express, mail, and baggage. He says: "All right. Boys, cut off the baggage car." Which they did, and pulled down to the crossing or over the crossing, right in the front part of the depot, and stopped the engine there. One of the gang says: "No one shall move this engine but McClintock." The witness sat down on the fireman's side, and took hold of the bell cord. They got down to the depot. McClintock told him he had better get off and go home; that he would not be responsible for his life. The witness said: "You never mind about my life. I guess I can take care of myself." They got the engine as far as they could get her.

W. S. Runyon, the person referred to by witness Hewitt in the testimony just quoted, was called on behalf of the defendants, and testified, in brief, that he was a locomotive fireman in the employment of the Southern Pacific Company in June last; that he belonged to the Brotherhood of Locomotive Firemen, and also to the American Railway Union; that he was a member of the executive committee of the American Railway Union in San Francisco; that during the strike he went to San Jose, on the evening of July 5th; that he went there of his own accord, to suppress any acts of violence or any deeds of violence that might possibly be committed there, as he understood there were some very troublesome people in that locality. His statements as to what took place at San Jose, and his connection therewith, in his own words, are as follows:

"I left San Francisco shortly after five o'clock of the evening of July 5th, and got onto the train here in San Francisco, and rode until we got to San José. As we were going in the yard at San José, the train slowed up slightly, and when about midway between the roundhouse at San José and the depot she came to a standstill. The people in the coaches commenced to get out. I, in company with a Mr. McQuade, of the Southern Pacific, got out. There was a large delegation of people on the tracks and around the depot. Q. What was done? State what you saw there,—what occurred. A. As I said, the train stopped. I got out, in company with Mr. McQuade, and stood on the outskirts of the crowd. They were doing a lot of scuffling around one place and another, and talking, and so on, and finally a remark was made that they would do Hewitt up,—the man who had charge of the train. I edged my way through the crowd. In the near vicinity I saw a number of men who had those white ribbons on their coat lapels. I said to them: 'I am what you ordinarily term a "striker," and a member of the A. R. U. As you are sympathizers with us, I should like to get your assistance to suppress any violence that might be perpetrated on Mr. Hewitt.' I got up to the engine, and, as I did, those gentlemen followed me. I says to Mr. Hewitt: 'You need not have any fear of doing you up, Jim. If I can possibly lend you any assistance, I shall certainly do so.' He was in a very excited condition; about as pale as my shirt bosom is at the present time. After a while the engine and the train was run down to a crossing or street just north of the depot. They stopped, and cut off all the coaches, with the exception of a combination car that they have for baggage and Wells-Fargo's matter. After they severed the connection between the baggage and smoker, the engine and baggage car went on the south side of the depot, to leave this here crossing clear. Mr. Hewitt changed his overalls. When he left his engine I stepped down behind him. As I did so, the other gentlemen who had the white ribbons on, and who I asked to accompany me, came along, and we walked alongside of Mr. Hewitt until he got through the crowd, and then he left. While he was walking through the crowd they jeered at him some, but there was no acts of violence. After Mr. Hewitt got away there was quite a number of men on the tender of the engine,—men and boys,—upon what is termed the 'running board.' I got them to disperse and leave the engine alone."

The witness admits seeing Mr. McClintock there at that time. The testimony of Mr. Hewitt as to what took place at the engine being read to him, he stated that some of the statements were correct and others not. He states that Mr. Hewitt suggested putting the train on the side track. He testifies that the statement said to have been made by him, viz.: "No, sir. We will kill her right here,"—is false. He states that there were several thousand people at that time there. In answer to the question: "Q. Hewitt states here that you and McClintock were trying to get hold of the fireman."—he replied: "He is a liar. I did not. I had nothing to do with the fireman, and

did not see any one pull him off the engine at all. The fireman was off of the engine five or six minutes before I got on the engine."

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (2) "by causing to be assembled, and by assembling with, large crowds of persons in said depots and yards of said Southern Pacific Company, at various points and places on said lines of railway, in said state and Northern district of California, and by gathering in great numbers in said yards and depots, to wit, \* \* \* and other places around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of the railways, preventing the movement and passage of said engines, cars, and trains."

#### Sacramento.

The following testimony relates to the assembling of crowds at Sacramento:

Felix Tracy, the agent of Wells, Fargo & Co., testified on direct examination: That there were no trains moving after the 29th of June. He saw a good many men down there at the station that were not at work,—railroad men. He saw them there, and he saw them in other parts of the city. There were more people at the depot from the 28th or 29th of June, up to the time of the United States soldiers going there,—some time about the 10th or 11th of July,—than usual, a good many more than usual. There were more there on the 3d of July, more there on the 4th of July, than it was customary to see there. He noticed that whenever he went down there. It will be remembered that Mr. Baldwin's testimony that there were crowds around the station is to the same effect. On the other hand, Mr. Knox denies emphatically that the depot was in the "possession of the strikers."

Mr. Baldwin, United States marshal, testified on direct examination that the station and the tracks were overrun with people,—people in the caboose and cars, and around them, sitting on the steps.

Mr. Knox admits this, but denies that he or his committee of the American Railway Union had anything to do with their coming there.

James Sims, called for the defendants, testified that the American Railway Union committee used one of the cars as an office on the 29th of June.

Mr. Baldwin further testifies, as to the crowd around delayed train No. 4, on July 3, 1894, that they were on the track and across the track, and they would not move out of the way of the engine. He had to get down from the engine and get in front of the engine and push them back and move them back, and the engine came foot by foot. They were threatening, and one man threw a rock at them. The same witness further testifies that he was at the depot subsequent to July 3d, and that the strikers continued to occupy the depot grounds. Being asked how he knew they were strikers, the witness stated that there was a crowd there. He was around among these men, and they were constantly informing him that they were strikers,—that they were employés of the railroad

company out on a strike. He was constantly talking with them, and walking among them, and they would address him and talk about the disturbances. That is the way he ascertained that they were strikers. The crowds never left. There was always more or less of a crowd of men there, night and day. With reference to the character of the crowd that was there late in the afternoon of the 6th of July, he states that they were strikers. Some of them said they were there to protect the property of the railroad company, and take care of it; and they were around on the cars, and it was the same crowd in character, except that they were men. The cars of the railroad company were being occupied by men, by strikers. Some of them were occupied apparently for sleeping quarters. They occupied cabooses on the tracks in the yard.

Thomas Compton, one of the mediation committee at Sacramento, called for the defense, testified that they "had our men stationed from one end of the yards to another, to see that the men did not get excited and do any damage to the property, and requested other men who came in on trains not to go out any more."

C. E. Leonard, a city trustee of Sacramento last June, and in the employ of the railroad company before the strike, testifies that there was a very large assemblage of people at the depot of the railroad company on the 3d of July.

#### San Jose.

The following testimony relates to the assembling of crowds at San Jose:

Frank Arnold, a railway postal clerk on the route from San Francisco to San Luis Obispo, testifying as to the crowd at San Jose, says on direct examination that there were several thousand people around the train that came in on July 5th. They were all around the train,—inside of it, on the platform, swarming all over it. On cross-examination he says that they were occupying all the spaces in the depot, on the railroad car platforms, and so on.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (3) "by threats, intimidations, personal assaults, and other force and violence, to prevent the engineers, firemen, conductors, brakemen, switchmen, and other employés of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways."

#### Sacramento.

The following testimony relates to threats, intimidations, and acts of violence at Sacramento:

Mr. Baldwin, speaking of the strikers at the Sacramento depot on July 3d, testified on direct examination that they were threatening, and there was one man that threw a rock at them. It struck the cab of the engine, just below where Mr. Clark was standing—between Mr. Clark and himself. He further testifies that there were crowds around the semaphore. The crowd was demonstrative at this time. There were men threatening them as they took the engine through,—hooting. He recollects one man saying, "I will fix you." He seemed

to be particularly addressing himself to the witness that time,—the people on the engine. Heard expressions of anger and defiance. They were angry.

Respecting this testimony of Mr. Baldwin, Greenlaw testifies that there was a good deal of yelling there. Some were "hollering." But he did not hear any threats made. He did not see any forcible means used to prevent the taking out of the train. No threats whatever were made towards Mr. Baldwin. He denies that he incited any people to do anything that day, or that he threatened Mr. Baldwin, or any one. He admits that he called some persons on the engine "scabs," but denies the statements imputed by Mr. Baldwin, in his testimony, to him.

While it is to be observed that Mr. Baldwin was not an employé of the railroad company, yet the testimony, if true, is significant with respect to the actions of the crowd towards Clark, the engineer, and the others on the engine.

Anthony Green, called for the defense, testified that he was captain of police of the city of Sacramento, and was such in June and July last; that he was present on the 3d of July at the depot; that he himself saw no acts of violence committed, but he admits, on cross-examination, that he did not see the cars actually shoved back by the crowd. He testified that he heard the crowd yelling at those who were in the cab of the engine that was being moved from the roundhouse to the delayed train No. 4; that such exclamations were used as follow: "Don't you go out;" "Don't you take that train out;" "Stand by one another;" "Don't be a scab;" "Don't take the places of those men who are working;" "Come out of there;" "Don't you take that engine out;" "Don't fire that engine;" "I appeal to you as a man;" "Come down out of there;" "Don't go out,"—and such questions as those, appealing to them; that he was in the cab himself several days, mornings and nights; that he stood in the first one.

#### Red Bluff.

The following testimony relates to what occurred at Red Bluff:

Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that he was not at liberty to go on the engine. He was told to keep away from the engine and let it alone. A brakeman by the name of Harper and two or three other men told him that. He does not know them. He thinks Harper was on strike. He was out with them. This occurred, according to the witness' testimony, on July 1, 1894. The same witness further states, after describing how engine 1,248 was killed by Van Devinter, Richard Roe, and Harper, that he had a conversation with Van Devinter about the matter. He told him he was doing very wrong, and Van Devinter said he did not think it was any of his damned business what he was doing. They told him if he did not get out of the roundhouse they would have him carried out on a board. Harper made that remark. Richard Roe and Van Devinter, and one or two others he did not know, were present. This was at the time they were killing engines.

## South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running out between South Vallejo and Santa Rosa, whose engine was killed, testified as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. This was near 7:30 or 7:35 in the morning. It could not have been far from that. He was running the train,—conductor. He left North Vallejo, and between North and South Vallejo he found an engine on the main line. The engine was called a "killed" engine,—no steam in it. As they pulled up near that engine, a crowd of men came out and fixed theirs the same way. They were obliged to stop by this "dead" engine. He thinks he must have been very near on time. He makes connection, with passenger and mail cars, with a boat that runs between North and South Vallejo and Vallejo Junction. At Vallejo Junction connection is made with the San Ramon passenger train. It is a mail train that runs between San Ramon and the Oakland pier. He asked a man named Smith to let him couple on and push the dead engine on the siding, so that he could get the train down to the depot. This man refused to do it, saying he was there under orders, and had to obey his orders to stop the train where it was. Smith showed him a card with his (Smith's) name on it,—an A. R. U. card.

William James, fireman of one of the Alameda local trains, testified, in answer to the question, "Did you have any trouble at tower No. 2 that day?" as follows: "The train was stopped by a mob of men, and I was taken off the engine." He further states that about 75 or 100 men got in front of the engine. The engineer stopped when they gave him the stop signals. The crowd, all of them, gave signals,—all those that were on the track. He could not see who they were. They took him through the crowd, and wanted him to go and join the A. R. U. They took him half way to the roundhouse, he would judge about 400 feet. Engineer Willard came out and told them it was a free country, and he would go where he wanted to, and with that they let go of him.

Many witnesses on both sides have testified as to the personal assault claimed to have been made on Mr. James. The testimony is contradictory as to what actually took place at that time. I think, however, this feature of the case is sufficiently fixed in your minds to enable you to determine the actual facts of the case without any extended comments from me.

(With the usual admonition to the jury, an adjournment was here taken until to-morrow, Tuesday, April 2, 1895, at 10 o'clock a. m.)

Tuesday, April 2, 1895, at 10 o'clock a. m.

When the court adjourned last evening, I was directing your attention to testimony tending to show the means conspired to be used in carrying out the conspiracy. First, I called your attention to the testimony tending to show, or to disprove, that the con-



spirators forcibly took and kept possession and control of all yards, depots, tracks, and trains of cars on said lines of railway, and forcibly held and detained the same; second, that they caused to be assembled, and assembled with, large crowds of persons in said depots and yards of said Southern Pacific Company at various points and places on said lines of railway in said state and Northern district of California, and by gathering in great numbers in said yards, and depots, to wit, \* \* \* and other places, around, in, and upon the trains, cars, engines of the Southern Pacific Company, and upon the tracks of said railways, preventing the movement and passage of said engines, cars, and trains; third, that by threats, intimidations, personal assaults, and other force and violence, they prevented the engineers, firemen, conductors, brakemen, switchmen, and other employes of said Southern Pacific Company from discharging their duties, and from moving and operating the said engines, cars, trains, and railways. I will now proceed to direct your attention to the testimony tending to show other means conspired to be used in carrying out the conspiracy.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (4) "by forcibly disconnecting air brakes upon such trains,—mail, passenger, and freight."

#### Red Bluff.

The following relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, testified on direct examination that the Oregon express reached Red Bluff about 4:30 or 4:35 in the morning of July 1st last; that it comes from San Francisco,—Oakland. Portland, Or., is its destination. She was on her regular trip. She was stopped at Red Bluff. The train was cut in two. The train came into the station, and they cut it in two; that is, they uncoupled it and uncoupled the hose. He was just passing there. He did not see the man who did it. There was a mob of men there. He elbowed his way through the crowd. As he passed, he heard the air holes pump as they do when they are open. The air was cut behind the mail car. The local cars followed first, then the baggage car, the express car, smoker, coaches, and Pullman. That is the way the train is made up. They all follow the mail car. They were all in the rear of the part cut off. The effect of that cut was to stop the movement of the train. That was about 5:30, a few minutes after they arrived.

Without repeating the testimony given by the defense, it is sufficient to say that the witnesses on their behalf, with reference to the Red Bluff occurrences, deny having had anything to do with the stoppage of the Portland express.

#### South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, testifying as to what occurred to his engine on

July 10th, says that they hauled the fire, let the water out of the boiler, shut the engine down, let the water out of the tank, and disconnected the hose. They ran the engine off the open switch. The testimony of this witness respecting what occurred to engine 1,190 on the following day has already been referred to under a previous head.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (5) "by putting out the fires in the engines, and drawing the same."

#### South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Jeff Gage, passenger conductor for the Southern Pacific Company, running between South Vallejo and Santa Rosa, whose engine was killed between North and South Vallejo on July 12th, called for the United States, testified, with reference to putting out the fires on his engine, as follows: That on the 12th day of July last he was stopped between North and South Vallejo, and his engine killed. They pulled the fire out of the engine. They shut the water off first in the tank valve, and started to pull the fire out. He asked them to turn the water back first, and then pull the fire on the engine, which they did. He asked them to do that to keep from burning the engine. The effect of letting the water out of the engine with the fire in it, he thinks, would be apt to burn the bricks considerable.

#### West Oakland.

The following testimony relates to what occurred at West Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland testified that a number of engines were killed in and about the shops in the latter part of June and early part of July last. He could not give the numbers. There were 8 or 10 engines with fire in them, and the fire was let out of them, and all the engines were emptied that were full; that is, all the engines that were about the place were emptied of water,—water let out of them. This was done by the strikers.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (6) "by throwing switches, in order to prevent the passage of such trains through depots and stations."

#### Red Bluff.

The following testimony relates to occurrences at Red Bluff with reference to delayed train No. 15 on July 3d last:

William Jones testified as to the throwing and spiking of switches as follows: That, after the Portland express which arrived at Red Bluff on July 1st stood there a while, the engineer said he wanted coal, and Mr. Day, the foreman at the roundhouse, and the witness, took the engine and the mail car, as it was coupled on,—two mail cars,—there was a freight car which they said contained mail.

It was with the mail car. It had United States mail locks on it. He did not see the inside of it. Mr. Monteith: "We will admit that car had mail." The witness, continuing, stated that they took it to the coal pile to give the engine coal. They passed over one of the switches in the yard, and while they were gone the switch was thrown and spiked to the side track, so that when the train backed down it could not back to the balance of the train. It was forced to go to the siding. The switch was opened. It was thrown off the main track to the siding, and spikes driven to hold it there, and the switch blocked. They could not have passed over it if it had been spiked. It was a switch in which the car could not go off the track. They could not have gone over it. It was not the case. The target was in its proper place and position. No orders were given by the railroad company for either the spiking of the switch or locking the switch. Such orders would come through him.

Charles F. Cadwalader, called for the United States, testifies that he saw Hehorn, Shade, Ray, and others spiking a switch on July 1, 1894.

W. H. Winter, also a witness for the government, testified that he saw the switch spiked, but the only person whom he can identify as having participated in the spiking is Hehorn.

Milton D. Clark, called for the United States, testified that he saw the spiking of the switch. He identifies Hehorn as the person who held spikes in his hand; Shade is the man who drove in the spikes; and that Ray was in the crowd with them.

John Kelly, a witness called for the United States, also testifies as to the spiking of the switch. He states that he was a member of the American Railway Union; that he was a fireman for the Southern Pacific Company; that he went out on strike at Red Bluff; that he did so because he was a member of the American Railway Union. He identifies John Shade as just in the act, when he saw him, of leaving with a spike-hammer and a couple of spikes in his hands. This switch, he states, connected with the main line. There were 30 or 40 men around there at that time. He gives the names of others, besides Shade, who were in the neighborhood of this switch, as Peter Ives, S. P. Roller, Jack Shepler, and Clodtfelder. He states that Roller locked the switch after it was spiked. As to the relation these persons bore to the strike, the witness testified that Roller was a brakeman, and that he was on strike at that time. He was an A. R. U. man. Ives was a car foreman up there. He was also on strike and an A. R. U. member. Clodtfelder and Shepler were on strike at that time. They are members of the A. R. U. Knows a man named Demmick. Knows a man named Harper. He (Harper) was there that morning. He is a brakeman, and a member of the A. R. U., and out on strike. Knows a man named Heaney. He did not see him there.

The persons referred to by the witnesses for the prosecution as having participated in the spiking of the switch, which prevented the engine and mail car of the Portland express from getting back to the passenger and Pullman coaches, or, more strictly speaking, those

who have testified, deny that they have been guilty of the acts charged, or did anything in any way which contributed to the spiking of the switch.

#### South Vallejo.

The following testimony relates to what occurred at South Vallejo:

Michael Keefe, yard engineer of the Southern Pacific Company at South Vallejo, called for the government, testified that on July 12th last he was making up a passenger train for Calistoga and the vicinity; that it was a mail train, and that it did not carry any Pullmans. He took the engine and made up the train with it, to get ready to go out again. He was going to the roundhouse with the engine. He saw a gang of men. He thought that he would get to the shops before they took the engine away from him. The switch was set for the side track. He would have got to the shop, he thinks, but this man closed the switch on him, so he stopped. Had he gone on he would have run off the track. It was an open switch. The crowd remained there. The engine was killed after that, and was there a day or two.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (7) "by opening drawbridges over navigable and other streams, upon which drawbridges the tracks of said railways were situated."

#### Sacramento.

The following testimony relates to what occurred at Sacramento:

T. W. Heintzelman, a master mechanic in the employ of the Southern Pacific Company at Sacramento, called for the United States, testified that he experienced some difficulty, on June 29th, in attempting to get train No. 4, which is a mail train, and came from Ogden, out of Sacramento,—in attempting to get her through. He testifies that he was requested by his superintendent, Mr. Wright, to back up the engine and mail car and express car,—he thinks it was coupled to the engine,—to couple on to the balance of the train that was left in the upper yard, and pull it down the depot. He did so. While pulling the train down in the depot, something was thrown at him while he was on the engine. After he saw what it was,—it proved to be a monkey wrench,—he got the train down to about its usual stopping place, and stopped there. After considerable persuasion he got the engineer and a fireman on the engine, and got the train started. The train had not moved a great ways—about 50 yards—when the drawbridge was swung open, and the train had to stop. This is the drawbridge across the Sacramento river. There was no vessel in sight to occasion the opening of the bridge. It was opened only for the purpose of stopping the train at that time. There was quite a crowd running down by the drawbridge just prior to the time it was opened.

Mr. Knox gives the following version of what transpired respecting the opening of the drawbridge: He says that on the morning of the 29th No. 4 came in. He guesses she got in about 6 o'clock,—somewhere around there. She came in with an engine, mail, bag-

gage, and express car. He went to Mr. Saulpaugh,—he was the engineer that was going out on that train,—and asked him if he was going to do any switching there. He said no, he was not; they would have to get some one else to do their switching. Mr. Wright came down there when they were talking, and asked him if he would back up to Sixth or Seventh street, he believes he said, and get the balance of the train. Mr. Saulpaugh suggested that it would be a pretty good idea to get Mr. Clark or Mr. Heintzelman to do that. They sent for Mr. Clark. The witness here stated that before this strike was ordered it was an understood thing with Mr. Wright and the committee that they should do all in their power to prevent any damage being done. On his (Wright's) side he was to give them permission to talk to the crews, engineers, conductors, firemen, and brakemen, and see if they could induce them to stay with them. When Mr. Clark came over they had the right to talk to him to see if they could induce him not to back up to get the cars. After they talked with him a while he turned around and said he did not want any of this in it. They simply asked him if he wanted to scab on his own son. His son was working there. He said he did not want to have anything to do with this, and turned around and went away. Heintzelman came, after some time, got up on the engine, and the first thing Knox saw was a monkey wrench coming out of the engine, which pretty nearly hit him. They backed up. While they were up there, he, with the balance of the committee, went through the shops, to notify the men that the strike had been decided on. While they were going through the shops a man was sent over after them to tell them that the drawbridge was open, and to ask them to come and see if they could not get it closed. He ran over there, and sent some men out in a boat to close the bridge,—Mr. Hatch and Mr. Jefford, and two or three more. They closed the bridge, and he went back and told Mr. Saulpaugh that the bridge was closed. After the bridge was closed, he told Mr. Hatch to go up to Mr. Wright's office and get a lock,—a Yale lock,—and put it on there, so that the bridge could not be opened. Mr. Hatch went and got the lock and locked it on the bridge, so that they couldn't open it.

Both Hatch and Jefford corroborated Knox with respect to the latter's statement that he sent them to close the bridge, and Hatch, further, as to the lock being procured at Knox's instance, and being placed by Hatch on the bridge.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (8) "by burning and destroying bridges, trestles, culverts, over which such trains necessarily and usually would pass."

#### Trestle No. 2, Near Sacramento.

The following testimony relates to the wreck of train No. 4 at trestle No. 2, near Sacramento:

Mr. Baldwin, who saw the wreck of the delayed train No. 4 at trestle No. 2 about two hours after it occurred, testified on direct examination that the baggage and mail cars were off the track. When he says "baggage," it might have been express cars with the baggage.

One mail car was badly damaged; also a baggage car badly damaged; also two mail cars slightly damaged. These cars were on the side, smashed over. Some of them had reached the water. He made an examination of the trestle. The engine apparently had gone probably three or four car lengths before it went off the trestle. The trestle is about 300 or 400 feet in length. He found that the east end of it, especially the north side, was badly smashed in, as though the bridge had been weakened and smashed down; the bents slivered up, the ties all broken very much more on that end of the bridge than further along, right at once where the engine struck the bridge. The trestle was very badly crushed in on the east side, towards Sacramento, immediately where it joins the track, the embankment, two or three car lengths from where the engine lay in the water. Then the train lay all along the trestle on to the embankment. The trestle, where it joined the embankment, was very badly slivered; there was only a piece of about six or eight inches where the ties were solid enough to walk on. The trestle was all crushed in below the ties at that corner.

The testimony of Mr. Baldwin tends to show that the trestle was blown up, and that delayed train No. 4 was wrecked. I will not take up your time in reading to you all the testimony introduced by the prosecution tending to show that the trestle was blown up by members of the American Railway Union, and was a part of the conspiracy to obstruct and retard the mails, and restrain interstate commerce, nor such testimony as has been put in by the defense contradictory of such design, or as to the participants engaged in such affair, or as to being or playing any part in the policy or plan of the members of the American Railway Union in carrying on the strike between themselves and the Pullman cars. The details of this unfortunate catastrophe, as told by the witnesses on the stand, are doubtless fresh in your minds. The testimony tends to show that a train was made up in Sacramento on July 11th last for Oakland, to be sent by the way of Davisville. It left Sacramento a few minutes past 12 o'clock, under charge of Conductor Reynolds, with Samuel Clark as the engineer and Danicamp for fireman. On the train was Postal Clerk J. A. Brown, in charge of the United States mail. Lieut. Skerrey and a number of United States soldiers were on the train for its protection, some of the troops being on the engine. The train consisted of four mail cars, baggage, passenger coaches, and a Pullman. About two miles west of Sacramento, in crossing trestle No. 2, the engine and four of the cars were thrown from the track into the slough. Clark, the engineer, and four soldiers were killed. The jurisdiction to try and punish the parties who were guilty of murder in this dastardly affair belongs to the state. It is only for you to ascertain who were the parties to the conspiracy that brought about this terrible result, that you may determine who were responsible for the minor offenses involved in the stoppage of the United States mails and interstate commerce. You will recall the testimony of the boy Sherburn, who drove the wagon carrying Worden and others out to a point near trestle No. 2 just prior to the time

the wreck occurred, and the testimony of Knoblauch, Reed, and Winney as to the declarations and conduct of the parties who, the testimony tends to show, were sent out by the American Railway Union along the line of the road, and for a purpose. What was that purpose? To guard the road, or to wreck that train? It is for you to determine.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (9) "by loosening, removing, and displacing the rails of the tracks of said railroad."

#### Trestle No. 2, Near Sacramento.

The following testimony relates to the track at trestle No. 2, near Sacramento:

Mr. Baldwin, who testified that he saw the wreck of delayed train No. 4 shortly after the catastrophe, testified that he made a little diagram of the position of the rails. The north rail was swung over across the south rail. It apparently had been forced over, lifted over. He found there, right at the joint a nut, three washers, and two spikes. They were loose.

#### Red Bluff.

The following was testified to as having occurred at Red Bluff: Joseph C. Day, roundhouse foreman for the Southern Pacific Company at Red Bluff, testified that the spikes and the bolts were pulled out of a rail on the main line. This was between 1 and 2 in the morning of July 1st last. He went to the coal bin, just a little ways from the turntable, to see if the coal bin was all right, and there were four men right across the other side of the fence, working at the rail. They had shovels there. He went to the turntable, and stood there talking to the fireman, when the four men came down with those tools in their hands. They came right from the direction where the rail was tampered with. He could hear them working with shovels, scratching away dirt and covering it up. He was not there more than a couple of minutes. He went back to the roundhouse. He saw John Shade, John Salstrum, Robert Lang, and George Werhing coming from this direction. Mr. Shade had a claw bar in his hand. Salstrum and Lang had a shovel apiece. He did not see anything in Werhing's hands. A claw bar is a long bar made in the shape of a claw, for drawing spikes. He examined that rail an hour afterwards, and found the spikes pulled from a rail and a half, the bolts taken from the fishplates and left lying on the ground. He put the bolts back himself.

J. F. Heaney, called for the defense, who was at Red Bluff on the occasion detailed by the preceding witness, with reference to the displacing of the rail states that he may know John Shade, Salstrum, Lang, and Werhing, but he does not know them by name; that he is pretty sure that they did not belong to the A. R. U. at that time; that they had no connection with him there.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (10) "by greasing the rails."

### Red Bluff.

The following testimony was given as to what transpired at Red Bluff with reference to greasing of rails:

John Kelly, a fireman employed by the Southern Pacific Company prior to the strike, but who went out with the A. R. U., testifies on direct examination, as to the part he took, with other members of the A. R. U., in greasing the rails north of Red Bluff, that on July 1st, at about 3 o'clock in the morning, he was about four miles north of Red Bluff; that he was greasing the track; that there were with him Bill Ray, Joe Hill, Clodtfelder, and Archie Montanya; that Montanya is a member of the A. R. U.; that he was on strike; that they went about four miles further than Red Bluff, and greased the track, coming towards Red Bluff, for about three miles. This was done with engine oil. Both rails were greased. They just rubbed it on. There is a down-hill grade from Red Bluff, going north, for about a mile, and then for about three miles it is up hill. It is a pretty steep grade. They got the oil with which they greased the rails from the roundhouse,—from the oil tanks. They had oil cans from the engines, and buckets with which to carry it. They got through greasing about 4 o'clock. There was not any oil left in one of the tanks.

The witnesses J. C. Shepler, William Sheehan, and J. B. Hill all deny that they participated in, or know anything about, the greasing of the rails as testified to by the witness Kelly.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (11) "by stopping trains upon railway crossings, and upon switches, and by forcibly refusing to allow such trains to be hauled from such crossings and switches."

### Sacramento.

The following testimony was given as to what took place at Sacramento with reference to obstructing one of the railway crossings:

C. A. Newton, night yardmaster for the Southern Pacific Company, called for the United States, testified on direct examination that the three main tracks leading into the Sacramento depot were blocked with trains and engines from the 1st to the 11th of July,—blocked east, west, and south. One of the tracks leads in off the Western Division, called "South"; one leads off the Sacramento Division, called "East"; one leads in from the California Pacific, "West,"—that is called the "California Pacific Division." These tracks lead both in and out. The roundhouse is situated north of the depot. There are several tracks leading from the roundhouse to the main track. There is one track direct to the roundhouse from the main track, that one can go to the roundhouse straight from, without doing any switching. There is another track that one can switch in off the main track, and there are several switches to throw to get to the roundhouse. All of these tracks were blocked between the 1st and 11th of July. By "blocked" he means trains and engines were on the tracks. The engines were dead; they had no steam in them. Some of the trains were made up, and some of them, that were coming into the yard,



that were stopped on the main track. On Sunday, the 1st of July, the yard was in such a condition that trains could not pass through the Sacramento depot east or west. He knows the exact condition of the tracks on the 1st of July last. The main track from the west had, on the crossing leading to the roundhouse, No. 4 engine, just about to enter the crossing to go to the roundhouse. Then there was an engine that came in on No. 69, on the 29th of June. Both pilots came together right on the crossing. That blocked the main track to the roundhouse and another track, that we used to let freight trains up and down on, called the "old main track." Crossing Washington, which is on the other side of the river, in Yolo county, the coaches, the smoker, and the mail car and the baggage car stood there in Washington. One of the coaches was shoved part of the way in on a siding, and the other coaches run down against it. That blocked that track. On the Western Division there were some three or four freight and passenger trains down on the main track, mixed up, part on a siding and part on the main track. On the Sacramento Division the cars were sandwiched in every way,—off the track and on the track, coaches among sleepers, and fruit cars, and everything else. That made the blockade complete. As night master he has control of the movement of all trains and engines in the Sacramento yard.

The testimony of Greenlaw, Compton, Knox, and others is to the effect that they had nothing to do with this obstruction, and that the American Railway Union did not countenance, nor was in any way responsible for, it.

Another of the means alleged in the indictment to promote, carry out, effect, and execute the conspiracy is (12), "by compelling the employes of said railroad company to leave their trains, shops, and the work of said company while in the performance of their duties."

#### Oakland.

The following testimony relates to what occurred at Oakland:

C. F. Hall, general foreman of the railroad shops at West Oakland, called for the United States, testified on direct examination that men in his shops were prevented from doing any work. He cannot name any of the parties who prevented his men from working, but they had a machinist working in there, with a helper, and they were taken out by a crowd that came in there. He could not now recognize any of the faces of the crowd. The same witness further testified that the crowds that came in took out the men that they had to work there,—pushed them out of the shops,—they took hold of them with their hands and shoved them out. Cannot name or designate or identify any men who were forced out of the shops, who were forcibly prevented from working. Cannot identify the men by their employment in the shops. This was on the 4th of July. He saw four men pushed out. He saw the stationary engineer taken out. He was surrounded by a gang that were forcing him out,—telling him to get out. They put their hands on him. Referring to the persons who thus prevented the men in the shops from working, the witness stated that one would not see the same parties there

every time. In the forenoon there were probably 150 or 200 men. In the afternoon, about 4 o'clock, he should judge about 300 came in, and so it was. There were small bodies coming in frequently. These crowds were composed partly of strikers,—he would not say largely.

### Red Bluff.

The following testimony relates to what occurred at Red Bluff:

William H. Jones, agent and train master of the Southern Pacific Company at Red Bluff, called for the United States, testified that on the 4th of July he did not remain in the continued occupancy of the telegraph office at Red Bluff. The telegraph office is his office. It is under his charge. It is the railroad office, the railroad wires doing the business of the railroad company. Mr. Clotdfelder and Mr. Demmick took possession of the office, and ordered him and his operator out. This was at 9:30 of the morning of the 4th of July. He asked them what for. He was told, "We have decided to close this office, and we want you to get out," and they locked it up. He immediately had the operator cut out the instruments, and locked the office and left. Both Demmick and Clotdfelder are operators, and have run both stations. They were on the strike at the time. Before the strike they were brakemen. He regained possession of the telegraph office at 6 o'clock in the evening. They, Clotdfelder and Demmick, opened it for their own use at about 1 o'clock. He was notified that he could come back to the office. Mr. Harper, another brakeman,—a striker,—also a leader, notified him that they had opened the office for their own benefit, or their own use, and he could come there and see nothing was disturbed. He did so. He went down after about half an hour. Mr. Demmick and Mr. Clotdfelder, Mr. Shepler, Mr. Heaney, came in at one time. Those that remained there all the time were Clotdfelder and Demmick. They used the office. His operator was telegraphing for them. The lines were working, and they were using the keys. Clotdfelder and Heaney both told him he could have possession of the office. Then he took possession. The night operator comes on at 6 and they took possession of the office until probably half past 9 or 10 of the evening, when another gang came in and said they had decided to close the office, and out they went. The other gang were Frierson and Roller. Both were brakemen. They were on strike. He thinks there were others there with Frierson and Roller at that time. There were about 17 there after the station train had left for Sacramento,—about 15 or 17. He does not recollect who was there particularly, but those two men came to the office. They said: "We have decided to close your office." He asked, "For what reason?" They could not give any reason at first. They went out and consulted together, several of them, outside on the platform. They held a meeting. They came back, and he said, "Have you decided why you are going to close me up?" or "that you are going to close me up?" They said, "Yes, we are going to close you up for the same reason that you were closed this morning." That is all the reason they gave.

J. C. Shepler, called for the defense, admits that the telegraph office was taken possession of by the men who were out on strike that day, and that he may have been there while it was in the exclusive control of those men, but he denies that he, with others, put Jones out, or told him he had to get out.

Finally, the indictment charges that it was sought to promote, carry out, effect, and execute the conspiracy "by using all such other forcible means as to them should seem expedient to prevent for an indefinite period the use of the said railway for the transportation of the mails of the United States and interstate commerce."

#### Red Bluff.

The following testimony relates to Red Bluff:

##### Miller Hooks.

John Kelly, previously referred to as one who went out on the strike at Red Bluff, and who had been previously employed by the Southern Pacific Company as a fireman, called as a witness for the government, testified on direct examination that he recollects train No. 15 coming into Red Bluff about half past 4 (of July 1st last). The train was prevented from going on. The bolts were taken out of the Miller hooks. He only noticed Will Ray, Richard Roe (Joe Hill) engaged in doing this, and he was there himself. He noticed what they were doing. These men whom he has mentioned were members of the A. R. U. They were among the strikers. They took the bolts out of the Miller hooks, so that they could not pull the train, and marked them all, and put them in a sack.

Joseph B. Hill, the person referred to in the testimony of the witness Kelly, just quoted, was called for the defense, and stated that he was present when the Portland express came in; that he did not see any safety chains or brake chains taken off, nor did he see any one at work taking off bolts or nuts from that train. He states, however, that all this could have been done without his knowing it; that there was quite a crowd around the station at the time the train came in. He states that he did not see Ray there, nor Richard Roe.

##### Dunsmuir.

The following testimony relates to Dunsmuir:

##### Ejected from Telegraph Office.

James Agler, superintendent of the Shasta Division, from Red Bluff to Ashland, Or., called for the United States, testified as to his being dispossessed from the telegraph office at the station as follows: That he has a telegraph office at the station at Dunsmuir; that on the 4th of July, from 10:30 until 12:15 p. m., he was dispossessed. After detailing how a crowd of 30 or 40 strikers rushed into the office, the witness states that Conductor Seyler was the man who did the talking. He said: "We are in here, and we have got to have this office." He (witness) said: "I don't see how you can

do this." Seyler replied: "We have got to have it." That it looked a little shaky. Agler told the dispatcher: "You had better go home. It seems they want the office, and I guess they are going to have it." He went out. Agler passed out, and went upstairs to the resident engineer's office, and was upstairs there 25 or 30 minutes. The witness then goes on to state who was there, and whether those persons had been in the employ of the railroad company. To the question, "Q. Were these men who came into your office at that time then in the employ of the Southern Pacific Company?" he answers, "A. No, sir; they were not. Q. Of what class was the crowd made up? A. Employés; train men, car men, machinists of all the different departments. There was a large crowd of them. A Juror: Q. Men who had been in the employ of the company? A. Yes, sir. Q. They were not at that time? A. No, sir." The witness further states that after going upstairs he saw these people get the engine No. 1,762 out of the round-house, which pulled the irregular train out of Dunsmuir. At 12:15 he was notified by them that they were ready to turn the office back to him. He thereupon went to the office. At 12:20 they pulled out.

#### Dunsmuir.

The following testimony also relates what took place at Dunsmuir:

#### Irregular Train from Dunsmuir to Sacramento.

The same witness (Agler) testifies as to this irregular train substantially as follows: That on the 4th of July a train went from Dunsmuir to Sacramento. Did not know who ordered it out. Saw the engine getting out. Saw the train made up. It was not a regular train. Had an engine and two cars. The instructions from the railroad officials concerning the movement of trains came to no other person than himself. He states that he received no instructions from his superiors in the Southern Pacific Company concerning the movement of this train. The train went without his authority. Witness knew a good many men that went on that train. Some 45 left Dunsmuir on it. He saw one Seyler, Littlefield, Walthers, Roberts, Price, Parrish. These men had been employés of the railroad company up to the 28th of June. H. L. Walthers was running the engine. Conductor Seyler seemed to be in charge of her. He noticed guns in the car. He had a conversation with Seyler just before the train pulled out. He explained to him that the coach and engine that was carrying Mrs. Stanford from Red Bluff to Dunsmuir had the right of way, and that he did not want him to leave there with a train that he had no right to. Seyler replied, "We have received a message from Sacramento and must go there, and are going." Then they pulled out.

In this connection it might be well to refer to the following telegram, Exhibit No. 687, which reads:

"July 4, 1894. To H. L. Walthers, Dunsmuir, Cal.: One thousand cavalrymen and militiamen here. Come with whole outfit by train, without orders, at once. H. A. Knox."

It will be noticed that this telegram is dated on the same day that this irregular train in charge of Walthers left Dunsmuir.

Walthers, who was called for the defense, admits that on the morning of July 4th a message arrived in Dunsmuir, purporting to have come from Mr. Knox at Sacramento, asking the men to come down,—asking their assistance,—to come to Sacramento. Walthers testified as follows:

"The message was read to all those present, members and outsiders, men and employes in general, and they all signified their intention of going. They all said they would go, and they left in a body, went down there, prepared an engine and coach, met the mail agent, and told him we were going to Sacramento. I could not state positively whether we asked him to go with us, or whether he put the question."

He states that they had a number of guns on the train,—perhaps 35. He states that the train was running without any orders at all. There were no orders from the company to run the train. He further states that he does not think Mr. Agler could have stopped his train.

M. C. Roberts, who was the secretary of the American Railway Union at Dunsmuir, of which Walthers was president, testifies to substantially the same facts as Walthers.

You will also recall that there is testimony with reference to an irregular train from Truckee to Sacramento, which arrived at the latter place about July 4th; and another from Lathrop to Sacramento, on the night of July 10th. You will observe that, so far, I have not alluded to the testimony tending to show acts committed by the defendants at Palo Alto on the 6th of July, although the indictment brings that place within the range of such testimony as I have referred to tending to show the means to be employed in carrying out the conspiracy. I have, however, deferred reference to this testimony until we reach the consideration of the overt acts charged to have been committed by the defendants, when such testimony may then be considered in the double aspect, namely, as tending to show, not only the overt acts required to be established by the statute, but also as tending to show the means whereby the conspiracy was to be carried out.

I have now directed your attention to the testimony which it is claimed by the prosecution tends to establish the means whereby the conspiracy was to be promoted, carried out, effected, and executed; that is to say, it is claimed that such means were, in fact, used, and were part and parcel of the conspiracy; that the acts concerning which testimony has been given were unlawful acts, which entered into and became part of the crime of conspiracy to prevent the use of the Southern Pacific Railways in this district for the transportation of the United States mails and interstate commerce. I have, however, not attempted to exhaust the testimony presented for the prosecution and defense, nor are you to conclude or assume that, in your deliberations upon these matters, you are confined to the testimony referred to by me. I have merely attempted to classify the general features in such a way that you may be able to apply the law, as I shall give it to you, to the facts as you may find them. It is for you to determine beyond a reasonable doubt, not alone from the testimony I

have alluded to, but from any and all parts of the evidence, whether any one or more of such acts as have been referred to was or were, in fact, committed; and, if you should so determine, whether any one or more of them was or were the means conspired to be used to promote, carry out, effect, and execute the object of the conspiracy, as charged in the indictment. For, after all, the real question is not whether these acts were, in fact, committed, but whether these acts, or some of them, was or were the means to be used to carry out the conspiracy. You will observe that it is not necessary, to establish this element of the conspiracy, that you should find that all the means charged were to be used in carrying out its purpose. If you find beyond a reasonable doubt that there was a conspiracy to commit the offense charged, it will be sufficient if you also find beyond a reasonable doubt that one of the acts charged was to be the means for carrying out and executing that conspiracy. We have now arrived at a stage of the case where we may properly refer to the law applicable to the conditions which it is claimed prevailed during the occurrences now under consideration. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United States. Moreover, it is no defense in this case to say that the railroad company obstructed and retarded the passage of the mails, or entered into a conspiracy in restraint of trade and commerce. If the railroad company violated the law, it should be punished, but we are here now charged with the sole and only duty of determining whether these defendants at the bar have been engaged in a conspiracy as charged in the indictment; and the testimony to which I have referred, bearing upon this question, suggests certain questions of law, to which I will now direct your attention.

The testimony tends to show, as you will remember, that the boycott of the Pullman cars was declared by Debs at Chicago on June 26th, to take effect at noon on that day. It did not, however, take effect at Sacramento until about midnight or early on the morning of the 27th, and its first operation in this district appears to have been to stop train No. 84 at Sacramento, due to leave there at 10:25 in the morning, for Oakland, by the way of Tracy. This train, when regularly made up, carries a Pullman car which comes from Chicago to Sacramento on train No. 2. The Pullman car is destined for Los Angeles, and is carried from Sacramento to Lathrop, where it is attached to the train for Los Angeles. The members of the American Railway Union at Sacramento refused to handle this car, by reason of the boycott declared by Debs at Chicago the day before. This train carried the mails. Knox, speaking of this train, says:

"They [meaning the railroad officials] refused to allow the engine to go without the Pullman car on. We tried to induce Mr. Wright to let her go, because it was a mail train, and we did not want to be parties to holding the mail. He refused."

He says further:

"That train stood there until leaving time, when it started to pull out, and perhaps pulled four or five car lengths out, and some one ran down out of

the office and turned the plug on the hind end of the air hose, and stopped the train. She was backed up to the depot, and stood there for a couple of weeks."

A mail train is a train as usually and regularly made up, including, not merely a mail car, but such other cars as are usually drawn in the train. If the train usually carries a Pullman car, then such a train, as a mail train, would include the Pullman car as a part of its regular make-up. The obligation which the railway company is under, as a common carrier, to employ such resources as it can command in the transportation of passengers, mails, express, and freight, without unnecessary delay, is one thing. The claim that the employes of a railroad company have the right to say what cars shall constitute a train is quite another thing. It is not for the employes of the railroad company to say whether a Pullman car shall constitute part of a mail train or not.

In the case of *U. S. v. Clark*, in the district court of the United States for the Eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed. Cas. No. 14,805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail. \* \* \* The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go, but the passenger train should not. They uncoupled the mail, and afterwards coupled it, for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads, it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars to accompany it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that, while nominally they permit the mail car to go, they really, by preventing the transit of other passenger cars, interfere with the transportation of the mails."

The law as thus declared by two learned judges many years ago is the law to-day. Apply that law to this case as you find the facts to be in relation to train No. 84 at Sacramento on June 27th; and also to train No. 2 at Sacramento on June 29th; and train No. 4 at Sacramento on June 28th, 29th, and July 3d, 4th, and 11th; train No. 69, from Red Bluff to Sacramento, on June 29th, stopped at Broderick; train No. 16, from Portland to San Francisco, stopped

at Dunsmuir, June 28th; train No. 15, from San Francisco to Portland, stopped at Red Bluff, July 1st; train No. 42, Santa Rosa to South Vallejo, stopped at South Vallejo, July 12th; train No. 19, from San Francisco to San Jose, July 5th; train No. 13, stopped at Palo Alto, July 6th; train No. 33, known as the "San Ramon Train," stopped at Sixteenth street station, Oakland, July 3d; and train No. 1, known as the "Santa Cruz Narrow-Gauge Train," at Alameda pier, July 4th. I do not understand that the testimony tends to show that there was any mail or express on the three local trains stopped in the vicinity of tower No. 2, West Oakland, on July 4th.

It is contended on behalf of the defense in this case that the boycott declared by the American Railway Union on June 26th, and the strike declared on June 29th, were in themselves lawful. The logical effect of this contention would be that, if any unlawful acts were committed during the pendency of the boycott and strike, they should be separated from these general and admitted acts of the American Railway Union. This feature of the case calls for the most careful consideration of the law as declared by the courts.

In *Thomas v. Railway Co.*, 62 Fed. 803, Judge Taft, in the United States circuit court for the Southern district of Ohio, determined that the boycott of Pullman cars, as it was enforced in Ohio, was unlawful. The facts in that case were substantially the same as in this case. He said:

"The employés of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They came into no actual relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury upon the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employés had the right to quit their employment, but they had no right to combine to quit their employment, in order thereby to compel their employer to withdraw from the mutually profitable relations with a third person, for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever upon the character or reward of their services. It is the motive for quitting and the end sought thereby that makes the injury involved unlawful, and the combination by which it is effected an unlawful combination. The distinction between an ordinary, lawful, and peaceable strike, entered upon to obtain concessions in the terms of the strikers' employment, and a boycott, is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quickly as the lawyer or the judge. The combination under discussion was a boycott. Boycotts, though unaccompanied by violations or intimidations, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be Minnesota. They are held to be unlawful in England. \* \* \* But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are arteries in the human body, and yet Debs and Phelan and their associates proposed, by inciting all the employés of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest



est degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employes. The merits of the controversy between Pullman and his employes have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise. More than this, the combination is in the teeth of the act of July 2, 1890, which makes it an offense to restrain interstate commerce." 62 Fed. 821.

In *U. S. v. Elliott*, Id. 801, Judge Thayer, in the United States circuit court for the Eastern district of Missouri, states the law in the following language:

"A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose by unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com. v. Hunt*, 4 Metc. (Mass.) 111."

In *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 324, Mr. Justice Harlan of the supreme court of the United States, sitting in the circuit court of appeals for the Seventh circuit, states the law in the following terms:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of its employes would be unlawful which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, and thereby disabling or rendering unfit for use engines, cars, and other property in their hands, or by interfering with their possession, or by actually obstructing their control and management, or by using force, intimidation, threats, or other unlawful methods against the receivers or other agents, or against employes remaining in their service, or by using like methods to cause the employes to quit, or prevent or deter others from entering the service in place of those leaving it. Combinations of that character disturb the peace of society, and are mischievous in the extreme. They imperil the interests of the public, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and personal liberty of individuals who, in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter and attempt to enter the service of those against whom such combinations are specially aimed."

The right of labor to organize for its own benefit and protection, as I have before explained to you, is a substantial right, which the laboring class is entitled to enjoy to the greatest extent consistent with the rights of others. The limitation is that in the exercise of this right the property and rights of others must be respected. It remains for you to apply this law to the facts in the case at bar.

I will now direct your attention to the overt acts charged against these defendants.

#### Overt Acts of Defendants.

George Cornwall, an engineer on train No. 13, going down towards San Jose, and No. 6, coming up, on the 6th of July, testified to what occurred at Palo Alto as follows: That he was the engineer on

train No. 13 on the 6th day of July last; that they took No. 6's time in coming back. It was express train No. 13, from San Francisco. It went down as far as this side of Santa Cruz crossing. They carried the mail and had a mail car. He saw some mail on the train. \* \* \* They stopped at all the main points going along. Left San Francisco at 3:15, he thinks. He returned towards San Francisco. He backed up a train to Lawrence's Station. He ran around it, got on the other end, and pulled it back. Going down, the mail car was on behind; when he was coming back it was in front, next to the engine. He backed up from Lawrence's Station towards Palo Alto station, at the switch there. Reached Palo Alto somewhere about 5 o'clock. It was after 5, pretty near 6, when he got back there. He don't recollect exactly. The mail had not been taken off the train before it reached Palo Alto. At Palo Alto they stopped, uncoupled, and went in on the turntable track. He knows Clark, Rice, Mayne, and Cassidy. \* \* \* He first saw some of them on his engine. This was at Palo Alto. He went in to turn around on the turntable. He got about half way turned around, and was saying something to the brakeman,—he forgets what it was,—when Mayne said: "Never mind those fellows. We will take charge of this engine." Then Mayne began to shake the grates, and was going to open the blow-off cock. He could not get it open until he loosened the nut underneath. He was trying to loosen it with a coal pick. Cornwall told him: "Don't break it off. Take the monkey wrench and unscrew it." Rice gave him the wrench, and told Mayne to go under it, as he knew more about it than he did. Mayne then went under. These men let the water out of the tank; shook the fire down. Mayne tried it, but thinks Rice did most of the shaking. Mayne was on the engine. He said he would take charge of her, and commenced shaking the grates. Cornwall was saying something to the brakeman, and he said: "Never mind them. We will take charge of this engine." Cornwall looked around,—that was the first time he saw them,—and he saw three or four of them there, and seven or eight on the ground; seven or eight all together. He saw Rice, Cassidy, and Mayne. He knows a man named Clark, but is not acquainted with him much. Believes he knows him by sight. Could not swear whether Clark was there with those men or not. The hose was uncoupled. One side was uncoupled by Cassidy; the other side, he could not say. The hose was uncoupled between the tank and the engine. The effect of uncoupling that hose was to let the water all out of the tank if the valve was open on top. \* \* \* It is necessary to go under this engine to unscrew the nut. He handed Mayne the wrench, and saw him go under. The turntable was then turned half around. Cornwall wanted them to turn it around, that he might clean the fire out of the ash pan, so that it would not burn the grates. Some one did turn it around, and he ran her over the pit where they put out the ashes. Then the boys went up to the other engine, and, as everything was all quiet down there, he put his coat on, and went up too. He had a talk with Mayne about the mail. He called him to one side and spoke to him. He said: "Mr. Mayne, aren't you

afraid you will get into trouble by stopping the mail?" Mayne said: "Damn the mail. You ain't got no mail." Cornwall said: "You have fired on this train long enough to know we do carry the mail all the time." And then Mayne went away, and that is the last Cornwall saw of him to speak to him. \* \* \* There is very seldom a Pullman car on that train. His engine was killed at that time. After these men left his engine, they went up to Mr. Minatt's engine and killed that one. He saw what was going on there. He saw her blowing off, and some one backed her on a split switch in front of the ticket office, and blew the steam right into the ticket office. The back drivers were partly off. It would take five minutes to get her on, if they had another engine there to do it. Could not see who was on the Minatt engine from the time it was moved from its position. There was too much steam. He could not say that these same men were there. Supposes they were. He believes he heard some of them say: "Come on. Let us go up to the other engine." \* \* \* On cross-examination the witness stated that he did not tell those men that they were interfering with the United States mail train when he was on the turntable there, for the reason that there were so many around there he did not think of it. \* \* \* Nothing said, to his knowledge, at the time that engine was killed, with reference to its being a mail train, by either party. It had a mail car on, though, and mail in it going north and south. \* \* \* This conversation that he had with Mayne was close by the depot, on the other side of the track. He called him to one side, close by where Minatt's engine was. No one else heard it. Is sure that no one else heard it. That is the only conversation he had with him. Did not have a conversation with him to this effect, in which he said: "Aren't you afraid you will get into trouble about stopping the mail?" Mayne said: "No. I did not know there was any mail on the train, and, if there was, it is pretty late in the day to tell me." \* \* \* Thinks there were more than four there. About seven or eight. Somewhere in that neighborhood. He had one brakeman and a fireman. He thinks he was helping turn around. He did not offer any resistance to them. They came on him so quickly that he did not think about much of anything.

W. R. Sowers testified that he was a brakeman in the employ of the Southern Pacific Company. That he was such on the 6th of July last. That he was on Conductor Gould's train as brakeman. Saw what happened to the engine of that train run by Cornwall. When they came into Palo Alto, coming back as No. 6, he cut the engine off from the train and took it over to the turntable, and started to turn it. He had the engine half or a third turned around, when there were five or six different parties came from over the field,—five or six different men. They were all together, as close as they could be, coming towards the engine. They came over and proceeded to kill the engine. One of the gentlemen in the crowd spoke to him and said: "You don't need to turn it any further. You remain in Palo Alto over to-night. You have run far enough to-day." Does not know who that man was. He was a tall gentleman, with a black mustache. He would know any of the gentlemen that were

with them at that time by sight, but not by name. (The defendants Mayne and Cassidy being directed to stand up, the witness identified them both.) After one of these men told him that he need not turn the engine further, but that he could remain in Palo Alto, the light-headed gentleman (Mr. Cassidy), who was on the left-hand side of the engine, and had something in the way of a hammer or monkey wrench, assisted to uncouple the hose between the tender and engine. He could not see who was on the other side. Did not notice who was in the cab. Mr. Mayne was in the cab, but what he was doing the witness does not know. He could not see unless he got into the cab. There were a couple of others in the cab at that time. Nothing else occurred, that he knows of, outside of uncoupling the hose between the tender and the engine, letting the water out, and blowing the steam off. Saw the steam escaping. Water escaped from the boiler. That engine was killed at that time. The fire was shook down. He supposes it was all out. \* \* \* Mr. Mulder was in the cab before these men reached the cab. Mulder was helping to turn the engine. Mulder was on the opposite side from where he was. After they killed the engine, these men went from his engine over to Palo Alto station. \* \* \* They were going at a moderate little trot. They were not running very fast, or anything like that. \* \* \* Is acquainted with the signals that are used on passenger trains. This was a regular train.

Peter Mulder was fireman on the engine of which Cornwall was engineer. He was present when Cornwall's engine was killed, but he is unable to identify the defendants as being the persons who assisted in killing the engine. The material parts of his testimony are as follows: Having returned as far as Palo Alto, they stopped the train, uncoupled, backed it on the turntable, to turn the engine around, because she was headed the other way, and they were going to San Francisco. As soon as the engine stopped on the turntable, he got off the engine, to help push the engine round. \* \* \* He was alone on the back end. He don't know whether any more were on the forward end with Long, or not. The engine was between them. Just as he put his shoulder to the lever to push it around, he saw some men coming from the back end of the engine towards the engine. They were walking pretty fast. Some were running a few steps. Some of them went up on the engineer's side of the engine; some of them stayed behind the engine. One of them turned open the air pipe under the engine while he was pushing around. He looked round and saw the air was blowing out of the hose. He stepped up and shut it off. Some one says, "God damn, leave that alone." With that this person opened it again, and Mulder went up on the engine. They pushed the engine partly around a little ways. Mulder got up on his seat, and sat down to see what was going on. Cornwall, the engineer, at the time he (Mulder) got up, was sitting on the seat box. \* \* \* The engine was killed. Saw the squirt hose used. One of the men said to him, "Turn that squirt hose on." Mulder said, "No, I will have nothing to do with this," and with that he reached by him and turned it on himself. They opened the door of the fire box, and squirted the water over

the fire, and killed it. They had already shaken the grates a little, although the fire was not altogether shaken down. This person was trying with a pick to open the blow-off cock, and the engineer told him it could not be opened that way; he would have to take a wrench and go underneath and loosen the nut before he could turn it. The engineer handed him a monkey wrench. One of the men went underneath and loosened the nut, and they blew the water out of the boiler and out of the tank. There were engaged in that work at least six, if not seven. He thinks there were seven,—three behind the tank when he left there, and four in the cab when he got up there.

T. J. Long was also a brakeman on the train pulled by Cornwall's engine. He accompanied the engine to the turntable, to assist in turning it around. He saw the killing of the engine, but is unable, like Fireman Mulder, to identify the defendants, or to distinguish the part they took in the disabling of the engine. He noticed some of the men coming down in the train with him. He recognizes Cassidy as being a member of that party. Cannot say as to Mayne, nor as to Rice and Clark.

C. B. Gould was the conductor of the train whose engine, of which Cornwall was engineer, was killed. He states that he left San Francisco on July 6, 1894, at 3:05, on train No. 13. The time was 2:20, but they waited for troops to take to San Jose. It was a mail train, having a mail car. He had baggage and express and mail, smoker, and, he thinks, two or three coaches. He had no Pullman cars,—no Pullman sleepers. He went as far as Santa Clara crossing, left the troops there, and returned immediately as No. 6; that is, on train No. 6's time. Those were his orders. It was a mail train returning. Left Santa Clara crossing at 5:15 p. m. Reached Palo Alto at 5:55. The engine had been backed all the way from Santa Clara crossing, there being no turntable between that place and Palo Alto. Arrived at Palo Alto, he left the train on the south switch. The engine was sent on to the turntable, to turn her, so that the pilot and engine would come first. He told his men to go up with the engineer and fireman and turn the engine, while he went to the depot to get orders, if there were any to obtain. It was his intention to take that train right through to the city. Did not intend to stay at Palo Alto more than about 10 minutes. It would have taken them only a couple of minutes had they not turned the engine. He had just arrived at the ticket office when some one sang out to him, "I saw some one running towards your engine." He ran to the engine from the ticket office. When he reached her she was virtually dead. Saw Rice, Clark, Cassidy, and Mayne around the engine when he reached it. Rice was shaking the grate. The hose of the engine was cut; that is, it was uncoupled. That is the hose between the tender and the engine. Did not see who cut it. While examining the engine, he noticed Cassidy, Mayne, and others make a run for the other engine, of which Engineer Minatt was in charge. She had just arrived with a train from San Francisco. He followed them up. When he arrived, it also had been killed. With the exception of seeing Rice

shaking the grate, he did not see any of the acts connected with the killing of the two engines. In answer to the question, "Did you have any conversation with Mr. Rice and Mr. Clark in respect to this act?" the witness stated:

"After this was over I went to the telegraph office and notified the superintendent what had been done. Shortly after, I passed down track to go to my train, which was on the main track below, to protect it, and I met Mr. Rice and Mr. Clark coming towards the ticket office. I said to Mr. Rice and Mr. Clark: 'Well, you have tied us up.' He said: 'Yes. Well?' I said: 'This is a very wrong, unlawful act, and you have no grievances whatever against the Southern Pacific company, or any other company;' that is, speaking of them as the A. R. U.'s. I says: 'It was only to make the railroad companies whip Pullman, or, in other words, bring him to their terms.' He stated: 'We had orders to do this, and we have done it.'"

Rice, Clark, Mayne, and Cassidy remained around Palo Alto about 20 or 30 minutes. Possibly it might have been more. There were no other engines at Palo Alto save those two. They laid there until the next morning, until they got another engine to pull these engines to Menlo Park, and filled them with water and got up steam, so that they were able to make the trip out. Got back to San Francisco about half past 10 or 11 o'clock the next morning. Were due in San Francisco the night before.

Edward J. Kincaid, assistant agent at Palo Alto, called for the United States, testified that his attention was attracted to Cornwall's engine by hearing some one holler, "They have got it." He was then in the ticket office, and ran out, and saw four or five men coming from the field between the county road and the railroad track. He saw the men climb over the fence and climb up on the engine. The engine was half turned around on the turntable, and he did not see what they were doing to her, but he states that steam soon began to issue from the boiler, and the engine was turned clear around and run onto a side track, and there the steam was blown off. This crowd remained around the engine probably about six or seven minutes. They then went to Minatt's engine, and climbed up on the engine and told them to get out,—told the fireman to get out. They then let the steam and water out of the engine. Knows Rice, Clark, and Cassidy by sight. Does not know the others. He saw them there at the time these two engines were killed. Saw them mingling with the crowd. The only one he saw on the engine, to recognize, was Rice. Did not see either Clark or Cassidy on the engine. But they could have been on the engine, and still he might not have seen them. Could not see what they were doing. On redirect examination he states that he could see that the hose between the engine and tender was uncoupled, hanging down, and he could see under this hose where the water had run out.

Robert Dannenburg, station agent at Palo Alto, also agent for Wells, Fargo & Co., and Western Union operator, called for the prosecution, testified that he saw some five or six men coming from the county road towards the railroad track east, at a sort of dog trot; that they went to Cornwall's engine; that he saw them stop the turntable when about half way around, but he could not dis-

tinguish who it was that stopped the turntable. He saw steam escaping from the engine, and shortly after they (the crowd) turned the engine clean around, and ran over the ash pit. Ran her off the turntable, right onto the track. He could not see any particular thing that was done on the engine from where he was. The crowd then went over to Minatt's engine. He saw Rice board that engine, and also another man. All that he saw with reference to Minatt's engine was two or three men climbing the engine. He did not see the rest of it. But, probably two or three minutes after these men boarded the engine, he saw steam blowing off from the engine. Saw Cassidy, Mayne, Clark, and Rice in the neighborhood of those engines at these times. Distinguished them near Minatt's engine, but could not see what they were doing.

E. F. Minatt, called for the United States, testified that he was an engineer on the Southern Pacific system, running on the Coast Division; that he was an engineer on or about the 6th of July last. He went off on No. 17 according to the time card, which leaves San Francisco at 4:25 in the afternoon, but he thinks they were 10 minutes late on that day. Pulled a local train between San Francisco and Palo Alto. He reached Palo Alto that day. He was to return from Palo Alto the next morning at 6:40. Four of the boys,—two of them fired for him before, and he pulled the other two as brakemen (Cassidy and Mayne, they both fired for him, and a fellow named Rice, a brakeman, and Clark),—they came to his engine. He was down on the ground and they got up. He thinks Rice—he is not sure—commenced to shake the fire out of the grates down into the ash pan. Cassidy and Mayne commenced to uncouple the hose. They wanted to blow the water out of the boiler, and let it out of the tender. At this time Rice came around, and the witness said to him, "Boys, don't damage the engine." They said they would not; only let the water out of the boiler and tender; and they did that. There was such a crowd around there that he could not tell how many there were. Cassidy, Mayne, Rice, and Clark were actively taking part and killing the engine. Mr. Cassidy, he thinks, and Mr. Mayne, both had a hand in loosening the blow-off cock. The witness gave them a wrench to do it,—to unloosen the blow-off cock,—and they did it. After they had blown the water partly out of the boiler,—the water was about out of the tender,—the young man Clark got up and backed her out through an open switch. Witness hollered to him, and told him the switch was wrong. He got the tender out and the back drivers out over this switch, then he undertook to run her ahead on the main track, and derailed her. She stood there like that until they sent a man from San Francisco to pull her on. \* \* \* There were some exclamations made of "Hip, hip, hurrah for the A. R. U." There was such a crowd around there—such a jam—that he could not get to the engine from the crowd. Who it was did it he don't know. The only man that he saw at the time of the hurrahing was Clark. The latter was on the engine after he derailed her. He did not see Mayne or Cassidy or Rice at the time the hip, hip, hurrahing was going on. After the excitement

was over, he saw the parties going towards Menlo Park. He saw Mayne, Cassidy, Rice, and Clark going towards Menlo Park.

Edward C. Murray, a witness for the United States, testified that he was the railway postal clerk who accompanied train No. 13, coming back on the same train,—it coming back as No. 6; that is, on No. 6's time. He testifies as to its being a mail train. He did not see the engine killed. He testifies as follows:

"Q. State what mail, if you recollect, you took up or delivered on the way down, or coming back. A. I received mail from all stations between San Francisco and Lawrence, inclusive. Coming back, I received mail from Lawrence, Mountain View, and Mayfield. Q. Did you have a mail car, or not, on that train? A. Yes, sir. Q. Did you reach Palo Alto? A. Yes, sir. Q. Did you go beyond Palo Alto that day. A. Not that night; no, sir. \* \* \* Q. What time were you due at San Francisco with that mail? A. 6:26."

#### As to Conversations Had with Clark.

R. M. Donne states that he was a conductor on the Coast Division, and that he was at San Mateo on the evening of the 6th of July, and the morning of the 7th. He saw Cassidy, Rice, and Clark there that night (the 6th). Also saw a gentleman with them who weighed about 180 pounds; had a smooth face; was heavy set. He had a talk with Clark that night. He spoke to him outside of the ticket office, and asked him if he would come inside of the office with him (Donne), and that he would introduce him to their assistant general passenger agent, and several others. He acceded, and came in. F. S. Douty, the secretary of the Pacific Improvement Company; H. R. Judah, the assistant general passenger agent; L. H. Fuller, an employé in the ticket auditor's department; the station agent, Mr. Peckham; and his assistant, Mr. Elmes,—were present. He testifies as to the conversation as follows:

"I introduced Mr. Clark to these men, and he was asked by Mr. Douty why they wanted to tie up the Coast Division. Well, he said that the boys on the other side were complaining that they were not taking any part in this affair; that they had the other side tied up, also the Narrow Gauge, and they had to do something on this side. Q. Do you recollect anything further that was said at that time? A. Nothing more, except that he was asked whether they had any grievances against the Coast Division. He replied by saying, 'No; not particularly.'"

F. S. Douty, a witness on the part of the government, narrates the conversation that passed between himself and Clark as follows:

"I think the conversation with Mr. Clark, after the introductions were over, by asking his reasons for this strike,—to get some information. He said that the Pullman Company had not treated the boys right, so that they had to strike on any road where Pullmans were used. I suggested that no Pullmans were used on this division. He said, in effect: 'No; but the boys on the other side' (referring to the Oakland side) 'are kicking, thinking that we are not doing enough here; so we have to keep our end up.' I said, 'Why do you have to keep your end up?' 'Well, we belong to an organization where we have taken an oath to stand together.' And he added, 'If we don't win this fight, I will go to China.' I said, 'Have you got any complaint to make against this Coast Division?' He said, 'No; there is no kick coming.' I asked him if it was what he called a 'sympathetic strike'; if he was striking in sympathy. He said, 'Yes,' he thought that was substantially it, so far as the Coast Division was concerned. I am giving the essence of my recollection, without trying to repeat the language."



Upon being asked if he could give the names of any other person with Clark, he says one was called Cassidy; another, Rice.

H. R. Judah, who was present at the conversation carried on between Mr. Douty and Mr. Clark, thus gives his version of it:

"Mr. Douty took the leading part in opening the conversation, and in a general, pleasant way, asked Mr. Clark what was the object of their tying up the Coast Division. \* \* \* I cannot give the exact language, but, according to my recollection, Mr. Clark replied that the men on the other side (having reference to the Oakland side) had complained that nothing had been done on the Coast Division in the way of tying up trains, and that they felt it necessary to do something (or words to that effect). Then Mr. Douty asked him—I think that was the next question that was asked—why the Coast Division should be singled out, you might say, entirely disconnected with the balance of the system, in so far as Pullman cars were concerned. Mr. Clark replied, in substance, that that did not cut any figure in the matter at that time; that they were into this fight, and that they were going to stay with it; and, furthermore, said that if they lost their cause he was going to China,—he would not live in this country. The conversation was carried on by all of us. Questions would be asked, but I cannot recall every single question that was asked, or every answer that was given. In substance, it is the same as Mr. Douty has given, and Mr. Peckham. My memory might be refreshed if some questions were asked of me, but, in the main, what I have said covers the ground. Of course, a good deal was said to Mr. Clark, to try and persuade him to have the men cease on the Coast Division; to allow that to be an exception, as there did not exist, in fact, any cause for complaint on the part of those employed on the division, and if they continued in blocking the traffic it must be on the ground of sympathy, and nothing else. Then Mr. Clark reiterated—in fact, he reiterated on two or three occasions—the fact that they were in this fight, and they proposed to see it through."

The witnesses Peckham and Elmes testify substantially to the conversation between Clark and Douty as detailed above.

On page 644, vol. 8, of the testimony, appears the following admission:

"Mr. Monteith: We will admit that both of these defendants are members of lodge No. 345 of the American Railway Union, located in San Francisco. Mr. Knight: Q. In the latter part of June? Mr. Monteith: In all of June, and all of July last. Mr. Foote: Let that be taken down. Mr. Monteith: We will admit anything of that kind. We have nothing to conceal about it. Our side of the case is an open book."

#### Testimony on Behalf of Defendants.

The defendant John Mayne testified: That he was a locomotive fireman on the Coast Division last spring. That he was hostler at San Francisco at the time of the strike. He had charge of the engines after they came in off the road, put the necessary supplies on, put the engines in the house, and got other engines out to go out on the road. Had been employed on the railroad about six years. Understands all the duties of a fireman. Was familiar with the rules of the company at the time of the strike. Belonged to the Brotherhood of Locomotive Engineers and the American Railway Union. That he attended meetings of the A. R. U. in the last part of June. He belonged to the San Francisco lodge. He attended a meeting on the night of the 29th of June. The lodge met on Mission street, between Fifth and Sixth. After the admission of members there was a message read stating that the members of the local union 310, in Oakland, had declared a strike on account of the discharge of

men. He identifies Exhibit No. 296 as the message, as near as he could remember. It reads as follows:

"June 29, 1894, Oakland, Calif. To J. E. Riordan, 118 Sixth St., Room 71, S. F.: American Railway Union three hundred ten has declared strike takes effect twelve thirty a. m. to-day. T. J. Roberts, President."

He further states that he thoroughly understood the cause of the strike. His union never participated in the boycott against the Pullman cars. With regard to the strike at Oakland, a motion was made, and a standing vote taken, that they indorse the action of the Oakland Union in striking, and that a strike be declared by their lodge for the reinstatement of the discharged employés. So far as this lodge was concerned, there was no other purpose in striking than the reinstatement of these men. After the strike was declared, the next action of the meeting was the appointment of an executive committee. Harry Bederman, George Elliott, Pete Farrel, and W. S. Runyon were appointed on that committee. They had full power to manage the strike, and all the business connected with it. The union did not reserve any authority to itself. After the appointment and authorization of this committee, the next business transacted was a discussion in regard to handling the mail. This was on the night the strike was ordered. The meeting of the 29th, some one made a motion (he thinks, Mr. Achorn) that the lodge take a vote as to whether they were willing to handle the mail or not. A standing vote was taken. Everybody in the hall stood up, in favor of handling the mails at all times. He did not hear any reference to interstate commerce. After that they held a meeting every day,—sometimes twice a day. He thinks he attended all meetings up to the afternoon of the 6th. Does not remember anything that was done, except routine business connected with the admission of new members, and so forth. He was in San Francisco on the 5th of July. Saw Cassidy every day. Has known him about six years. For the last three years he has been almost a constant companion of Cassidy. They roomed together, boarded together, and were together evenings, and all the time. Saw him on the 5th. On the morning of July 5th, Cassidy and he, after breakfast, attended a meeting of the union. After the meeting they went around town,—he does not know just where, now; and in the afternoon they went to Valencia street, and took the train bound south,—bound for San José. He invited Cassidy to go down with him to San José, to see his folks, on the morning of the 6th. He had been with him all the morning from the time they got up. He asked the agent if there would be a train along in the afternoon. The latter informed him there would. He asked him for two tickets to San José. He notified him they were only carrying passengers as far as Mayfield. He bought two tickets for Mayfield, and handed one to Cassidy. He thinks it was about 3:30 o'clock when he got on the train. It was an ordinary train. There was a mail car on the hind end of it. Next to the mail car there was a car load of passengers. He tried to get into the car, and did not know what was in it, and the brakeman refused him admission. He then took the car immediately ahead of that. Cassidy did not get in at the same time he did. He saw Clark and Rice on that day.

When he got on at Valencia street, he was reading a newspaper. When he finished with the paper, he went into the smoking car. When he arrived there, there were quite a few people in the smoking car. There he saw Rice and Clark, and he believes Cassidy was in the smoker at the time. Rice and Clark and a number of passengers were talking to a captain of the militia,—he supposes it was a captain; he had stripes on his uniform. Just before they got to Redwood, the captain left the car, and went back through the train. Fred Clark came and sat down alongside of him. They chatted along the way. Mayne asked him where he was going. He said he intended to go to San José, but he only had a ticket for Mayfield. When they got to Mayfield he and Cassidy got off, and Rice and Clark also, and a great number of the other passengers. The first thing they did was to look for a conveyance. He found nothing there; no wagons around the depot. They talked the matter over, and finally concluded to go back to Palo Alto. There are a couple of crews which run in there, and they thought they could get definite information of whether train 19 was coming out that afternoon or not. If there was no way of getting to San José they would have come back to the city. They walked up the county road very leisurely. Stopped just outside of Mayfield, and looked at the cavalry. There was a company of cavalry camping just outside of Mayfield. Walked up the county road to almost opposite Palo Alto. Cassidy complained that his shoes were hurting him, and wanted them to wait a moment. They jumped over the fence; sat down under a tree in University Park. They stayed there 10 or 15 minutes. While they were sitting there an engine came in on the turntable. They all got up and looked at it. He does not know whether he suggested that they go and kill it, or whether Rice did. He knows that Rice and he got over the fence, and went over and killed the engine. Rice and he were in advance of the rest. He did not know whether the rest were coming or not. He did not look around to see. They got to the engine first. He went up on the left-hand side, over the timber of the turntable, and thinks Rice went on the right-hand side. When he got on the engine, Engineer Cornwall was standing up with his head out of the window. There was a fireman, a man with overalls, and a man in citizen's clothes, turning the turntable. Cornwall was saying: "A little ahead. How is that, pard? A little ahead,"—repeating that remark two or three times. He (Mayne) said to him, "That is all right, George; she is all right where she is." Cornwall said, "What are you going to do?" Mayne replied, "Nothing in particular." Cornwall then stated, "Don't hurt my engine, boys." To which Mayne replied, "We have no intention of hurting your engine." That was all that was said. He caught hold of the grates, and started to shake the fire out. He tried to shake the fire out. It was in such a condition—it was all clinkered—that it would not go through the grates. He was about to give it up, when the idea struck him that he could put it out with a squirt on the left-hand injector. He put on the injector, turned the water into the fire box, and drowned the fire out. \* \* \* About the time he thought the fire was quenched, he asked the engineer if he thought

it would be safe to let the water out. The latter stooped down, looked into the fire box, and said he thought it was all right. Then Mayne took the coal pick, and tried the blow-off cock. He suggested to the engineer that they had better run the engine off the turntable, on account of the blow-off pipe coming against the timber of the turntable, and it would scald the paint on the engine. He approved of that, and the table was turned back for the straight track, and the engineer ran the engine off over the ash pit. Mayne tried the blow-off cock, and he could not open it. The engineer told him he would have to get down underneath with a monkey wrench, and loosen up the nut in the bottom of the car. Cornwall gave him the monkey wrench. Mayne jumped down on the ground. It was necessary for him to get under the engine, so he took off his hat and coat, and handed it to the engineer. The latter held his hat and coat while he opened it, and until he got back on the engine. \* \* \* There was nothing said, further than what he has stated. The engineer requested them not to hurt his engine. He said: "Boys, don't hurt my engine. I like my engine." And he repeated that remark two or three times, and that was all that was said. \* \* \* Just before he finished killing the engine, Rice came back from up towards the depot, and after he let about four inches of water out of her he went back into the cab, and opened the blow-off cock. Then he stood by the water glass, and watched it until the water went out of sight in the glass. Then he closed the blow-off cock. He did not know but what the fire might kindle up again, and he was not taking any chances on it. He shut the blow-off cock as soon as the water went out of sight. After they killed the engine, Rice and he walked up to the depot. There was a crowd of 20 people up there, he supposes. Just before they reached the depot, the other engine that Minatt was running was blowing out against the side of the station-house,—a little station, six by six. He said to him (Rice): "That won't do. You don't want to spoil the paper in there." He mentioned the paper and instruments. Rice went up on one side, and he on the other. They moved the engine ahead a foot, so that she would clear the building. Rice was moving the engine, and he had hold of the brake wheel. About the time they moved a foot, some one hollered, "Whoop! you are off the track." They stopped immediately. The water was all, or nearly all, out. He kicked the blow-off cock shut, and got down off the engine. He had nothing whatever to do with the killing of Minatt's engine. He got up there. The fire was all out, and the water almost all out. He had a talk with Engineer Cornwall just before they left Palo Alto. Cornwall was up at the station. Cornwall called him over, and said to him: "Pard, don't you think you have done something pretty serious, in stopping the mail?" Mayne replied: "No, I don't think so. Even so, this is a hell of a time to tell us of it now, when it is all over." Mayne then turned round and walked off. He denies having made the statement testified to by Cornwall, as follows: "I says, 'Mr. Mayne, aren't you afraid you will get into trouble by stopping the mail?' He [Mayne] said, 'Damn the mail. You ain't got no mail.'" Cornwall replied, "You have fired on this train long enough to know

we do carry the mail all the time." He, on the contrary, affirms that statement was just exactly as he gave it, word for word. He further states that he had no knowledge of any mail train coming along at that time, and before he killed the engine; did not know that a mail train was due at that time on the schedule. Is familiar with the surroundings at Palo Alto. The train could not be seen from that turntable. He remained in Palo Alto about 40 minutes; then went over to Menlo Park. Cassidy told him he had heard that Haydock had telegraphed to the constable at Palo Alto to arrest them. The first thing they thought of was to move over to Menlo Park. They stayed in Menlo Park an hour, or may be an hour and a half. Ate supper over at the hotel. Then they tried to get a rig. The livery stable man wanted too much. He suggested to the boys that they walk over to Redwood; there was a friend of theirs over there who would drive them up. They walked to Redwood, got a rig there, and they were taken as far as San Mateo. Got to San Mateo between half past 10 and 11 o'clock. Did not do anything in particular, only sat on the platform and talked with the boys around there. On cross-examination the defendant Mayne testified that he bought his ticket as far as he could go in the direction of going home,—to San José. The distance from Mayfield to San José is 16 miles. He was there when the train left. He made no effort to get on and buy a ticket from the conductor, and proceed on his journey, when he saw it going further on, although his destination was his home, at San José. He did not think they were carrying passengers any further than Mayfield. He supposed he would find the regular Palo Alto crews at Palo Alto. He knew that two trains laid over at Palo Alto at night. From where he was, he could not see the train coming back. He did not hear it coming. He was over 200 yards from the road. He admits that, although he neither heard nor saw the train come in, he suddenly started over to kill a live engine. He had fired on that train. He knew that Cornwall sometimes went on that engine. He knows all the engineers on the Coast Division. He states that he did not know what engine was on the train that he went up on, but he admits that he knew train 6 was due at San Francisco at 6:30. Being asked to repeat the circumstances under which he jumped up and ran for that engine, he states that when the engine came over the switch, just before she came on the turntable the cylinder cocks were opened, and made a lot of noise,—steam blowing off. They got up and looked at the engine. He don't know now whether he suggested to Rice, or the latter suggested to him, "Let's go and kill her." They did not debate the question at all. They went and killed her.

"Q. What was your purpose in killing a live engine there? A. I have not any good reason for killing the engine. We wanted to be doing something, I suppose. We wanted a frolic. Q. Did you not know that a live engine could pull a train? A. I did. Q. And a dead one could not? A. And a dead one could not. Q. Did you not kill that engine because you did not want it to pull a train? A. I did not know one was there at the time. Q. Did you not know that a live engine usually pulls a train? A. Yes, sir. Q. Did you not know that to kill that live engine was to disable it from pulling a train? A. I did. Q. Yet you killed it, and for no purpose? A. I did not know there was a train there, attached to it. I thought it was a light en-

gine. It is customary— Q. I do not want anything about customary. I want you to answer my question. Now, Mr. Mayne, did you not know that to kill that live engine would render it impossible to take a train that might be there back to San Francisco? A. I did not think anything about it. Q. You just went up there out of pure deviltry? A. Yes, sir. Q. You did not know whether there was a train or not, or whether or not there was any mail, or not any mail, and you killed it out of pure deviltry? A. I did not debate it. I thought it was a light engine, and went over there and killed her for no reason whatever. Q. Did you not do it for that reason? A. For deviltry? Q. Yes; from a pure spirit of mischief and deviltry. A. I guess you might as well put it that way. Q. Without caring what the result was? A. That is as good an answer as any."

Referring to the conversation he had with Cornwall about the mail, he states that, if he had stopped the mail, it was too late to start it then. The engine was killed. He made no effort whatever to repair that which he was told was a violation of the law. He left because he did not know just exactly what the consequences would be. He went off towards San Francisco. He went in company with these men,—Clark, Cassidy, and Rice.

John Cassidy, the other defendant on trial, testifies, substantially, that he was a fireman employed by the Southern Pacific Company last spring; that he had been such for about eight years; that he belongs to the Brotherhood of Locomotive Firemen, and San Francisco Lodge, No. 345, of the American Railway Union; that he attended the meeting of that union on June 29th; that "every one was there, and there was a telegram read about the Oakland strike, or about the Oakland boys going out on a strike, and we indorsed their action. \* \* \* We all decided to strike." He states that most of the members of his union were employed on the Coast Division; that at that meeting, besides ordering a strike, they took in a number of new members, and appointed a crew to go down, and go out with the mail the next morning. They also appointed a mediation committee. The witness' statement as to the invitation tendered him by Mayne to go down to San José on July 6th, to visit Mayne's folks, agrees substantially with the latter's testimony. The witness further states that he first saw Rice and Clark on July 6th, somewhere between San Mateo and Redwood City, on the train. He got off the train at Mayfield. He states that, after an ineffectual attempt to secure a conveyance to San José—

"We concluded to go back to Palo Alto. We went back to Palo Alto to see if train 19 was coming through. When we got up about opposite Palo Alto, on the way up, there was some cavalry marching back from Santa Cruz; some regular troops. They were in the field. We stopped and talked with them for quite a while. We walked on until we got opposite Palo Alto. I had a new pair of shoes on. I told the fellows they could go on the rest of the way, if they wanted, but I was going to take my shoes off. I climbed over a fence in the park, took off my shoes, and laid down in the grass. They all got over the fence, too. We were sitting there, or laying there, telling stories and yarns, for about ten or fifteen minutes, when we heard the cylinder cock of an engine blowing off. Some of the boys got up, and looked over the fence, and saw an engine. Some one says, 'There is an engine on the turntable,' and they started for it. I had to put my shoes on, and, I believe, my coat. Somebody else had their coat off. They were on the engine before I got there. I got there just as quick as I could, after I got my shoes and coat on. There were two or three in the cab of the engine. I went around to the left, and started to take off or uncouple the tank hose.

I turned around, and happened to see Minatt's engine up the track, and I quit my job, and went up to Minatt's engine. Q. What did you do with Minatt's engine? A. Between Minatt and myself, we loosened the blow-off cock, and blew the water out. The fire was already out of it. I had to crawl under the engine to do it. The tank valve was open, and the water was running out of the tank. Q. Did Minatt offer any resistance? A. No; he stood off, and seemed tickled. He gave me a wrench to do it; told me where I could get one. I had to lay down flat. There is an air drum under the deck, and I had to lay down flat, and crawl under it. Q. Was Mayne there when you were killing that engine? A. No, sir. Q. Who was there besides Minatt and yourself? A. I think Clark and I did that job. I am pretty sure Clark was there."

Upon being asked by his counsel if he knew what the indictment charged, he states that he does, but that he never did anything except to let water out of that engine. Respecting the cause of his leaving Palo Alto that night, he states that somebody in the crowd told him that the division superintendent, Haydock, had ordered the constable at Palo Alto to arrest them; that they thereupon went over the county line to Menlo Park, and subsequently to San Mateo. On cross-examination, being interrogated as to his motive in running towards Cornwall's engine to assist in killing her, he states that he went because the others did; that he helped kill the engine because the rest of them were killing it; that he simply wanted to be with the crowd, or, to use his own language, "I suppose I wanted to be in the swim." Respecting the killing of Minatt's engine, he states that he thinks he was the first man to reach it; that when he did he got up and looked into the fire box; the fire was out of her; he started in to open the blow-off cock; that the effect of this was to let the water out; that he let nearly all of the water out; that the effect of this was to kill the engine. He also states that, while engaged in killing Minatt's engine, he heard some one holler, "Three cheers for the A. R. U." Being asked to give his reason for killing Minatt's engine, he states it was "to have a good time." He states that he would have done what he could towards killing Cornwall's engine if the other engine (Minatt's) had not been there. Further, that he did not think of any consequences that might ensue, from the killing of those engines, to him; that the only reason that prompted him to kill those engines was "to keep my hand in."

F. W. Clark, one of the defendants in the indictment, but not on trial, was called for the defendants, and testified, briefly, that he was a brakeman on the Coast Division of the Southern Pacific Company, and had been such for about two years; that he was braking between San Francisco and Monterey, on freight trains; that he knows Rice; that he met him on the morning of the 6th of July at the A. R. U. meeting; that, after the meeting adjourned, Rice asked him to go down to San José with him; that they could not get tickets for San José, and they went as far as Mayfield. On cross-examination he states that he met Cassidy and Mayne on the train between San Mateo and Redwood City; that he stayed with them all the while until they got back to San Mateo; and that he finally came to San Francisco with them. He states that, when they got opposite University Park, Cassidy complained that his shoes were hurting him. They thereupon climbed over the fence

of the park, and sat down under the shade of a tree. After they had been sitting there about 10 minutes, he heard a noise of steam blowing out of a cylinder cock of an engine. He rose up, and looked over, and saw an engine going on to the turntable. Either Mayne or Rice said: "There is an engine. Let's kill her." They jumped over the fence. He followed them over to the engine. When he reached there, Mayne got up on the engine,—on the left side,—and Rice on the right side. He got up behind Rice. Cornwall was standing by his lever. He had his head inside the cab when he (Clark) first got up. Then he stuck his head out, and said to some one in front of the engine: "What do you want? A little more ahead. Is she all right, pard?" He believes it was Mayne who replied, "She is all right where she is, George." Cassidy was some distance behind. The witness stayed on Cornwall's engine about a couple of minutes, and then went over to Minatt's engine. Cassidy also went over. Rice got on the engine, and Cassidy did also. The witness got up behind Cassidy. There was no fire in the fire box; the witness took out a hammer from the tool box on the tank, and disconnected the hose, and took the packing off, and pulled the strainer out, and put the hook and hammer and strainer back in the box. Respecting the conversation he had with Douty, Judah, Donne, and others in the station at San Mateo, he testifies that he was called by Conductor Donne, who said to him: "There is some people in here who want to have a talk with you." He asked: "Who are they?" Donne said: "Douty and Judah. They want to talk with you about the strike. This is no put-up job to put you in a hole, or anything like that." He states that he went in, and was introduced to Douty and Judah. He believes it was Douty who asked them what they had struck for. He told them members of the Oakland Union had been discharged for refusing to handle Pullman cars, and that the union over there had ordered a strike, and Union 345, in San Francisco,—the union he was a member of,—indorsed the action of Union 310, and they struck. Douty said: "What do you want to strike on the Coast Division for? They are not hauling any Pullman cars here." And he wanted him (Clark) to go back to San Francisco, and declare the strike off. Clark told him (Douty) that he could not declare the strike off. Respecting his motive in participating in the killing of the engines, the testimony is as follows:

"Q. (on cross-examination). What was your idea in killing these engines, where there were no Pullmans running on that end of the line, unless it was to help out those that were striking against the Pullmans? A. I do not know. I was with the others, and helped them. Q. You were with the others, and helping them? A. Yes, sir. Q. And you had no idea in the world as to what the object was? A. No, sir."

This concludes the review of the testimony relating to the overt acts charged as having been committed by the defendants at Palo Alto. It is for you to say whether it establishes, to your satisfaction and beyond a reasonable doubt, that the defendants committed any of the following acts charged in the indictment, to wit:

"(1) Forcibly taking possession and control of the \* \* \* engines \* \* \* of the Southern Pacific Company, by (1) \* \* \* (2) threats, intimidations,



personal assaults, or other acts of force and violence, in, upon, and towards the engineers, firemen, conductors, brakemen, switchmen, agents, and other employes of said company having charge of said \* \* \* engines, etc.

"(2) By forcibly and violently preventing the movement of all trains of the Southern Pacific Company to, from, or through the town of Palo Alto, by (1) gathering in crowds, etc.; (2) by placing physical obstructions upon said track; (3) by displacing the switches; (4) by forcibly and violently assaulting, threatening, and intimidating said engineers, firemen, conductors, brakemen, switchmen, agents, and other employes while engaged as aforesaid; (5) by uncoupling the cars of said trains, and disconnecting the same; (6) by removing said cars from said tracks; (7) by withdrawing the water from the boilers and tanks of said engines, and putting out and removing the fires therein [I call your particular attention to this charge, and the evidence relating to the overt acts under this head]; (8) by displacing and removing valves, pins, bolts, plates, and other appliances and portions of the machinery of said engines and cars, and of the rails of said railways, thereby loosening said rails; (9) by other violent, forcible, and unlawful acts and means, to the grand jurors unknown."

As I have before explained to you, it is not necessary that the government should prove that all the overt acts charged were committed by the defendants. If you are satisfied, beyond a reasonable doubt, that they committed any one of the acts charged, it will be sufficient, in determining this element of the offense involved in the crime of conspiracy.

Whether the Southern Pacific Company was in June and July last a railway corporation, duly organized and existing under the laws of the state of Kentucky, engaged in the business of a common carrier of the mails of the United States, and of passengers, freight, and express matter, in this district, and over the lines of the railways mentioned in the indictment, is a material fact in the case, which you will be required to find, as you would any other material fact; that is to say, beyond a reasonable doubt. You will recall the testimony of Mr. Lansing upon this point, and the circumstance that no testimony was offered to contradict him in any particular.

Whether train No. 6, at Palo Alto, on July 6th, was a regular or special train, is immaterial. The testimony tends to show that the train carried the mail, and that it was being carried over post route No. 176,002. Whether some other train was annulled or not is also immaterial. The question is, was this train carrying the mail under the sanction of the postal authorities? If it was, it was a mail train, in the eye of the law.

It is claimed by counsel for the defendants that an intent to obstruct and retard the passage of the mails cannot be inferred against these defendants unless they had knowledge that the mails were on board the train when they killed the engine on the turntable. In the language of Judge Grosscup in the case of *U. S. v. Debs* (in the United States district court of Illinois) 65 Fed. 211:

"I do not concur in this view. The defendants are properly chargeable with an intent to do all the acts that are the reasonable and natural consequence of the acts done. The laws make all the railways post routes of the United States, and it is within every one's knowledge that a large portion of the passenger trains on these roads carry the mail. There is no stretch, therefore, either of law or common sense, to presume the person obstructing one of those trains contemplates, among other intents, the obstruction of the mail."

And in *U. S. v. Debs*, 64 Fed. 764, Judge Woods, of the circuit court, uses the following language:

"The rule is well settled, and I suppose well understood, that all who engage, either as principals, or as advisers, aiders, or abettors, in the commission of an unlawful or criminal act, are individually responsible for the criminal or injurious results which follow the commission or an attempt by any of their number to commit the intended crime or wrong. It is by the same rule that co-conspirators are responsible for the acts and declarations of each other in the furtherance of their unlawful purpose. \* \* \* 'A man may be guilty of a wrong which he did not specifically intend (says Bishop), if it came naturally, or even accidentally, through some other specific, or a general, evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding and growing out of the common plan, terminates in a criminal result, though not the particular result meant, all are liable.'"

But, aside from this responsibility which the law imposes upon those who commit unlawful acts, the testimony of the defendants Mayne and Cassidy may throw some light on the real motive that actuated the defendants in killing the engine at Palo Alto. When asked by Cornwall if he did not think he had done something serious in stopping the mail, he admits that he replied: "Even if I have, this is a hell of a time to come and tell us of it, after it is all over." And, hearing, soon after, that an officer was after them, the defendants fled from that place. Was the motive "deviltry," as Mayne says; and the consequences, whatever they might be? Was the motive "to be in the swim," as Cassidy says; and the consequences, whatever they might be? If so, how can they avoid responsibility for such consequences?

In considering the testimony relating to the whole case, it will be for you to determine whether there was such a general conspiracy as claimed by the government, involving the members of the American Railway Union in a combination and concert of action to obstruct and retard the passage of the mails of the United States, and in restraint of trade and commerce, and whether these defendants were members of that conspiracy; but you may also consider the case, under this indictment, within much narrower limits. A conspiracy may have been formed between these defendants, at Palo Alto, while Mayne, Cassidy, Clark, and Rice were sitting under the tree at University Park, to commit an offense against the United States, in obstructing and retarding the passage of the United States mails, and in restraint of trade and commerce, and in pursuance of such conspiracy they committed the overt act of killing the engine on the turntable; and if you believe from the testimony, beyond a reasonable doubt, that they did at that time form a conspiracy to commit such an offense and committed the act they did in pursuance of that conspiracy, it will be your duty to find the defendants guilty on the facts involved in that occurrence alone, without regard to the testimony relating to occurrences elsewhere.

#### Reasonable Doubt.

This is a criminal case. The presumption of innocence is in favor of the defendants. A mere preponderance of testimony, in a criminal case, is not sufficient to justify a verdict of guilty. The burden

of proof is upon the prosecution, and it must prove every material fact, and establish the guilt of the defendants to your satisfaction, beyond a reasonable doubt. The degree of satisfaction and certainty required is not absolute conviction or certainty, but the evidence must produce that effect on the minds of the individual jurors, so that, after its consideration, he can, in view of his oath, have no reasonable doubt of the guilt of the accused. By 'reasonable doubt,' I mean a reasonable doubt arising out of the evidence, and not an imaginary doubt, a fanciful conjecture, or strained inference, but such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns are involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence. When such a doubt exists, the accused is entitled to its benefit, and should be acquitted. But where the evidence is satisfactory to the impartial mind that the crime was committed; that the defendant committed it as charged,—when the mind comes naturally and reasonably to this conclusion, from a fair consideration of the evidence, properly, there can be no reasonable doubt, and the prisoner should be convicted.

#### Jury Sole Judges of Credibility of the Witnesses.

Now, in relation to all the testimony in this case, you, gentlemen of the jury, are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by the evidence affecting his character for truth, honesty, or integrity, or his motives; by contrary evidence. And you are the exclusive judges of his credibility. In judging the credibility of the witnesses in this case (and their testimony is, to some extent, conflicting), you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given, and in doing so consider all the circumstances under which any witness has testified, his demeanor, his manner while on the stand, the relations which he bears to the government or the defendants, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and any construction that tends to shed light upon his credibility, and to determine the amount of credence to which each statement is entitled at your hands, as reasonable and intelligent men; but, in this respect, you must remember that your power and duty to judge the effect of evidence is not arbitrary. It must be exercised with legal discretion, and in subordination to the rules of evidence. This is a government of law, and you are charged with its administration in this case without fear, favor, or partiality. An honest, fair, and impartial trial of persons accused of crime is the highest obligation we owe to society. The law, properly administered, affords protection alike to the high and the low, to the rich and the poor. Popular clamor should not direct

it, nor the insinuating influence of prejudice turn it aside. Courts never appeal to the passions, prejudices, or sympathies of a jury, in favor of a prosecution, or against the accused. They seek only equal and exact justice, and appeal only to reason. In this light only is the case presented to you by the court, and it is with the utmost confidence in your reason and intelligence, and in the fullest belief that you highly appreciate the important duty imposed upon you, that I commit this case to your careful and patient consideration.

NOTE. The jury, after deliberating four days and nights, failed to agree, and were discharged. On the final ballot, 10 jurymen voted for conviction, and 2 for acquittal, upon the count for conspiracy to retard the mails, and 8 for conviction, and 4 for acquittal, on the count for conspiring to obstruct and interfere with interstate commerce.

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UNITED STATES v. DUNBAR et al.

(Circuit Court of Appeals, Sixth Circuit. May 20, 1895.)

No. 255.

1. CUSTOMS DUTIES — EXPORT AND REIMPORTATION — "MANUFACTURES OR MACHINES."

A dredge boat, without power of self-propulsion, and capable of use as a dredging machine only, is a "manufacture or machine," within the meaning of Rev. St. § 2505, and, after exportation from the United States, is entitled, under that section, to be reimported without duty, if "returned in the same condition as exported."

2. SAME.

A dredge boat which was exported from the United States, was again returned thereto, but, before her return, was extensively repaired. The repairs consisted in part in putting in a new dipper and crane, substituting new and much heavier anchors, and a more powerful anchor hoist, and also in raising her deck to enable her to carry the additional weight. This involved an expenditure amounting to 40 per cent. of her value after the work was done. *Held*, that the dredge could not be considered as "returned in the same condition as exported" (Rev. St. § 2505), and that she was therefore subject to duty, notwithstanding that some of the work was done by American labor, and that part of the material used was American material.

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

This was an application by C. F. and H. T. Dunbar to review a decision of the board of general appraisers reversing the action of the collector of the port of Marquette, Mich., in exacting duties upon a dredge boat reimported into the United States. The circuit court sustained the action of the board of appraisers, and the United States appealed.

John Power, U. S. Atty., and R. L. Newnham, Asst. U. S. Atty., for the United States.

John L. Romer, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. The question for decision in this case is as to whether the dredge boat Tipperary Boy, exported to Canada in 1882, and imported in 1890, is entitled to entry without duty, as a manufacture of the United States, "returned in the same condition as exported." 22 Stat. 517; Rev. St. U. S. § 2505. This dredge boat was properly regarded as a manufacture or machine, and not as a vessel, inasmuch as it has no power of propelling itself, and is incapable of use save as a dredging machine. It was built in the United States in 1873, exported to Canada in 1875, returned in 1880 or 1881, re-exported to Canada in 1882, and returned in 1890. The collector of customs at Marquette, Mich., on the evidence submitted to him, held that the article was not "returned in the same condition as exported," and was therefore liable to duty. The importers paid the duty assessed under protest, and appealed to the board of United States general appraisers, who affirmed the decision of the collector. Proper proceedings were taken to procure a review by the United States circuit court of the questions of law and fact involved in the decision made by the board of appraisers, and an order was made referring the matter to Appraiser Ham to take and return such further evidence as might be offered relating to the questions at issue. Additional evidence was taken and returned, and the questions submitted to the circuit court, which reversed the collector and board of general appraisers, and found that the Tipperary Boy was an article of manufacture of the United States returned to the United States "in substantially the same condition as when exported." From this decision the United States has appealed.

The original cost of this dredge, in 1873, was some \$13,000. Its customs value when exported, in 1882, was \$7,500, and it was entered for importation in 1890 as of the value of \$8,000. Just before this importation it was, at the close of the season of 1889, towed from a point on the St. Lawrence river, through Lakes Ontario and Erie, to Amherstburg, on the Canada side of the Detroit river, and nearly opposite Detroit. At Amherstburg it was put in a shipyard, and overhauled and reconstructed at an expenditure of about \$3,000. It was then entered at the port of Marquette, Mich., as an article of American manufacture "returned in the same condition as when exported." In explanation of this very large expenditure just before importation, the owners, in a sworn statement of facts filed with the collector at Marquette, stated that, "When we were about to bring the Tipperary Boy back, we found that she needed repairs before it would be safe to tow her here,"—a statement which would seem to be quite inconsistent with the fact that, before making any of the so-called repairs, it was towed from the St. Lawrence river to Amherstburg. This very large expenditure, amounting to 40 per cent. of the value of the dredge after the work was done, is shown to have consisted in replanking, and, to some extent, reframing, her bow and stern; raising the forward deck; recalking the bottom and sides; putting in a new dipper and crane; substituting new and much heavier anchors, and a more powerful anchor hoist. The principal reason for these expenditures seems to be found in the fact that the owners were about to engage in dredging on the St.

Mary's river, where the current was stiff, and the bottom rocky. This condition required heavier anchors, by means of which the dredge might be securely held in position while at work. The means by which such dredges are held in place is by the use of beams of solid oak, from 40 to 45 feet in length, placed perpendicularly on the bottom of the stream, one at each corner of the bow, and a third at the stern. These beams are held to the dredge by iron slides, through which they are let down or drawn up. These beams constitute the anchors of such a floating machine, and are put down or taken up by means of a derrick and gearing operated by the engines, and called an "anchor hoist." The anchors exported were of a diameter of 16x18 inches, and the anchor hoist exported was of power sufficient to operate them. For the exported anchors the owners substituted anchors having a diameter of 24x24 inches. The increased weight of these anchors so settled the bow of the dredge as to necessitate the raising of the forward deck nine inches. To operate them in the slides, the old anchor hoist was insufficient, and so a new and more powerful hoist was procured. This new hoist was not attached to the dredge until after importation, but was placed on the dredge, ready to be attached, and duty was paid thereon without protest. The adaptation of the dredge for the harder and more difficult work under contract, in our judgment, amounted to such a substantial change in its condition, as to defeat the claim that it was "returned in the same condition as exported." That condition was deliberately and premeditatedly changed to meet the conditions surrounding the new work to which she was to be put. When returned, the old anchor hoist, though still in place, was useless to handle the substituted anchors, and the forward deck had been raised to meet the conditions resulting from the adaptation of the anchors to the contract about to be undertaken. That some of the material used in this partial construction, or in substituting new for old in the work of repair proper, was American material, or that some of the ship carpenters engaged on the work were American citizens, is of no importance whatever. The only standard of the free entry act is that the condition of the machine or thing, when entered for importation, shall be the same as when exported. The words of the statute, "in the same condition as when exported," have been used without change, since 1842, in defining what articles of American manufacture may be returned without duty after importation. A very strict construction has been uniformly put upon this provision by the treasury department, as is shown by numerous treasury decisions; and this strictness of construction seems fully supported by the cases of *Knight v. Schell*, 24 How. 526, and *Belcher v. Linn*, Id. 533. In the cases cited it was held that empty new barrels, made in the United States, and exported to be filled with molasses and returned, were not entitled to free entry, the court saying in *Belcher v. Linn* that:

"It is impossible to hold that molasses barrels manufactured here, and exported to a foreign port, and there filled with molasses, whether it be the ordinary article, or that denominated 'concentrated,' and then reimported with their contents to this country, were brought back in the same condition

as when exported, within the true intent and meaning of the acts of congress. Contrary to the views of the plaintiffs, we think the words 'the same condition' mean, not only that the identity of the article exported is preserved, but that its utility for its original purposes is unchanged. On this point we adopt the view taken by the defendant, because it appears to be more consonant with the language of the provision under consideration, and with the obvious intent of congress in passing it."

These cases seem to demand that the intent of congress shall not be evaded by an elastic construction of the words of the provision. The decision of the collector and board of appraisers has not, in our judgment, been overthrown by the additional evidence. Judgment of the circuit court reversed.

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MARTIN & HILL CASH-CARRIER CO. v. MARTIN.

(Circuit Court of Appeals, First Circuit. May 9, 1895.)

No. 97.

1. PATENTS—ESTOPPEL BY ASSIGNMENT.

An assignor of a patent is estopped, as against his assignee, from denying the validity thereof, but he may show the prior state of the art for the purpose of determining what was old and distinguishing what was new at the date of the patent, and to aid the court in the construction thereof. *Ball & Socket Fastener Co. v. Ball Glove-Fastening Co.*, 7 C. C. A. 498, 58 Fed. 818, and *Babcock v. Clarkson*, 11 C. C. A. 351, 63 Fed. 607, followed.

2. SAME—CASH CARRIERS.

The Martin patent, No. 255,525, for an improvement in automatic cash-carrier systems for store service, is not a pioneer patent, but is one merely for details of construction. *Held*, therefore, that claim 1, which covers substantially a system consisting of an endless track, was not infringed by a cash-carrier system constructed under patent No. 399,150, which covered an apparatus consisting essentially of a double track, the carriers traveling in one direction on one track, and in the opposite direction on the other. 62 Fed. 272, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Martin & Hill Cash-Carrier Company against Joseph C. Martin for infringement of certain patents for automatic cash-carrier systems for store service. The circuit court found that there was no infringement, and dismissed the bill. 62 Fed. 272. Complainant appeals.

M. B. Philipp (Frank D. Allen, Edwin C. Gilman, and J. Stuart Rusk, on the brief), for appellant.

Frederick P. Fish and William K. Richardson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. This bill was originally brought for the infringement of three patents, Nos. 255,525, 276,441, and 284,456, granted to the defendant, Martin, for improvements in automatic cash-carrier systems for store service. These patents have been as-

signed to the plaintiff. By amendment to the bill, the two latter patents were stricken out, and the suit as it now stands is limited to the first claim of patent No. 255,525, which issued March 28, 1882. In answer to the charge of infringement, the defendant relies upon a subsequent patent, No. 399,150, issued to him March 5, 1889.

The first question which arises is how far the defendant is estopped in this action. In a suit for infringement, brought against the assignor of a patent by his assignee, the assignor is estopped from denying the validity of his patent. He cannot say that the patent has been anticipated by prior structures, or that it is void for want of novelty or utility. *Babcock v. Clarkson*, 11 C. C. A. 351, 63 Fed. 607; *Id.*, 58 Fed. 581; *Ball & Socket Fastener Co. v. Ball Glove-Fastening Co.*, 7 C. C. A. 498, 58 Fed. 818; *Faulks v. Kamp*, 3 Fed. 898; *Onderdonk v. Fanning*, 4 Fed. 148; *Purifier Co. v. Guilder*, 9 Fed. 155; *Curran v. Burdsall*, 20 Fed. 835; *Underwood v. Warren*, 21 Fed. 573; *Parker v. McKee*, 24 Fed. 808; *Barrel Co. v. Laraway*, 28 Fed. 141; *Corbin Cabinet-Lock Co. v. Yale & Towne Manuf'g Co.*, 58 Fed. 563; *Chambers v. Crichley*, 33 Beav. 374; *Hocking Co. v. Hocking*, 4 Rep. Pat. Cas. 434, 438, 442; *Walton v. Lavater*, 29 Law J. C. P. 275.

But it is the settled rule with respect to the construction of patents that the prior state of the art is admissible in evidence "to show what was then old, to distinguish what was new, and to aid the court in the construction of a patent." *Brown v. Piper*, 91 U. S. 37, 41; *Eachus v. Broomall*, 115 U. S. 429, 6 Sup. Ct. 229; *Grier v. Wilt*, 120 U. S. 412, 7 Sup. Ct. 718. That this rule applies as between assignor and assignee has recently been held by this court in two carefully considered cases,—*Ball & Socket Fastener Co. v. Ball Glove-Fastening Co.*, *ubi supra*, and *Babcock v. Clarkson*, *ubi supra*. In the latter case the court (adopting the language used in the former case) says:

"The record contains very much touching the state of the art and prior patents. From what we have already said, it is plain that they cannot be introduced here for the purpose of invalidating any of the patents covered by the contract, or any portion of any claim of any of such patents. Nevertheless, they, as well as the file wrappers and their contents, are appropriate to be considered for ascertaining the true construction of the various patents involved, and especially for determining whether, according to such construction, the improvements were of a primary or secondary character, and how far the combinations admit of the doctrine of equivalents."

The appellant also claims an estoppel different from that which we have considered, to the effect that, under some circumstances, a patentee assigning his patent after it has been apparently embodied in a machine is estopped, as against his assignee, from denying that the machine correctly represents the substance of the patent. But in the present case several patents were assigned. Only one is brought before us, and we do not know the scope of the others. Non constat the patents which have not been brought to our attention, and not the one in suit, furnish the basis of this alleged estoppel, if such an estoppel can be maintained. Therefore, we are not called on to consider this question, either as one of law or of fact.



Looking at what was old at that time, it is impossible for us to give the broad construction to the patent in suit which is contended for by the plaintiff. The patentee himself declares in the specification that the invention "relates to the details of the construction of automatically moving cash boxes and devices for moving such boxes from one place to another." At the date of this invention, conveying apparatus of various kinds were old. One variety of conveying apparatus then existing was especially intended for use in stores. The Brown patent, No. 165,473, dated July 13, 1875, shows a conveying apparatus which is described as "for transmission of goods, packages, money, etc., in general, but more particularly as an expedient and cheap method of transmitting packages, bills, and money in stores and salesrooms, from the salesmen to the cashier, and vice versa, without the aid of the now employed cash boys." The White patent, No. 229,783, dated July 6, 1880, also shows a conveying apparatus "whereby articles are carried from the counters of a store to a central desk, and each back to the counter from which it was sent." In our opinion, the patent in suit cannot be considered in any proper sense a pioneer patent which lies at the foundation of a new art, but it is a patent, as the specification declares, for improvements in the "details of the construction." As a store-service apparatus, it was crude and imperfect.

In the adaptation of the old cable-conveying apparatus to store service two problems presented themselves: First, it was necessary to provide tracks leading in all directions from a given point, such as the cashier's desk, to different stations at the various counters; second, it was essential to provide for the automatic delivery of different carriers at different points along a single line of track, so that one track connected the cashier's station with a number of different receiving stations, and the boxes sent along one track must each be delivered at the station to which it belonged. The first of these objects is only imperfectly met, and the second is wholly unprovided for, by the patent in suit.

The first claim of the patent is as follows:

"In an automatic cash-box system, the track, b, the endless cord, o, the cash box, v, and appliances, substantially as described, for attaching said box to said endless cord, and for automatically detaching said box therefrom, and a suitable motor to give a motion to said cord, all combined and operating substantially as set forth."

This claim is for the combination of several elements, the track, the endless cord, the cash box or carrier, the motor, and appliances for attaching and for automatically detaching the box from the endless cord. The prior state of the art, as exhibited in the various patents in this record, shows conclusively that the patentee is not entitled to claim broadly the combination of a track, carrier, endless cord, motor, and devices for attaching and automatically detaching carrier to the endless cord, but that his patent must be limited to substantially the means described and shown in the specification and drawings. The track is essentially an endless one, over the entire length of which the carrier must travel in passing from one station to the other, and thence back to the first station. The

cable is an endless one, extending throughout the entire length of the track. The motor is any suitable one to drive a cable. The carrier, which has a tube firmly attached to its under side through which the cord runs, is one adapted to travel along and never be disengaged from the track. The appliances for attaching and automatically detaching the box from the cord consist of a grip device connected with the box, composed of two arms or clamping jaws, one of which is stationary and the other movable. To the latter a spring is attached, and the gripping or ungripping takes place as the movable arm is pressed against or is released from the endless cord, by the operation of the spring. The cash box, at each of the two stations, runs into a trough provided with a hinged spring cover. This cover supports upon its lower side two converging cams or guards and two stops. By means of these cams and stops the box is stopped, and is unclutched from the endless cord; and, after the box has been stopped under this cover, it cannot be clutched to the cord again until the cover is lifted by an attendant. The act of lifting the cover not only removes the cams and stops out of the road of the box, but permits the grip to work so as to again clutch the cord. In the patented device, the cover, with its cams and stops, movable with respect to the track, is a necessary feature.

While defendant's apparatus contains elements corresponding with those of the patent in suit, it is in substance and effect a different system. The track in this apparatus is essentially a double track, the carriers traveling in one direction on one track and in an opposite direction on the other track. The carrier must be capable of removal from the track and cord, for it cannot go back to its starting point by continuous movement in one direction. It must be wholly removed from one track, and placed upon an adjoining track, before it can be returned to the point from which it started. This apparatus has a gripping device, but the appliances for attaching and disconnecting the carrier from the cord are different from the patent in suit. It has no hinged cover with its converging cams and stops movable with relation to the track. The appliance for disconnecting the carrier from the cable is a cam or projection in fixed relation to the path of movement of the carrier along the track, which operates to release the grip; and the carrier continues to move on the track until it loses its momentum or is otherwise arrested. The carrier is then placed by the attendant upon the returning track. The system of the patent in suit is practically limited to a single carrier, because it must be remembered that it has only a single track, and that the carrier always runs in the same direction propelled by the endless cord. Now, if a second carrier were used, and the operator at one station should move away the stop, and thus start the carrier, and the operator at the other station should fail to start the carrier from that station at the proper time, the carriers would collide, and the ungripping devices would fail to properly operate. The defendant's apparatus is so constructed that an almost indefinite number of carriers may be used, and, while certain carriers will be automatically switched off from

the main track and disconnected from the cable at certain stations, others will be switched off at the other stations. Giving as full a scope to the invention covered by the plaintiff's patent as the state of the art will warrant, we think it clear that the defendant's apparatus does not infringe.

Decree of the circuit court affirmed.

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WRIGHT & COLTON WIRE-CLOTH CO. v. CLINTON WIRE-CLOTH CO.

(Circuit Court of Appeals, First Circuit. May 10, 1895.)

No. 125.

1. PATENTS—NEW USE OF OLD MEANS.

Where all that an alleged invention does is to apply an old and well-known means to a new use and new material, the patent, if sustainable at all, must be restricted to the specific combination described.

2. SAME—ANALOGOUS USES—EFFECT OF LAPSED PATENTS.

It seems that under the doctrine which gives to the patentee all the uses of which his invention is susceptible, whether known to him or not (*Potts v. Creager*, 15 Sup. Ct. 194, 155 U. S. 597), the public are entitled to all the uses of which the means involved in devices covered by lapsed patents are susceptible; and that a patentee who employs old means with improvements adapting the use to a new or nonanalogous industry is limited to a monopoly of the combination or improved machine.

3. SAME—LIMITATION OF CLAIMS—PRIOR STATE OF THE ART—WEAVING WIRE CLOTH.

The Wright patent, No. 239,012, for an improvement in the art of weaving wire cloth, if sustainable at all, in view of the prior state of the art, should not be construed so broadly as to give a monopoly of all the means of straightening or swaging wire in the wire-weaving industry. 65 Fed. 425, modified.

4. SAME—INFRINGEMENT—WIRE-WEAVING SHUTTLE.

The Wright patent, No. 239,011, for a combination shuttle, in which the alleged invention consists in swaging the twist out of the wire, by passing it over swaging rolls, before leaving the shuttle, if sustainable at all, in view of the prior state of the art, must be narrowly construed, and is not infringed by a shuttle made according to patent No. 299,895, which possesses no swaging rolls, but swages the wire by the use of the delivery rolls, combined with a metal friction post or block. 65 Fed. 425, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by the Clinton Wire-Cloth Company against the Wright & Colton Wire-Cloth Company for alleged infringement of two patents relating to the art of weaving wire cloth. The circuit court sustained the patents, found infringement, and directed a decree for an injunction and accounting. 65 Fed. 425. Defendant appeals.

Elmer P. Howe, for appellant.

Causten Browne and Alexander P. Browne, for appellee.

Before COLT, Circuit Judge, and NELSON and ALDRICH, District Judges.

ALDRICH, District Judge. This is a suit in equity in behalf of the Clinton Wire-Cloth Company, wherein it is alleged that the defendant has infringed two letters patent,—one for an improvement in the art of weaving wire cloth, and the other for an improved shuttle whereby the improvement in such art may be practiced. The complainant contends that prior to its inventions there was a practical difficulty in weaving wire cloth by means of a shuttle carrying a cop of wire; and that the difficulty resulted from the fact that the wire, as it lay on the cop, in coils substantially at right angles to the axial line of the shuttle, necessarily at each turn, as the coil was paid out longitudinally from the cop, took into itself turns of twist, by reason of which the wire constantly tended to resume the spiral form in which it was while wound on the cop, instead of remaining in a straight line in the web, as was necessary in order to accomplish satisfactory work.

The complainant claims, under patent No. 239,012, dated March 15, 1881, known as the "Art Patent," an invention which effectually removes this difficulty by swaging the twist into the body of the wire, which result, it is claimed, is accomplished by straining the wire around rollers as it passes from the cop to the loom and its place in the web. Under its other patent, No. 239,011, dated March 15, 1881, the complainant presents a combination shuttle consisting of a shuttle body for weaving wire, with a cop case or chamber, to contain the wire and swaging rolls, around which the wire passes after leaving the cop, and before leaving the shuttle, whereby the twists of the wire are swaged into its body, and smooth weaving insured. So it will be seen that under the Art patent, which is the first patent mentioned here, the complainant seeks to monopolize or control the means of swaging or straightening wire as it passes from the cop to the web; and that, under the second patent named, he seeks to control or monopolize the use of a combination shuttle, which it is said effectually performs the work.

We are of opinion that the means of straightening or swaging wire, as a general proposition, are old and well known, and that it has been understood for a long time that wire having crooks or twists could be straightened either by a hammering process, or by drawing the wire under tension around a rigid body or hard substance, like the horn of an anvil, for instance. It is probable that the boy is rare who has not in his playdays been confronted with the problem of straightening crooked or twisted wire, and it may be safely said that the problem was readily solved by holding one end of the wire in each hand, and drawing it firmly around some hard substance; and it mattered not, except in degree, whether the substance was a fixed rounded, or circulating, surface. It is probably true that the molecular condition of crooked or twisted wire is in a measure changed when subjected under tension to any of the old and well-known processes of straightening; and it therefore follows that the complainant's first or "Art Patent," so-called, should not, if sustained, be construed so broadly as to give a monopoly of all the means of straightening or swaging wire in the wire-weaving industry; and as we dispose of this case without passing upon the validity of the

second patent, which is the patent covering the combination shuttle or device, we do not deem it necessary to pass upon the question whether such particular device accomplishes more or better results than the means involved in the older devices known and open to the art of weaving.

As has been said, the complainant's device covered by his shuttle patent is the combination of a shuttle body for weaving wire with a cop case or chamber to contain the wire and with swaging rolls, around which the wire passes after leaving the cop, and before leaving the shuttle. In this machine or combination shuttle there are three rolls, which are designated as "swaging rolls," and two other rolls, which are denominated as the usual "delivery rolls." The wire, under the strain of weaving, passes around the three first named, and then around one or the other of the delivery rolls, to its place in the web. As the shuttle is passed from one side of the loom to the other, the wire is drawn around the delivery roll nearest to the point to which the shuttle is directed. The complainant does not claim that the two rolls called "delivery rolls" are new, or that they perform in this device any necessary swaging function; and in fact it is conceded that they were in use and known to the public as delivery rolls, both in wire and textile fabric weaving, long before the complainant's alleged invention. The device known as the "Combe Patent" was an English device invented in 1857, and was designed to be used in the textile fabric industry. It possessed a semicircular friction block or post, which performed the double function of putting friction upon the weft thread, and of guiding the thread on its course to the loom. It also possessed a steel channel or groove on the side of the shuttle, through which the thread was drawn as it was delivered to its place in the web. While this device was limited in design and in use to weaving textile fabrics, and had no reference whatever to the idea of swaging turns of twists from weft-wire threads in the wire-weaving industry, it unquestionably embodied the means of performing that function. Perhaps not satisfactorily, but it possesses the means and will accomplish the work in a degree. It is urged by the learned counsel for the complainant that the problem of swaging turns of twists into wire thread was never presented in the textile-fabric industry during the life of the Combe patent. If this be so, "doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him" (*Potts v. Creager*, 155 U. S. 597, 606, 15 Sup. Ct. 194); and, if the Combe patent were in force, the patentee would doubtless be entitled to control the use of his device in the wire weaving as well as in the textile fabric weaving industry. Under the doctrine which gives to the patentee all the uses to which his invention is susceptible, whether known or unknown, it is difficult to see why the public should not be entitled to all the uses to which the means involved in devices covered by lapsed patents are susceptible, or why a patentee who employs the old means with improvements adapting the use to a new or nonanalogous industry should not be limited to a monopoly of the combination or improved machine. To say that one who discovers that old means will do

a new work without any change may thereby monopolize the old means as applied to such new work, or, in other words, to say that because of such discovery others engaged in the wire-cloth industry shall not, in weaving, run a wire thread through the means used in the older industry, would be carrying the discovery doctrine altogether too far.

On the view most favorable to the complainant, all its alleged invention does is to adapt or apply old and well-known means to a new use and new material; and if the question as to the validity of the patent were a question necessary to a decision of this case, and if "the patent could be sustained at all" (*Brook v. Aston*, 27 Law J. Q. B. 145, 28 Law J. Q. B. 175, 176; *Potts v. Creager*, 155 U. S. 597, 606, 607, 15 Sup. Ct. 194; *Watson v. Stevens*, 5 U. S. App. 101, 107, 2 C. C. A. 500, and 51 Fed. 757; *Pennsylvania R. Co. v. Locomotive Engine & Safety Truck Co.*, 110 U. S. 490, 494, 4 Sup. Ct. 220; *Brown v. Piper*, 91 U. S. 37; *Roberts v. Ryer*, Id. 150; *Atlantic Works v. Brady*, 107 U. S. 192, 2 Sup. Ct. 225; *Tucker v. Spalding*, 13 Wall. 453; *Rob. Pat. § 259*, and note 1), "it would have to be restricted and confined to the specific combination described" in the specification and claims (*Knapp v. Morss*, 150 U. S. 221, 228, 14 Sup. Ct. 81; *Duff v. Pump Co.*, 107 U. S. 636, 639, 2 Sup. Ct. 487; *Newton v. Furst & Bradley Co.*, 119 U. S. 373, 7 Sup. Ct. 369; *Bragg v. Fitch*, 121 U. S. 478, 484, 7 Sup. Ct. 978; *Dryfoos v. Wiese*, 124 U. S. 32, 37, 8 Sup. Ct. 354). If, therefore, we were to assume in this case that the wire-weaving industry is nonanalogous to the textile-fabric industry, and that the complainant's combination was patentable as a combination of old means with improvements adapting it to a new and nonanalogous material and use, still the monopoly would be limited to the combination, and would not extend to the old means employed in the new industry without invoking the aid of the improvements involved in the new combination or device, for which the complainant seeks protection.

The Tunstill patent of 1864 was a device for textile weaving, and employed a tubular gudgeon and a round roller as means for protecting weft thread from becoming entangled as it passed from the cop; and the Bigelow patent of 1857 was designed as an improved device for use in weaving wire cloth, and employed a series of pins, which were designated as a "wire straightener," through which the wire was drawn out from the bobbin between guide rollers to the loom, and to the pins there was applied a spring to hold the pins "in greater or less proximity, according as more or less pull is required to straighten the wire." It is also claimed for the last-named device that "two conforming friction surfaces may be employed to straighten the wire, said surfaces being pressed together by a spring, and the wire drawn between them." The Washburn patent of 1865 covers a wire-straightening machine with fixed points or rollers, whereby it is claimed that "wire may be more readily and effectually straightened than by machines hitherto employed for this purpose," and it sets forth that the wire is to be drawn between fixed points or rollers. Without pursuing the state of the art or older devices further, it may be observed that weavers of wire and textile cloths

have variously employed friction posts, blocks, metal grooves, channels, and rollers in connection with the shuttle for the purpose of straightening textile and wire weft thread. The defendant's alleged infringing shuttle is covered by letters patent No. 299,895. It possesses no swaging rolls, but employs the delivery rolls, which are old, combined with a metal friction post or block somewhat larger than that used in the Combe patent, around which the wire is paid out from the cop or spindle, and passed through the delivery rolls to the loom. As has been said, the delivery rolls are old, and the friction post or block is old; and if there is, as claimed, peculiar virtue and novelty in the combination of the complainant's swaging rolls with the delivery rolls, which are old, then the defendant's device does not possess such virtue or novelty. It is sufficient for the purposes of this case to say that, if we were to assume that the complainant's combination presents a patentable device and a better shuttle than any other known in the art of wire weaving, we should feel bound to construe the patent as not covering or controlling all means of swaging turns of twists into wire, during the process of weaving. It follows, therefore, as the defendant's alleged patentable combination employs such means only, for straightening or swaging wire, as were old and well known, that the rights of the complainant are not infringed.

The decree of the circuit court is reversed, and the case remanded to that court, with directions to dismiss the bill, with costs.

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#### THE HINDOUSTAN.

#### STARACE v. COMPAGNIE NATIONALE DE NAVIGATION.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

#### SHIPPING—DAMAGE TO GOODS—EXCEPTIONS IN BILL OF LADING.

Under a bill of lading containing exceptions of "deterioration of fresh fruits or vegetables, \* \* \* moisture by fresh or salt water, condensation, \* \* \* decay of every kind or vice propre," the burden of proof is upon the shipper to show that deterioration in a shipment of garlic might have been avoided by the exercise of reasonable skill and attention on the part of the ship.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Achille Starace against the steamship Hindoustan (the Compagnie Nationale de Navigation, claimant) to recover damages for deterioration and decay of four shipments of garlic brought from Naples, and consigned to the libelant. The district court dismissed the libel, and the libelant appeals.

The opinion filed by BROWN, District Judge, in the court below was as follows:

Under the bills of lading the burden of proof is upon the libelant to show negligence in the carrier; since the damage was by an excepted peril; negligence in this case could only be the omission of the customary ventilation for garlic in passenger ships. The proof does not show such omission, but the presence of the usual and sufficient ventilation for properly cured garlic.

The defendants had no notice that any ventilation beyond the usual and customary was needed. The testimony that the garlic was thoroughly cured when shipped is not persuasive, because the outward appearance was not a sufficient test. I think the decay arose from the early crop not thoroughly dried, and that the ventilation was sufficient for well cured garlic, and all that is usual for such ships and all she was bound to provide.

Libel dismissed.

The matters in issue will appear from the following statement, contained in the brief for the appellant:

The libel was filed to recover \$1,582.89 for damage to four shipments of garlic made on June 14, 1892, by four different persons, at Naples, Italy, on the steamship Hindoustan, then bound for New York, and which were on the 6th day of July, 1892, delivered at New York to the libelant, the consignee thereof, in a damaged condition. These four shipments of garlic, consisting together of 422 hampers, were stowed in the lower hold No. 3 of the steamship, and the hatchway leading into that hold was closed, the cracks caulked, and the hatch covered with a tarpaulin. The hatch was not opened during the voyage. The garlic, when shipped, was in good order and condition, having been properly dried and packed, but the greater portion of the garlic when delivered at New York was decayed, and this damage was caused by heating and sweating on account of insufficient ventilation. The hatch having been closed, the only means of ventilation of the hold in which the garlic was stowed were four iron pipes, leading from the bottom of the hold, two to the between decks, and two to the upper or spar deck. The two pipes leading to the between decks were undoubtedly closed, as was the hatch, to prevent a supposed annoyance by the odor of the garlic to the passengers who were located in the between decks. As there was no opening in the deck by which air could escape, no air could pass down the two ventilators from the spar deck, through which it was designed that air should pass to the bottom of the hold, and there was consequently no ventilation whatever. The weather during the voyage permitted the opening of this hatch sufficiently often to have afforded ventilation enough to have preserved the garlic. If the garlic had been stowed in some other part of the ship, where proper ventilation could have been had, it would not have decayed. It is evident that those in charge of the ship could have prevented the damage to the garlic by affording it proper ventilation, either by opening the hatch occasionally during the voyage, or by stowing it where there was sufficient ventilation. The libelant claims that the failure to afford sufficient ventilation was negligence, and that the steamship is consequently liable for the damage, notwithstanding the bills of lading contained a clause exempting the steamship from liability by reason of decay, for the decay could have been prevented by the exercise of due diligence on the part of those in charge of the steamship. On behalf of the steamship, it is claimed that the garlic was not sufficiently dried when shipped; that it was stowed in the customary way and place; that it had the usual ventilation; and that the damage was due to inherent defects or vice propre, and not to the negligence of those in charge of the steamship; and that, consequently, the steamship and the claimant are exempted from liability therefor, under provisions of the bills of lading.

George H. Balkan, for appellant.

C. C. Burlingham, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The bills of lading contained the express condition that the carrier should not be liable for "deterioration of fresh fruits or vegetables, \* \* \* moisture by fresh or salt water, condensation, \* \* \* decay of every kind or vice propre." The burden of proof, therefore, was upon the libelant to show that the deterioration or decay might have been avoided by the exercise



of reasonable skill and attention on the part of the steamship. He contended that there had been insufficient ventilation, but we concur in the finding of the district judge that he has failed to show by a fair preponderance of proof that the garlic was not given such ventilation as is usual and ordinarily sufficient on vessels of this character. There is no direct proof that the ventilating pipes which led into the between decks were obstructed, and, in the absence of proof, we cannot infer that such was the fact, merely from the circumstance that the hatch in the between decks was closed and caulked.

The decree of the district court is affirmed, with costs.

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FREEMAN v. WELLMAN et al.

(District Court, D. Massachusetts. May 13, 1895.)

No. 532.

SHIPPING—CUSTOMARY QUICK DISCHARGE.

Where 30 or 31 working days were occupied in discharging a cargo of 475,000 feet of lumber, which had been loaded in 16 days, *held*, that there was a failure to comply with an agreement to discharge with "customary quick dispatch," although some allowance was to be made for wet weather, the lumber being seasoned.

This was a libel by R. R. Freeman against H. E. Wellman and others for demurrage.

Carver & Blodgett for libellant.

C. T. & T. H. Russell, for respondents.

ALDRICH, District Judge. This case involves a controversy as to the discharge of a cargo of hard pine lumber from the schooner Annie E. Kranz at the wharf in the port of Boston. The schooner was loaded at New Orleans, under a written contract of charter party and bill of lading, which called for the "customary quick dispatch" in the discharge of the cargo at the wharf. It was provided by the contract that the charterers were to furnish 30,000 feet per day for loading, and there is no question about the fact that she was loaded at about that rate. The cargo consisted of about 475,000 feet of lumber, and was loaded in 16 days, if I recall the evidence correctly. There is no controversy about the loading, however, and the time occupied is only important so far as it bears on the controversy as to the discharge. The testimony on both sides tended to show that loading lumber necessarily requires more time than the discharge, for the reason that care is required in packing the small pieces in and about the vessel.

Coming now directly to the controversy, the vessel arrived at the port of Boston, August 31, 1892, and the discharge was finished October 5th or 6th. She was therefore at the wharf 36 or 37 days, and, deducting Sundays and holidays, there were left 30 or 31 working days. From these days, however, some deduction should be made by reason of wet weather, as the lumber was seasoned, and care

required to keep it from the water while being discharged. I assume that the term "customary quick dispatch" in discharging means what is known as the ordinary quick dispatch, as distinguished from the usual discharge; and from the evidence I am inclined to think it more probable than otherwise that it is understood in the business to mean a gang of stevedores at each hatchway through which lumber can be delivered, while in the ordinary discharge one gang only is employed. In this instance the stevedore in control of the discharge of the cargo was also foreman of the wharf and agent of Wellman, Hall & Co., the consignees; and the principal controversy in this case—in fact the only controversy—is upon the question whether the consignees exercised proper foresight and care, as it was their duty to do, in keeping the wharf unobstructed and in a condition for free discharge, in view of the fact that the cargo was to be unloaded with customary quick dispatch. The evidence taken altogether would seem to make it more probable than otherwise that there was unnecessary and unreasonable delay at the wharf, and that such delay was chargeable to the respondents or their agents. It is difficult to determine just how much unreasonable delay there was. It would seem, however, that the discharge could and should, at a liberal limit, have been made in 20 or 21 days, and the unreasonable delay, therefore, was at least 9 days.

As there is no controversy about the demurrage, which is fixed by the charter party at \$60 per day for each day's detention, it follows that the libellant is entitled to recover \$540, with interest from date of libel. Decree accordingly, with costs.

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## NEW YORK & WILMINGTON STEAMSHIP CO. v. McLAUGHLIN.

(Circuit Court of Appeals, Third Circuit. May 14, 1895.)

### No. 3.

#### NEGLIGENCE—DEFECTIVE MACHINERY.

Libellant, a fireman on a steamer, while engaged in hoisting ashes with a steam hoisting apparatus, was injured by the bucket on the hoisting rope running too far up, and cutting off his finger. It appeared that the apparatus was simple, and could have been so adjusted as to be perfectly safe, but that it had not been so adjusted. It also appeared that the defect had existed for some time, and that the attention of the officers of the vessel had been called to it. *Held*, that the vessel was liable for the injury sustained by libellant.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel for personal injuries by John McLaughlin against the steamer Benefactor (the New York & Wilmington Steamship Company, claimant). The district court entered a decree for the libellant, upon the following opinion (BUTLER, District Judge):

The libellant, who was a seaman on board the respondent, sues to recover compensation for an injury sustained while operating her ash hoist on a trip from Philadelphia to Richmond. I find the facts to be substantially as

set out in his statement: "This hoist consisted of a tube or brass cylinder containing a piston, to which was attached a wire rope which passed through a gland or stuffing box over a pulley. A lever operating a valve admitted steam on top of the piston, driving the piston down, causing the bucket, which was attached to a rope or fall, to ascend through the ventilator to a door in it on deck, through which the bucket of ashes was taken by the operator and his assistant, and dumped overboard. At the discharge of the ventilator was a house containing a door 2½ feet wide, and a window which at that time was inclosed with a sash and glass. Inside the house was a lever, and there was only enough room to enable the operator to stand in the doorway and work the lever, take the bucket of ashes from the hook, and pass it outside to another fireman, who assisted in dumping it. On the voyage in question the firemen noticed that a three-inch stud bolt which was used to secure the gland or stuffing box of the hoist, to prevent the escape of steam, was broken off; and a piece of wire was wrapped around it, as a makeshift to take its place. The officers of the steamer knew of this, and admitted that it was the third voyage which the steamer had made from Philadelphia with the broken bolt, but that they did not have time to repair it. The effect of this absence of the bolt was to permit the steam to escape from the cylinder, and render the hoist dangerous to work. Every fireman on board during the voyage complained to all of the officers that the hoist was out of order. At times the bucket would not come up far enough in the ventilator for the operator to take hold of it, and would slide back again to the fire room. The only thing done by the officers, or those in charge of the machinery, was to tie knots in the rope which held the bucket. Some four or five knots were thus made in the rope, which, instead of making any improvement, rendered the working of the hoist more irregular. Instead of the bottom of the bucket stopping two inches above the sill of the ventilator door, as intended by the inventor, the bucket would go up into the ventilator, until the handle struck the hook on the top of the pulley. Two of the firemen refused to operate it. Those in charge of the machinery, seeing the danger, then suggested to libelant to let the bucket go up as far as it would go, and take it out when descending. This seemed the safest way to operate the hoist, and libelant adopted it. On the 27th of March the steamer was in Norfolk, and it is alleged by her officers that the broken bolt was replaced there on that day. Although this may have been done (which is denied by libelant), the rope which held the bucket, and had been knotted and shortened and adjusted to compensate for the loss of steam, was permitted by the officers to remain in that condition. The steamer left Norfolk at night on the 27th of March, and, about 11 o'clock the same night, libelant started, during his watch, to raise ashes at the hoist. It worked worse than ever. The bucket would go up, and strike with greater force than before, and come down again. The third bucket had gone up in this way, and when it was coming down, and libelant had put his hand on to take it out, the lever, which was loose, and had been affected by the unusual jarring caused by the bucket's striking above, and the lurching of the vessel, fell over, sending the bucket up again, and taking libelant's finger with it, and cutting off part of it. A new fall or rope, to take the place of the knotted one, was afterwards rigged up, the next morning. The method of operating the hoist was also afterwards changed. The sash was taken out of the window, and the man who operated the lever stood outside the window, and was compelled to hold on to the lever until his assistant landed the bucket."

I need not discuss the evidence. It sustains the foregoing statement in all essential respects. The theories of respondent's witnesses respecting the cause of the accident, and the manner in which it occurred, are entitled to very little weight, as against the direct and positive testimony on the other side. That the hoist was out of order, and was dangerous to one operating it, and that the libelant was injured while engaged in the discharge of this duty, is entirely clear. I find no reliable evidence that he was negligent. The presumption is that he was not, and more especially in view of the fact that he knew the hoist to be out of repair, and difficult to work with safety. While there is no evidence to repel this presumption, his testimony supports it. He could not properly refuse the work, and would have en-

countered the risk of punishment if he had. The notion that his injury resulted from the slamming of a door is met, not only by positive testimony to the contrary, but also by evidence that this was impossible. The charge that the libelant was neglected,—that he did not receive proper treatment,—after the accident, is not sustained. The case must go to a commissioner to ascertain the extent of the injury, and the compensation due.

Claimant appeals.

J. W. Bayard and Frank P. Prichard, for appellant.

John A. Toomey, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This is an appeal by the New York & Wilmington Steamship Company from a decree entered against it by the district court of the Eastern district of Pennsylvania in a libel filed by John McLaughlin for personal injuries. The proofs show that on March 27, 1893, libelant, while performing his duties as a fireman on the Benefactor, one of appellant's vessels, in raising ashes, by means of a patent steam hoist, from the fire room to the deck, had the middle finger of his right hand cut off at the first joint. He alleged the machinery and appliances were not proper for the purpose; were, to the knowledge of the officers, out of order; and that his wound was improperly treated on the vessel. The last issue was found for the ship, the other for the libelant, a decree entered in his favor, and from it the present appeal is taken. After full examination of the proofs, we are of opinion there was no error in the result reached by the court below.

The testimony of Mr. Selden, the inventor of the apparatus, and of other witnesses called by the respondent, shows the hoist was simple in design and construction, and capable of such an adjustment as allowed it to be safely worked by unskilled men. A description of it is as follows: Near the ventilating shaft through which the ash bucket was to be hoisted, a piston was placed in a tube having a length equal to the hoist, or made equivalent thereto by means of pulleys. Secured to the piston was a wire rope passing through the stuffing box and over a pulley, whence, by a rope running down the shaft, connection was made with the ash bucket. A valve controlled by a lever near a door opening from the ventilator to the deck admitted steam to the top of the piston. By this means the piston was driven to the bottom of the valve, and the bucket raised to clear the ventilator door. Mr. Selden describes it as being operated by a single person and says:

"A man standing there, looking down in the tube, could see the bucket five feet down, before it reached the hole. He stands with his hand on the lever, and, as the bucket comes up, the intention is to shut off the steam, and take the bucket out. The lever is placed very conveniently to him."

He says that, after the steam is shut off by the lever, it is impossible for the bucket to rise any higher; or, to use his words, "it is nothing in the world but a lever with a weight on one side and a weight on the other." He says the apparatus is adjusted so that the bucket clears the bottom of the door by two or three inches, and

that the arrangement of this vessel was such that, if all the steam was turned on until the piston was all the way down, it would hold the bucket at rest at that point. The captain of the vessel, O'Neil, speaks thus of the working of the hoist:

"Q. When he turns the steam on, what happens? A. The bucket comes up. When it gets to a certain height, it stops itself. You could not pull the bucket out then, or haul it out, because the steam is still on the piston, and the piston is down at the bottom of the cylinder. You have got to reverse the lever, and then you shut the steam valve and open the exhaust. That relieves the pressure off the piston, and you can haul the bucket out."

The testimony of Wood, the assistant engineer, is:

"Q. Why is it that this bucket cannot rise higher than you have described? [Two inches from the lower edge of the ventilator door.] A. Because the piston goes down in the bottom of the cylinder, and you can't get it any further. Q. You mean, when the ash bucket is that high, the piston is down at the bottom of the cylinder? A. Yes, sir; down to the bottom of the cylinder."

From this testimony, it is quite clear how the hoist should work when properly adjusted, and that it could be so adjusted that, even when run by an unskilled man, it was impossible to force it as high as the upper edge of the ventilator door. But, unfortunately for the appellant, the overwhelming testimony of the libelant and his witnesses shows the bucket did strike the upper edge of the door, and the explicit admission of the answer concedes that it was at that place libelant's finger was cut off. The second paragraph of the libel says the injury was caused by libelant's finger "being caught between the edge of the iron bucket containing the ashes, and the top of the ventilator door, through which the bucket was taken to be emptied;" and the answer says, "the averment in the second paragraph of the libel as to the manner in which libelant was injured is true." The appellant afterwards took the position that it was a physical impossibility that such a thing should happen; but even if this issue were still open, in view of the express allegation in the libel, and the equally explicit admission of its truth in the answer, we are of opinion the proofs show that this was the manner and the cause of libelant's injury. The testimony of Welsh and libelant, who were the only persons present, is positive that Mc Laughlin's finger was caught between the bucket and the upper edge of the door, and the testimony of the numerous persons who had worked the hoist is quite convincing that the bucket did run up as high at other times. In view of these facts, and of the fact that the appliance could have been so adjusted as to have avoided any such danger, we think no injustice is done in visiting the appellants with the damage which resulted from their failure to so adjust the hoist as to avoid this danger. The decree will therefore be affirmed.

## SMITH v. SARGENT MANUF'G CO.

(Circuit Court, S. D. New York. May 18, 1895.)

**COURTS—JURISDICTION IN PATENT CASES—WHERE SUIT MAY BE BROUGHT.**

The provision in the judiciary act of 1887, as amended in 1888 (25 Stat. 433), requiring suits to be brought in the district of defendant's residence, does not apply to suits for infringement of a patent, and such suits may be brought wherever personal service can be had. *In re Hohorst*, 14 Sup. Ct. 221, 150 U. S. 653, followed.

This was an action at law by Herbert S. Smith against the Sargent Manufacturing Company for alleged infringement of a patent. Defendant demurs to the complaint for want of jurisdiction.

Thomas M. Wyatt, for plaintiff.

Francis Forbes, for defendant.

**WHEELER**, District Judge. The plaintiff is a citizen of New York; the defendant is a corporation and citizen of Michigan; and the suit is brought for an alleged infringement in this district of letters patent of the United States No. 185,193, issued to the plaintiff for an improvement in wheeled chairs, and therefore arises under the patent-right laws of the United States. The defendant has demurred to the complaint, assigning for cause want of jurisdiction "of the person of the defendant," because the suit is brought in another district than that whereof the defendant is an inhabitant. The act of 1887, as amended in 1888 (25 Stat. 433), is relied upon to support this demurrer. The circuit courts of the United States had exclusive jurisdiction of cases arising under the patent laws long before the act of 1887; and before the act of 1875 the district courts had exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. Act Feb. 15, 1819 (Story's Laws U. S. 1719); Act July 4, 1836, § 17 (5 Stat. 119); Rev. St. U. S. § 563, cl. 3; *Id.* § 629, cl. 9; *Id.* § 711, cls. 3, 5. These suits could be brought in any district where personal service could be made upon the defendant. *Chaffee v. Hayward*, 20 How. 208. The general words of the act of 1875 would have given the circuit court jurisdiction of suits for penalties and forfeitures of which the district court before had exclusive jurisdiction, but the supreme court held that this special jurisdiction of the district court was not included in these general words. *U. S. v. Mooney*, 116 U. S. 104, 6 Sup. Ct. 304. In the same way, suits under this special jurisdiction of the circuit courts in patent cases would be included by the general words of the act of 1887, as to where suits should be brought, but the supreme court has said that suits under this special and exclusive jurisdiction of the circuit were not included by these general words. *In re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221. This decision and this saying of the supreme court seem to be sufficient for overruling the demurrer in this case now. Demurrer overruled.

## HATCH v. BANCROFT-THOMPSON CO. et al.

(Circuit Court, E. D. Michigan. May 10, 1895.)

No. 3,354.

## 1. EQUITY PRACTICE—PLEA SUPPORTED BY ANSWER—EQUITY RULES.

The only method by which complainant may test the sufficiency of a plea, or, if its sufficiency be conceded, the truth of its averments, is that provided by equity rule 33, and consists either in setting down the plea to be argued, or in taking issue upon it as to the facts; and where a plea in bar is supported by answer, as provided by equity rule 32, complainant cannot properly except to the answer for insufficiency, and at the same time move to quash the plea; and, if he does so, it must be held that, by excepting to the answer, he admits the validity of the plea.

## 2. EQUITY PLEADING—EXCEPTIONS TO ANSWER—RULE 39.

Under equity rule 39, an answer in support of a plea in bar is not subject to exception because it fails to answer all the specific interrogatories attached to the bill.

## 3. STATE AND FEDERAL COURTS—COMITY—CREDITORS' BILLS.

Under the Michigan statutes relating to creditors' bills (How. Ann. St. §§ 6614-6618), and conferring upon the state circuit courts certain powers in respect to corporations (chapter 281, §§ 8148-8173), as construed by the state courts (Turnbull v. Lumber Co., 21 N. W. 375, 55 Mich. 387, and Bank of Montreal v. J. E. Potts Salt & Lumber Co., 51 N. W. 512, 90 Mich. 345), a creditor who has procured a judgment in a federal court against a corporation is entitled to intervene on a footing of equality in a creditor's suit pending in a state court; and, after jurisdiction has fully vested in the state court, a federal court will refuse, on the ground of comity, to proceed on a bill subsequently filed by such creditor, to procure the same relief as that prayed in the state court, and will take such action as will leave complainant free to resort to the state court, or will stay its hand until that litigation is ended.

This was a creditors' bill brought by Edward P. Hatch, doing business under the firm name and style of Lord & Taylor, against the Bancroft-Thompson Company, Frederick A. Bancroft, John W. Thompson, Charles R. Hawley, William Butler, Lawrence E. Christopher, Benjamin M. Hawley, Joseph W. Fitzgerald, and John L. Bassingthwait. The case was heard upon exceptions to the answer, and also upon a motion to quash the plea.

The bill of complaint in this cause was filed on the 4th day of September, 1893, and shows that the complainant, who is a citizen of the state of New York, obtained a judgment against the Bancroft-Thompson Company, a corporation organized under the laws of the state of Michigan, in this court, on the law side thereof, June 28, 1893, for \$2,575.43, and costs, taxed at \$31.45, on which judgment an execution was duly issued, and placed in the hands of the marshal of this district for collection. Said writ of execution was duly returned August 25, 1893, by the marshal, wholly unsatisfied. The judgment remains in full force and effect, wholly unpaid, and there is still due the complainant thereon the full amount thereof, with interest and costs. The purpose of the bill is to reach, in favor of the judgment creditor, equitable assets of the Bancroft-Thompson Company, and compel the discovery of concealed property and assets, and for other and incidental relief. The defendants named in the bill are the corporation, and its officers and stockholders, who, it is charged, have bought property of the corporation defendant, and a part of the relief sought is that these persons pay money into the company, which shall be applied to the satisfaction of complainant's claim. The gravamen of the bill is alleged frauds committed by defendants, which may be summarized briefly, as follows: (1) A fraudulent organization of the

company to have it substituted as a debtor in place of the copartnership previously existing, whose assets it acquired; (2) fraudulent overvaluation of property turned over of the company as capital stock subscription, and in non-payment of capital stock of the corporation; (3) the fraudulent giving of a mortgage on the property of the corporation; (4) fraudulent sales of goods to defendant C. R. Hawley; (5) the fraudulent foreclosure of the mortgage; (6) the fraudulent purchase by C. R. Hawley & Co. of the property of the company at the foreclosure sale had under said mortgage; (7) the fraudulent diversion of the profits and property of the corporation to the use and benefit of its directors and stockholders, to the detriment of the bona fide debtors of the company. Twenty-seven specific Interrogatories are propounded, which the bill prays may be answered by the defendants.

The defendants have filed a plea to the bill, setting forth, in substance, that, under and pursuant to the statutes and practice of the state of Michigan, a similar bill on judgments of claim in the circuit court for the county of Bay, in chancery, was filed in that court by James McCreary and others against the defendants on the 16th day of February, 1892, and a second and like bill was filed in said state court against the defendants in this suit by Marshal Field and others, who are also judgment creditors of the defendant corporation; and that the purpose and object and the charges in said bills and the relief sought thereby were identical in substance and effect with those contained in the bill in this cause, except that the complainant here was not a party to said bills in said state courts, and the amounts of the judgments are different. The proceedings on said bills in said state courts were founded upon sections 6614-6615, and also chapter 281, How. Ann. St. Mich., which confer jurisdiction upon a court of chancery in behalf of a creditor "who has obtained judgment at law, and who has been unable to collect the same upon execution, in whole or in part, to compel a discovery of any property or things in action, belonging to the defendant, and of any property, money or things in action due to him or held in trust for him, and to prevent the transfer of any such property, money or things in action or the payment or delivery thereof to the defendant, except where such trust has proceeded from some other person than the defendant." Chapter 281, § 8150, of Howell's Statutes enacts that the circuit court within the proper county shall have jurisdiction over directors, managers, trustees, and other officers of corporations, and over any persons who may have held such offices in any corporation, provided that proceedings are commenced within one year after they have become managers, trustees, and other officers: "(1) To compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge. (2) To decree and compel payment by them to the corporation whom they represent, and to its creditors, of all sums of money of the value of all property which they may have acquired to themselves or transferred to others, or may have lost by any violation of their duties as such directors, managers, trustees, or other officers. \* \* \* (7) To set aside all alienations of property made by the trustees or other officers of any corporation, contrary to the provisions of law or for purposes foreign to the lawful business and objects of such corporation in cases where the persons receiving such alienations know the purpose for which the same was made. (8) To restrain and prevent any such alienation in cases where it may be threatened or there may be reason to apprehend that it is intended to be made." Section 5 of this statute enacts that the jurisdiction conferred in the third section of the chapter shall be exercised as in ordinary cases, on bill or on petition, as the case may require, or as the court may direct, at the instance, among others mentioned, of any creditor of such corporation. And section 6 provides: "Whenever a judgment at law or a decree in chancery shall be obtained against any corporation incorporated under the laws of this state and the execution issued thereon shall have been returned unsatisfied in part or in whole, upon the petition of the person, obtaining such judgment or decree, or his representatives, the circuit court within the proper county may sequester the stock, property, things in action and effects of such corporation and may appoint a receiver of the same." The plea sets forth that in and by virtue of the said suits of McCreary and others and Field and others, so pending and undisposed of in



the circuit court for the county of Bay, in chancery, the said court has acquired and "has full jurisdiction, control, and custody of all the estate and property of the Bancroft-Thompson Company, and of all the debts and property owing by any person on any account to said Bancroft-Thompson Company, with the power and right to order a disposition thereof, and that this court ought not, by reason of said matters and things, to take jurisdiction of this suit"; and prays judgment whether the defendants ought to be compelled to make any other or further answer to complainant's bill. This plea is properly verified, and is supported by an answer under general equity rule 32, fortifying the plea, and explicitly denying the fraud and combination charged in the bill and the facts on which the charge is founded. The answer does not set forth all the information called for by the interrogatories annexed to the bill. The complainant has filed exceptions to the answer for insufficiency, because the specific interrogatories attached to the bill are not answered. In addition to his exceptions and simultaneously therewith, complainant moved to quash defendants' plea, on the ground of insufficiency, and for a decree in conformity to the prayer of the bill.

Jones, Samuels & Culver, for complainant.

C. L. Collins, for defendants.

SWAN, District Judge (after stating the facts). The plea in this cause, in accordance with the requirements of general equity rule 31, has attached the certificate of counsel that, in his opinion, it is well founded in point of law, and it is supported by the affidavit of the defendants Bancroft, Hawley, Thompson, and Bassingthwait that it is not interposed for delay, and is true in point of fact. By general equity rule 33, it is provided that the plaintiff may set down the plea to be argued, or he may take issue upon it, and if, upon an issue, "the facts stated in the plea be determined for the defendant, they shall avail him as far as, in law and equity, they ought to avail him." This rule provides the only two methods by which the plaintiff may test the sufficiency of the plea, or, if that be conceded, the truth of its averments. The course pursued by the complainant is an innovation upon chancery practice, which is excluded by the very terms of the rule, and which has no sanction in the equity practice of the federal courts. It was plainly the duty of the complainant, if he questioned the sufficiency of this plea, to set down the same for argument; and, unless he intended to admit its validity, he could not, before it had been argued, test the sufficiency of the answer by exceptions, without admitting the validity of the plea.

The rule laid down in Daniell's Chancery Practice is as follows:

"If a plaintiff conceives an answer to interrogatories to be insufficient, he should take exceptions to it, stating such parts of the interrogatories as are not answered, and praying that the defendant may, in such respect, put in a full answer. If, however, the answer is one which accompanies a plea or a demurrer to part of a bill, he must, unless he intends to admit the validity of the plea or demurrer, wait until it has been argued, for his exceptions would operate as an admission of its validity." 1 Daniell, Ch. Pl. & Prac. pp. 691, 760; Darnell v. Reyny, 1 Vern. 344; Brownell v. Curtis, 10 Paige, 210; Buchanan v. Hodgson, 11 Beav. 368.

Upon this ground, therefore, the plea must be sustained.

By general equity rule 38:

"If the plaintiff shall not reply to any plea or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next

succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

This rule seems equally fatal to complainant's position.

The course pursued by the complainant in excepting to the sufficiency of the answer seems to have been taken without thought of the effect of general rule No. 39, which provides as follows:

"The rule that if a defendant submits to answer he shall answer fully all the matters of the bill, shall no longer apply in cases where he might, by plea, protect himself from such answer and discovery, and the defendant shall be entitled in all cases by answer, to insist upon all matters of defense (not being matters of abatement or to the character of the parties or matters of form) in bar of or to the merits of the bill in which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. \* \* \*

Rule 39 is considered by the late Justice Bradley in *Gaines v. Agnelly*, 1 Woods, 238, Fed. Cas. No. 5,173. The learned justice there says that the general effect of the rule is to leave the complainant under the burden of proving his bill, and take from him the benefit of defendant's answer.

"This disadvantage is compensated for in some degree by the liability of the defendant to be called as a witness in the case. Still, the general effect of the new rule being such as I have stated, it seems to be no longer a ground of exception where the answer sets up a bar to the whole bill, and claims the benefit of it, as of a plea in bar, that it does not fully answer the allegations of the bill. If the bar set up and claimed as such be insufficient, or if it be unsupported by proper averments or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may, except for insufficiency, set the cause down on bill and answer only, or file a replication, and proceed to proofs according to the exigency of the case. If the bar set up should be insufficient as such, I think the complainant would be entitled to exception as for want of a full answer; and, to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend the bar set up in the answer. \* \* \* From this view of the subject, it is manifest that, if the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them, and the rule no longer applies that if the defendant does answer at all, even on matters outside of the bar, he must answer fully. If that rule did apply, it would have the effect to convert the answer in such a case into a strict plea in bar. Any divergence of statement, any notice of the allegations of the bill outside of the strict line of the defense, would be held a waiver of the bar, and would subject the defendant to the old burden of a full answer. I do not think that this would be a sound construction of the rule."

If, however, we assume that the motion to quash the plea should be held to be the equivalent of setting down the plea for argument, and ignore the admission of the sufficiency of the plea made by the exceptions to the answer, the matter pleaded forbids the interference of this court to grant the relief prayed by the bill.

The cases of *Turnbull v. Lumber Co.*, 55 Mich. 387, 21 N. W. 375, and *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich.

345, 51 N. W. 512, have construed the statute under which the proceedings were had which are set forth in the plea as pending in the circuit court for the county of Bay in chancery, and define their effect. In the first-named case the court say the statute giving the court of chancery jurisdiction to restrain the transfer of any property found to belong to a judgment debtor, an execution against whom has been returned unsatisfied (How. Ann. St. Mich. §§ 6614-6616), is in pari materia with chapter 281, §§ 8148-8173, which give the circuit court jurisdiction over the directors and officers of a corporation, and provides that, at the instance of any creditor, such jurisdiction may be exercised on bill or petition, and the property of the corporation put into a receiver's hands; that the stock and property of an insolvent corporation is a trust fund for the payment of its creditors, and among such creditors the maxim holds that equality is equity.

"The statute recognizes this maxim, and declares that the court shall upon final decree cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among the fair and honest creditors of such corporation in proportion to their respective debts. Any creditor of a corporation is entitled to come in by bill or petition, and establish his claim, and share in the assets; and this he may do although the bill is not filed in behalf of all creditors, or of such as should come in and share the expense. The object of the statute is to bring all the property of a corporation so circumstanced—i. e. 'insolvent'—within the control and disposition of the court, to the end that it may distribute it equally and ratably among all the honest creditors of the corporation."

This case is cited and approved in *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512. The procedure under it is pointed out in *McCreery v. Cobb*, 93 Mich. 463, 53 N. W. 613. In the latter case the court held that the suit brought by McCreery and other judgment creditors of the Bancroft-Thompson Company was a proceeding under chapter 281, How. Ann. St.

These adjudications on the provisions of the statute negative the claim made by the complainant in this cause that he would not be permitted to intervene or be entitled to the privileges of a judgment creditor in the circuit court for the county of Bay, because complainant's judgment was rendered on the law side of this court. The case of *Steere v. Hoagland*, 39 Ill. 264, holding that a creditors' bill will not lie in a state court on judgment obtained in the federal court, can scarcely be accepted as law. The earlier case of *Brown v. Bates*, 10 Ala. 432, is a direct authority to the contrary, and, as it seems to me, founded upon a better reason. However that may be, the language and spirit of the Michigan statutes regulating the remedies of judgment creditors in equity seem to leave no doubt of the competency and readiness of the state courts to administer equal remedies to all judgment creditors alike. Again, it is evident that under the provisions of the Michigan statutes and the liberal interpretation which they have received, the remedy which they provide is ample to protect the rights of all, and was designed to secure an equitable division of the judgment debtor's effects among those entitled.

Where such a bill as that pending in the state court has been filed, usually the courts will not permit other creditors to file a similar bill, but will require all creditors to join in one proceeding (*Crease v. Babcock*, 10 Metc. [Mass.] 525); for judgment creditors obtain no preference by filing a bill, as the decree must provide for all creditors (*Morgan v. Railroad Co.*, 10 Paige, 290). It is manifest that this rule is founded upon considerations of equity, and its purpose is to avoid the infliction of needless hardship and expense upon the judgment debtor. This is the accepted rule in Michigan, whose laws regulate and control the relation of corporations and their debtors, as well as their officers and stockholders.

While it is true, as a rule, that the jurisdiction of the courts of the United States over a controversy between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power, yet, unfortunately for complainant, the single qualification of this principle includes his case, since the property he seeks to reach is now in the course of administration in another tribunal of competent jurisdiction. It is clear from the facts stated and the effect and operation of the proceedings pending in the circuit court for the county of Bay, in chancery, at the instance of the judgment creditors mentioned in defendants' plea, from the provisions of the statutes upon which these proceedings are founded, and the admitted fact that the suits in the state court were begun and jurisdiction thereof had fully vested in that court long prior to the commencement of this suit, that the rule of comity prevailing between the federal and state court requires that the state court should be permitted to complete its work and conduct of the proceedings there pending to final disposition without the interference of other courts. The bill in this case prays for an accounting for the appointment of a receiver for the taking into possession the assets of the corporation defendant, and their distribution, at least, in part, for the benefit of the complainant. This is the very scheme and object of the suits in the state court, and the relief here prayed is that which the state court has undertaken to grant to all creditors ratably. The court, therefore, is asked in effect, by complainant's bill, to divest the state court of its lawfully acquired jurisdiction, and assume the same to itself.

The authorities requiring the observance of the rule of comity universally obtaining between courts of concurrent jurisdiction, and forbidding this court to interfere under such circumstances, are numerous.

In *Peck v. Jenness*, 7 How. 612-626, the court says:

"It is a doctrine of law too long established to require citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the case; and, whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity; for, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a

process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of another by replevin or by any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

To the same effect is *Taylor v. Carryl*, 20 How. 597.

In *Taylor v. Taintor*, 16 Wall. 366, it is said that:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is (unless there is some provision to the contrary) exclusive in effect until it has wrought its function."

In *Wiswall v. Sampson*, 14 How. 53, the controversy was as to the title of real estate: one party claiming under a sale of an execution issued on judgments rendered in the circuit court of the United States, the property being at the time of the sale in the possession of a receiver of a state court, under whose subsequent decree and sale the defendant claimed title. It is a significant fact that, at the time of the appointment of the receiver by the state court, the executions upon the judgments had been issued and levied, and were a subsisting lien upon the premises. It was said in that case by Mr. Justice Nelson delivering the opinion of the court:

"It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the event of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it, independently of any rights acquired by third persons pending the litigation; otherwise, the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

In *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, Mr. Justice Matthews, discussing the effect to be given to proceedings in the state court to enforce a mechanic's lien upon property in the custody and possession of the district court of the United States, says:

"When the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession or that dominion which is equivalent draws to itself the exclusive right to dispose of it for the purpose of this jurisdiction."

In the same line are *Coal Co. v. McCreery*, 141 U. S. 475, 12 Sup. Ct. 28; *Railroad Co. v. Vinet*, 132 U. S. 565, 10 Sup. Ct. 168; *Sharon v. Terry*, 36 Fed. 337; *Howlett v. Improvement Co.*, 56 Fed. 161; *Gaylord v. Railroad Co.*, 6 Biss. 286-291, Fed. Cas. No. 5,284; *Judd v. Telegraph Co.*, 31 Fed. 182.

In the last case a motion was made for a receiver and an injunction pendente lite by a creditor in the federal court, who sought to get in the assets and distribute the property of an insolvent corpo-

ration among its creditors, where suits had already been brought in the state court by other creditors to obtain the same relief. The bill also contained allegations of grave irregularities in the proceedings in the state court, which were evidently advanced to sustain the application for the interference of the federal court. Judge Wallace applied the rule that the state court, having first taken cognizance of the controversy, was entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject-matter of the investigation, to the exclusion of all interference of other courts of co-ordinate jurisdiction.

See, also, *Young v. Railroad Co.*, 2 Woods, 606-619, Fed. Cas. No. 18,166; *Union Trust Co. v. Railroad Co.*, 6 Biss. 197, Fed. Cas. No. 14,401.

It is manifest from these authorities that until the proceedings in the suit pending in the state court have come to an end, and the property in controversy is no longer in the possession of that court, this court is powerless to afford complainant relief. The conditions require that this court should stay its hand, and leave the complainant free to pursue his remedy in the state court, by intervening in that suit for the assertion and protection of his rights, or to permit him to await here the result of that litigation, and take such further proceedings as may be shown to be necessary and permissible. In order that the complainant's right to redress may not be defeated, he may have leave to dismiss his bill without prejudice, so that he may safely intervene in the state court.

As it is not questioned that the proceedings pleaded in behalf of defendants are still pending in the state court, and as the doors of that tribunal are open to all judgment creditors alike, in view of the considerations stated, and of the further fact that many of the interrogatories call for the contents of books and papers which the defendants could be compelled to produce at the instance of complainant, unless such books and papers are in the custody of the state court, as presumably they are (and, if such be the case, it is an additional ground for our conclusion), the motion to quash the plea is denied, and the exceptions to the sufficiency of the answer are overruled.

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MARDEN et al. v. CAMPBELL PRINTING-PRESS & MANUFACTURING CO.

CAMPBELL PRINTING-PRESS & MANUFACTURING CO. v. MARDEN et al.

(Circuit Court of Appeals, First Circuit. May 4, 1895.)

Nos. 126, 127.

1. APPEAL—TIME OF TAKING—PETITION FOR REHEARING.

A petition for rehearing which is not filed within the 15 days limited by rule 16 of the circuit court for the First circuit does not operate to extend the time within which defendants may appeal.

2. SAME—DISMISSAL OF APPEAL.

An appellate court has no power to remand except for the purpose of giving effect to some judgment of its own, and hence it cannot remand

a suit in equity merely for the purpose of a rehearing of the cause in the court below in view of new matter to be produced by the defeated party.

3. SAME—APPEALS FROM INTERLOCUTORY DECREES.

The right given by section 7 of the judiciary act of March 3, 1891, is a privilege or option, and, whether availed of or not, it in no way affects or diminishes the right to appeal from the final decree to be rendered in the cause; and hence appellants thereunder may be allowed to dismiss their appeal without prejudice to their right to take a subsequent appeal.

4. SAME—FINAL APPEALABLE DECREE.

A decree which declares certain claims of a patent valid and infringed, but holds others invalid, and that others still are not infringed, is not a final decree against complainant in respect to the claims found invalid or not infringed, so as to give him a right of appeal before the case is finally disposed of after the accounting.

5. SAME—APPEAL FROM INTERLOCUTORY DECREES—CIRCUIT COURTS OF APPEALS.

The rule that upon an appeal from an interlocutory decree declaring infringement of a patent, and directing an injunction and accounting, the circuit court of appeals may go fully into the merits, and finally dispose of the whole case, is one of equitable convenience, to be applied only when the full record is brought before it, and when the decree below was entered after a full hearing. *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, explained.

6. SAME—APPEAL BY COMPLAINANT FROM INTERLOCUTORY DECREE.

A complainant in a patent case has no right, under section 7 of the judiciary act of March 3, 1891, to a cross appeal in respect to so much of a decree as declares that certain claims of his patent are void, and that certain others are not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Campbell Printing-Press & Manufacturing Company against George A. Marden and Edward T. Rowell, copartners doing business under the name of Marden & Rowell, for the infringement of letters patent No. 292,521, issued January 8, 1884, to Wellington P. Kidder, for a printing machine, and No. 376,053, issued January 3, 1888, to John H. Stonemetz, for a web-printing machine. The circuit court entered the usual decree finding infringement of the 1st, 2d, and 7th claims of the Kidder patent, and the 12th claim of the Stonemetz patent; noninfringement of the 5th, 7th, 10th, and 17th claims of the Stonemetz patent; and that the 8th claim of the Stonemetz patent is void for want of novelty. 64 Fed. 782. Both parties appealed, the appeal of the complainant being directed to that part of the decree which refused to find in his favor in respect to certain of the claims.

Samuel R. Betts (Frederic H. Betts, on the brief), for George A. Marden and another.

Louis W. Southgate (Frederick P. Fish, on the brief), for Campbell Printing-Press & Manuf'g Co.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. This was a bill by a patentee alleging infringement. After hearing the cause on bill, answer, and proofs, the circuit court entered the usual decree directing a perpetual injunction and an accounting on a portion of the claims contained in

the letters patent in suit, and adjudged other claims invalid; and it further determined, as to still other claims, that defendants had not infringed them. The decree also stated that certain other claims had been withdrawn from the consideration of the court, and no finding was made touching them. Thereupon the respondents below appealed under the seventh section of the judiciary act of March 3, 1891, which was followed by cross appeals by the complainant below touching the claims with reference to which the circuit court had refused to find in its favor. After the decree in the court below, and simultaneously with the taking of their appeal, defendants below filed a petition for a rehearing, setting up the alleged discovery of certain new and essential proofs. The petition, however, was not filed within the 15 days limited by rule 16 of the circuit court, and therefore did not operate to extend the time within which the defendants below could appeal, under the circumstances found to exist by this court in *Andrews v. Thum*, 12 C. G. A. 77, 64 Fed. 149.

The defendants in the court below have filed two motions in this court, which we have considered. The first is that the cause be remanded to the circuit court "for the purpose of a rehearing of the said cause," having reference undoubtedly to the new matter presented to the circuit court, to which we have referred. This court, however, has no power to remand except for the purpose of giving effect to some judgment of its own. *Roemer v. Simon*, 91 U. S. 149; *Smith v. Weeks*, 3 C. C. A. 644, 53 Fed. 758. This is so essential by fundamental rules of practice that it need only be stated. To remand under any other circumstances would necessarily operate as a dismissal. It is, however, entirely plain that the appeal given by the seventh section of the act referred to is a privilege or option, and in no way affects or diminishes the right to appeal from the final decree; and as the defendants below, on receiving from this court an oral intimation of the views above expressed, elect to dismiss their appeal, without prejudice to their right to take any other appeal which the law may give them, and without prejudice to the questions which may thus be raised, we permit them so to do.

The second motion of the defendants below was to dismiss the cross appeal of the complainant below. The question is whether the complainant below was entitled to take a cross appeal, or to appeal in its own right, from the interlocutory decree. This question not only compels us to examine the statute itself, but also, to a certain extent, to restate the decisions of this court in *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, and *Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co.*, 9 C. C. A. 450, 61 Fed. 208. We are unable to see any doubt as to the intent, scope, or effect of these decisions, and yet they seem to have been misunderstood to some extent. From the beginning of the federal judicial system, no appeal was allowed to the supreme court except by analogy to a writ of error; and, as the latter could only go from a final judgment, so the former, by statute, has always been expressly limited to a final decree. This was so in the original judiciary act of 1789, and in the amendatory act of 1803, as re-enacted in sections 691 and 692 of the Revised Statutes. This limitation has been for the most part very strictly



construed. Perhaps this has been influenced by the fact of the long delays which would come to a cause by taking it through the supreme court, in the absence of any provision such as is found in the seventh section of the act of March 3, 1891, to the effect that the case may to a certain extent proceed in the lower court, notwithstanding the appeal, and by the desire to prevent this delay from being multiplied by numerous appeals in the same cause. On the other hand, in England, at least so far back as the middle of the eighteenth century, appeals have freely been granted in interlocutory matters, including appeals to the house of lords. This gave rise to delays (*Hovey v. McDonald*, 109 U. S. 150, 160, 3 Sup. Ct. 136), but far short of those which would occur under the federal judicial system as it has heretofore existed. As a partial offset, however, the English courts, including the house of lords, have been accustomed to use a certain discretion with reference to appeals from interlocutory orders, to the extent of availing themselves of the opportunity of disposing finally of the case against the complainant when it was apparent that the appeal from the interlocutory order brought up so much of the case on his behalf as would enable the appellate court safely to do so. This is illustrated by a very early case: *Ellis v. Segrave*, 7 Brown, Parl. Cas. 331, 344, decided in May, 1760. This was an appeal from an order directing a feigned issue for a jury. As the appeal brought up the complainant's *prima facie* case, the house of lords was able, not only to reverse the order directing the issue, but also to dismiss the original bill. As shown in *Richmond v. Atwood*, *ubi supra*, this is the recognized rule of practice wherever appeals from interlocutory orders are allowed. The great convenience and value of the rule as applied generally, and especially as applicable under the act of March 3, 1891, cannot be questioned.

We have already said that the provisions of the statute allowing appeals from final decrees only had been strictly construed, and yet the complainant below claims that so much of the decree below as adjudged certain claims invalid, or not infringed, was final, and entitled the complainant to appeal, independently of the seventh section of the act of March 3, 1891. On the contrary, the practice has been so continuous for so long a time the other way, and with such universal acquiescence, that this proposition, so far as we know, has never before been made, nor any necessity arisen for its adjudication. This long-continued recognition of the rule ought to be of itself a sufficient answer to the complainant's proposition. There have been exceptional instances where the case below has been severed and appeals allowed from a decree which did not complete the entire case. *Forgay v. Conrad*, 6 How. 201, and *Potter v. Beal* (decided by this court) 2 C. C. A. 60, 50 Fed. 860, were of this exceptional class. In those cases the appeals were allowed *ex necessitate rei*, as in each case the court below not only severed the matter appealed from, but was proceeding to execution. The general rule, however, is undoubtedly expressed, as to writs of error, in *Holcombe v. McCusick*, 20 How. 552, 554, as follows:

"It is the settled practice of this court, and the same in the king's bench in England, that the writ will not lie until the whole of the matters in

controversy in the suit below are disposed of. The writ itself is conditional, and does not authorize the court below to send up the case unless all the matters between the parties to the record have been determined."

This statement of the rule was applied to equity appeals in *Hohorst v. Packet Co.*, 148 U. S. 262, 13 Sup. Ct. 590. The settled practice of the supreme court touching appeals and writs of error is such as to prevent the same case reaching it a multiplicity of times, so far as practicable to accomplish this; and, moreover, by the settled modes of proceedings in equity in a cause of this kind, although there may be an interlocutory finding declaring certain claims void and others valid, yet there is only one final decree. It would be contrary to all well-conceived notions to imagine two final decrees in a patent cause of this character. The proposition of the complainant below in this direction cannot be entertained.

As a new question, it must be admitted that much might have been said in favor of the proposition that, where the circuit court has granted a perpetual injunction, as in this case, and proceeded immediately to execute it, so much of the case is *ex necessitate rei* severed and appealable; but as early as *Barnard v. Gibson*, 7 How. 650, it was determined otherwise by the supreme court. At the conclusion of its opinion in that case, the court referred to the claim of the great hardship involved in the enforcing of an injunction against the defendants, which might afterwards be held by the supreme court erroneous, and to the consequent remediless condition of the defendants under those circumstances. Touching this, the court said, on page 658, as follows:

"The hardship stated is an unanswerable objection to the operation of the injunction until all the matters shall be finally adjusted. If the injunction has been inadvertently granted, the circuit court has power to suspend it or set it aside until the report of the master shall be sanctioned. And unless the defendants below are in doubtful circumstances, and cannot give bond to respond in damages for the use of the machines, should the right of the plaintiff be finally established, we suppose that the injunction will be suspended. Such is a correct course of practice, as indicated by the decisions of this court, and that is a rule of decision for the circuit court."

It is, however, a matter of history that this caution from the supreme court has been too largely disregarded by the circuit courts; and, in some cases, all the hardship claimed in *Barnard v. Gibson* as possible, and even greater hardships, have resulted. Out of this undoubtedly grew the seventh section referred to.

An examination of the reports will show that the relief which this seventh section intended to give was needed as much in behalf of those against whom perpetual injunctions had issued, after hearing on bill, answer, and proofs, as in behalf of those who suffered from merely ad interim decrees which were subsequently found to be erroneous. One example is *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, wherein an interlocutory perpetual injunction was issued in 1874, the patent expired in 1879, and the decree ordering the injunction was reversed by the supreme court in 1884. The amounts involved were very large, said to run into the hundreds of thousands of dollars, and the loss, as to which the defendants below were remediless, might

have been very great. Numerous other examples equally probative of the proposition we make are accessible. On this account this court has been inclined to the opinion that the remedial provisions of the seventh section referred to were to be construed as such, and were not to be limited so as not to meet a large part of the evils needed to be remedied, and which part was as conveniently covered by it as any other. Assuming this to be correct, and assuming that a decree for an injunction like that in the pending cause is within the purview of the seventh section referred to, it follows that the whole record touching the merits of the decree, so far as it supports the injunction, comes up before the court of appeals, or can come there, so that court has before it everything in this respect which the circuit court had, or which the court of appeals would have on an appeal from a final decree. So it is apparently an absurd proposition that, under such circumstances, the court of appeals should shut its eyes and dispose of the question as perhaps it might dispose of an appeal from a mere *ad interim* injunction. Passing by this absurdity, there would follow another apparent absurdity in the proposition that, on such appeal, this court should pass on the merits, and order the injunction dissolved, because on the merits it found the patent in question invalid or not infringed, and that yet the court below should proceed in the vain and fruitless pursuit of so much of the sequence of the litigation as comes from that part of the same decree which orders an accounting. Such would be the result if, on an appeal like this at bar, this court had no jurisdiction except over the injunction itself. At this point, the settled practice of the English chancery came to our assistance, as appears by the determination in *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, already referred to. It is apparent, however, from the closing sentences in *Richmond v. Atwood*, that the rule is one of equitable convenience, to be applied when the full record is brought before us on account of an appeal against an injunction granted by an interlocutory decree after a full hearing. There is no indication in *Richmond v. Atwood* of any disposition to go further than this, or to permit other parts of a decree to be brought up by cross appeals, or appeals of the complainant below, for the purpose of being heard as on an appeal from a final decree. Under the circumstances of *Richmond v. Atwood* the injunction covers the entire case, and thus an appeal from the injunction brings up the whole decree, and necessarily the whole record, so that the court is required, for the mere purpose of adjudicating touching the injunction, to examine on appeal the entire cause; and so no detriment to the court or the parties can come by its thereupon disposing of the merits, and entering orders to the circuit court analogous to those entered upon an appeal from a final decree. This, however, is a very different thing from reaching out for parts of the record, and of the decree below, not covered by the injunction order. While it should not be said that *Richmond v. Atwood*, and the rules determined by it, are limited to cases in the precise condition of *Richmond v. Atwood* itself, yet it is entirely clear, for the reasons which we have stated, that it was not therein intended to embrace within the scope of the conclusions in that case

the disposition, as on its merits, of the entirety of an interlocutory decree of the character of the one at bar, which the injunction touches only in part. We think the seventh section in question did not confer on the complainant below in this case any right to an appeal. It is true that, if we look only at the letter of the statute, we might well be asked to hold otherwise; but an enactment which has been fitted into the great system of equity practice and proceedings must be so constructed as to adjust itself to the fabric of which it is made a part. There was no mischief complained of except as against parties defendant suffering from injunctions. There was no special occasion for congress to legislate except in their behalf. This, however, would not conclusively enable the court to restrict language general in its character; but it is the settled principle of the law of appellate proceedings that no one can appeal from a decree who is not prejudiced by it. The only person prejudiced in the sense of the law by a decree of the character of that in the case at bar is the defendant, and he is prejudiced only so far as the injunction order operates against him. While the complainant suffers delay and expense by reason of a partial adjudication against him, if, on appeal from the final decree, that partial adjudication should be reversed, yet, in the sense of the law, he is not prejudiced thereby, because no judgment has gone against him. What has an appearance of a decree against him, so far as embraced in the interlocutory proceeding, is only a finding of the court. It is sufficient to bar further proceedings in the cause, so far as the claims passed on are concerned; but it is effectual for nothing more, and is not pleadable as a judgment in any subsequent litigation. Therefore defendants do not stand in the position of parties prejudiced in the sense of the law, and were not entitled to an appeal.

This undoubtedly has always been the view of this court, and, so far as we are aware, of all the other circuit courts of appeals. We are not aware that it has ever before been even suggested that a complainant is entitled to an appeal under the seventh section. In *Gamewell Fire Alarm Tel. Co. v. Municipal Signal Co.*, 9 C. C. A. 450, 61 Fed. 208, already referred to, the court decided that, where the interlocutory injunction terminated by force of law pending the appeal, there remained nothing for the judgment of this court to act on, and that this court would therefore not go any further, nor consider whether or not the injunction was properly granted, and that it could only dismiss the appeal. This means that the backbone of our jurisdiction under the seventh section is so much of the decree as relates to the injunction; and it necessarily follows, from the views therein entertained, that, so much of the case as is covered by the injunction having been disposed of, no basis remains for further proceedings on the part of this court. We need not, however, discuss this question to any further extent, because the act of February 18, 1895, has so far modified the seventh section referred to as to open up possibilities of appeal by the complainant which did not before exist, and any judgments which we may now pronounce, beyond disposing of the precise question before us, would evidently soon prove obsolete, and probably of no importance. We will, however, remark

that the practice in the English chancery appears to be substantially as claimed by the complainant below, and we admit that it has its conveniences to a certain extent. Nevertheless, to hold that in this respect we can follow the English practice would be to beg the question; that is, to hold at the outset that the seventh section is to be construed as giving the general privilege of appeal from an interlocutory order which exists as a common right in the English equity system. In view of the fact that the appeal given by the seventh section is optional, it follows, as already said, that defendants, omitting to take that appeal, would not be prejudiced by such omission with reference to an appeal from a final decree; and it further follows that any disposition which this court may make of an appeal under the seventh section, other than one involving a determination of the merits, cannot prejudice any appeal afterwards taken. Therefore we permit the defendants below to dismiss their appeal, as elected by them.

It is ordered that the appeal of the defendants below be dismissed, without prejudice to any proceedings in the circuit court, or to their right to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal, if lawfully taken, but with costs for the complainant below, and that the appeal of the complainant below be dismissed, with costs for the defendants below.

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**BEAL v. ESSEX SAVINGS BANK.**

(Circuit Court of Appeals, First Circuit. April 20, 1895.)

No. 129.

1. **CORPORATIONS — WHO ARE "SHAREHOLDERS"—STOCK HELD AS COLLATERAL.**  
A "shareholder" in a corporation, within Rev. St. §§ 5139, 5151, is one who has a proportionate interest in its assets, and is entitled to take part in its control and receive its dividends. In all essential particulars, he is distinguishable from one who holds shares of stock as collateral security for a loan.
2. **NATIONAL BANKS—INSOLVENCY—LIABILITY TO ASSESSMENT ON STOCK.**  
One who holds stock of an insolvent national bank as collateral security for a loan, which stock is registered upon the books of the bank in his name "as collateral," is not liable to assessment upon such shares under the statutory liability of shareholders.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Thomas P. Beal, receiver of the Maverick National Bank of Boston, against the Essex Savings Bank, to recover its proportionate amount of an assessment made upon the stockholders of the Maverick Bank by the comptroller of the currency, under Rev. St. § 5151. In the circuit court a judgment was rendered for defendant, and plaintiff brings error.

The stock in respect to which the assessment was made was held prior to April 9, 1884, by Asa P. Potter and Jonas H. French. On that day they borrowed from the defendant bank \$50,000, and each of them transferred 175 shares of said stock to it, by an assignment in which it was described

as collateral. A single certificate for 350 shares was then issued to defendant, in the following form: "Be it known that Essex Savings Bank, Lawrence, Mass., as collateral, is entitled to 350 shares in the Maverick National Bank, transferable only at the bank by the said bank or its attorney." The language of the assignment from Potter and French to the bank was as follows: "For value received, I hereby sell, assign, and transfer to Essex Savings Bank, as collateral, of Lawrence, Mass., and assigns, 175 shares," etc.

Edward W. Hutchins and Henry Wheeler, for plaintiff in error.

George O. Shattuck and William A. Munroe, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. Sections 5139 and 5151 of Revised Statutes, which are relied on by the appellant (complainant below), use throughout the word "shareholder," and avoid all such general expressions as "holder" or "owner" of stock. A "shareholder" in a corporation is one who has a proportionate interest in its assets, and is entitled to take part in its control and receive its dividends. In all essential particulars, he is distinguishable from a creditor of a shareholder. By the very root of the word, he is entitled to a present share in the assets of the corporation, and receives presently and immediately the benefits of the share, which the creditor does not, even if he holds corporate stock as security, because the creditor's rights in this respect are only contingent and remote. We are all of the opinion that, in the proper sense of the word "shareholder," one does not become such by merely making a loan on the security of the stock, no matter what formalities the transaction takes, provided only that it does not come in the form of an absolute transfer, so as to make the creditor the apparent legal and equitable owner. Even in this event, as between the creditor and the debtor, the debtor would remain the shareholder, because in equity, so long as he is not in default, he can control the apparent title of the creditor. It is true the creditor may thus put himself into the apparent position of a shareholder as against all the world except the debtor; yet even then he would not be really and equitably such. This view of the meaning of the word "shareholder" is strengthened by the expression contained in the early part of section 5151; namely, the words "in addition to the amount invested in such shares." The whole of this part of the section is as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

Of course, these words are not a legislative declaration that no person is thus liable except one who has invested in the stock in the ordinary sense of the words; and other words might easily have been selected which would have expressed the legislative intent so far as it was necessary to be expressed. But the selection of these peculiar words by congress indicates that it had in mind the common and popular sense of the word "shareholder," as we have de-

fined it. The creditor of the shareholder does not invest in the stock, in any fair sense of the expression, until he has been compelled to accept full legal and equitable title to it towards the satisfaction of his debt. In the present case nothing has been done by the Essex Savings Bank, or by its consent, by which it was held out to be other than a mere creditor holding the stock as collateral, or by which it is in any sense estopped. As between itself and its debtors Potter and French, it clearly was not a shareholder, and it has done nothing to hold itself out to others as such.

It is a principle, recognized quite generally by the law, and outside of it, that one who may profit by the gains of an enterprise should bear its losses, rather than that they should fall on strangers; and the statute imposing a liability on the shareholders of national banks undoubtedly rests on this. But creditors of a shareholder cannot, as such, share the gains of stock which they hold only as security, and therefore there is no equity compelling them to share its losses. Any provision, to have that effect, should be expressed in unmistakable terms, before it can be accepted as conveying such legislative intent. We regard the tendency of the decisions of the supreme court and of other federal courts, including those cited in the opinion of the learned judge of the circuit court, as in this direction. Especially is this true of the expressions found in *Bank v. Case*, 99 U. S. 628, 631, which fully meet the Massachusetts decisions relied on by the appellant. We note also the interpretation given that decision in *Bowden v. Johnson*, 107 U. S. 251, 261, 2 Sup. Ct. 246. On the page last referred to, it is said that the supreme court, in *Bank v. Case*, defined, as one limit of the right to transfer so as to carry with it a shareholder's liabilities, "that the transfer must be out and out, or one really transferring the ownership as between the parties to it." It must be conceded that in none of these cases or expressions has the precise point at bar been settled, but they have a leaning towards the conclusion reached in the circuit court, with which we concur. The judgment of the circuit court is affirmed.

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#### MILLS v. GREEN.

(Circuit Court, D. South Carolina. May 8, 1895.)

**1. CONSTITUTIONAL LAW—SUIT AGAINST A STATE.**

A suit, brought by a citizen of the United States against the supervisor of registration of a state, charged, under the state statutes, with the duty of superintending the registration of voters, to restrain him from carrying out the provisions of such statutes, on the ground that they violate the constitutions of the state and of the United States, is not a suit against the state.

**2. SAME—AMENDMENTS 14 AND 15—JURISDICTION OF UNITED STATES COURTS.**

The leading purpose in the adoption of the fourteenth and fifteenth amendments to the constitution of the United States was to secure to persons of African descent the full enjoyment of the privileges of citizenship, including the right to vote; and the courts of the United States have jurisdiction of a suit by such a person against officers of a state to restrain them from acting under a statute of such state, claimed to violate said amendments to the constitution by abridging or denying such privileges.

3. SAME.—REGISTRATION LAWS.—SOUTH CAROLINA STATUTE.

The constitution of South Carolina provides (article 1, § 31) that all elections shall be free and open, and every inhabitant possessing the constitutional qualifications shall have equal right to elect and be elected; (article 8, § 2) that every male citizen of the United States, 21 years of age, who was a resident at the adoption of the constitution, or who resides in the state one year and in the county where he offers to vote sixty days before an election, shall be entitled to vote; (article 8, § 3) that the general assembly shall provide for registration of electors; and (article 8, § 8) that the general assembly shall never pass any law which will deprive any citizen of the right of suffrage, except for crime. The statutes relating to registration of voters (Gen. St. 1882, § 90, etc.) provide that in 1882 a registration of voters should be made, and the registration books closed; that thereafter such books should be open once a month after the general election in each year, until the 1st of July preceding each general election (usually held in November), for the registration of persons thereafter becoming entitled to vote; that, after the closing of the books in each year, persons coming of age before the election might be registered; and that, upon the registration of any voter a certificate of registration should be given him, without the production of which he should not be allowed to vote, and which, upon removal from one county to another, must be transferred and renewed under onerous conditions. An act passed in 1894, providing for the election of members of a constitutional convention, also provided that a person not registered in 1882, or at a subsequent time when he would have had a right to register, might, within a certain time, register, upon making affidavit, supported by that of two respectable citizens, as to various particulars of his occupation and residence at the time he might have registered and thereafter. *Held*, that these provisions of the statutes were an unreasonable restriction of the right of suffrage, manifestly designed to prevent the exercise of that right by ignorant persons, especially of the African race, and were a violation of the constitution of the state and of the fourteenth and fifteenth amendments to the constitution of the United States.

This was a suit by Lawrence P. Mills against W. Briggs Green to restrain the defendant individually and as supervisor of registration for Richland county, S. C., from performing certain acts under the registration laws of the state. The complainant moved for a preliminary injunction. Granted.

Obear & Douglass, for complainant.

Wm. A. Barber, Atty. Gen., C. P. Townsend, Asst. Atty. Gen., George S. Mower, and Edward McCrady, for defendant.

GOFF, Circuit Judge. On the 20th day of April last, on consideration of the bill in this cause, I passed an order that the defendant, W. Briggs Green, individually and as supervisor of registration for Richland county, in the state of South Carolina, be enjoined and restrained until the further order of this court from the commission of the acts complained of in complainant's bill, and I directed that said defendant show cause before me, if any he could, at Columbia, S. C., on Thursday, May 2d inst., why such order should not be continued, or some order of like purport and effect be then granted, enjoining and restraining him both individually and as such supervisor of registration from the commission of said acts, until the final hearing and determination of this cause.

The plaintiff, a citizen of the state of South Carolina and of the United States, brings this suit against W. Briggs Green, a citizen



of said state and of the United States. The plaintiff exhibits his bill in his own behalf and for all others, citizens of the county of Richland, in the state of South Carolina, circumstanced like him, who are too numerous to be named, and made parties hereto. It is set forth in the bill: That the plaintiff was 26 years of age on the 4th day of February, 1895. That he is a resident of Ward 4, precinct of Columbia, in said county and state. That he is a male citizen of the United States. That he has resided in the state of South Carolina for more than 1 year preceding the last general election in that state, and in the county of Richland for more than 60 days prior to said general election. That he is an elector of the state of South Carolina, possessing all of the qualifications of an elector of the most numerous branch of the state legislature, and is subject to none of the disqualifications set forth in the constitution of that state; and that he is, under the constitution and laws of the United States, duly qualified to vote at all federal and state elections held in said ward, county, and state. It is also set forth in the bill: That section 90 of the General Statutes of South Carolina of 1882 provides as follows:

"All electors of the state shall be registered as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as hereinafter required."

That by section 94 of said statutes it is provided:

"When the said registration (in certain books to be provided for and made in the manner provided for in section 93) shall have been completed, the books shall be closed, and not opened for registration, except for the purpose and as hereinafter mentioned, until after the next general election for state officers. After the said next general election the books shall be opened for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month, to and until the first Monday in July, inclusive, preceding the following general election, upon which last named day the same shall be closed and not re-opened for registration until after the said general election, and that thereafter the said books shall be opened for the registration of such electors, on the days above mentioned, until the first day of July preceding a general election, when the same shall be closed as aforesaid until the said general election shall have taken place."

That in section 137 of Revised Statutes it is provided:

"After every general election the registration books shall be opened for registration of such persons as shall thereafter become entitled to register, on the first Monday in each month until the first day of July preceding a general election when the same shall be closed until such election shall have taken place."

That section 97, Gen. St., provides:

"Any person coming of age, and being qualified as an elector, may appear before the supervisor of registration, on any day on which the books are opened as aforesaid and take oath as to his age and qualifications as hereinbefore provided, and if the supervisor find him qualified he shall enter his name upon the registration book of the precinct wherein he resides."

It is also alleged that said registration laws provide that the supervisors of registration in the several counties shall issue to the voter, when registered, a certificate of registration, and that said voter shall

present the same at the polls to the managers of the election, and that no one shall be allowed to vote at any election to be held in said state unless his certificate of registration is exhibited when he offers to vote; and that it is required by said law that, in case a voter shall remove from one county to another in said state, or from one precinct to another in the same county, or from one residence to another in the same precinct, he shall obtain a transfer and a renewal certificate; and that, should a voter lose his certificate, he must obtain a renewal thereof, upon furnishing evidence satisfactory to the registrar of the county wherein he resides that his certificate has been mislaid or lost, and that the same has not been willfully or intentionally disposed of. The bill also alleges that by the provisions and requirements of said enactment the voter failing for any reason to comply with any of the provisions of the same is denied the right of suffrage both in federal and state elections. Complainant claims that the provisions of the said enactments fixing the time for registration and the closing of the books for that purpose on the 1st day of July preceding every election, and the many requirements and conditions set out in the various sections of said registration law, were intended, and that they in effect do, abridge, impede, and destroy the suffrage of the citizens, both of the state and of the United States. It is also averred that on the 24th day of December, 1894, an act was passed by the general assembly of South Carolina entitled "An act to provide for calling a constitutional convention, to provide the number and qualifications of members of the convention, their compensation, etc., and to provide for the election of the same, and to define and prescribe the qualifications of the electors, and the manner of the election and of declaring the result"; that by section 4 of said act it is declared who shall be entitled to vote for delegates to said constitutional convention; and that, in addition to the qualifications prescribed for electors by the constitution of the state of South Carolina, is provided a further one, viz. "that the elector be duly registered as now required by law, or who, having been entitled to register as a voter at the time of the general registration of electors in the state which took place in the year 1882, or at any time subsequent thereto, failed to register at such time, or who has become a citizen of this state, and who shall register as hereinafter provided in such cases." Other provisions of the laws and of the constitution of the state of South Carolina are set forth, but I do not deem it necessary to now recite them. The bill charges that W. Briggs Green has been appointed to the office of supervisor of registration for Richland county, in pursuance of said registration laws; that he is now exercising the duties prescribed by the same, and that he intends to continue so to act, and that he intends to furnish to the several boards of managers for the precinct in which plaintiff resides, in said county, who hold the election of delegates to said constitutional convention, certain paper writings purporting to be registration books for use at such precinct.

The complainant says that he failed to register at the registration made after the general election of 1888, and during the 10 days in March, 1895, provided for in the act of 1894, because, although he

made repeated and persistent efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions prescribed by said unconstitutional registration laws as conditions precedent to his right to register, and that he has never been allowed to vote at any federal or state election of the state of South Carolina; that he is desirous of voting for delegates to the said constitutional convention, and that the paper writings purporting to be books of registration, now in the hands of the defendant, do not and will not contain his name as a registered voter for the reason before stated; that he and others like circumstanced with him will not be permitted to vote at said special election by the managers thereof unless their names be found upon the books of registration, and they produce the registration certificate mentioned; and that, if the defendant be permitted to continue the aforesaid illegal, partial, and void registration, and be allowed to turn over to the managers of such election for the county of Richland the books of registration for said county, he, the plaintiff, will be deprived of his right to vote at said election, and *grievous and irreparable wrong and damages will be done him*, which can only be prevented by the interposition of this court by way of restraining the defendant from the performance of said before-mentioned acts.

The defendant, in his return to the rule to show cause, insists that, as supervisor of registration for Richland county, he is not answerable to the jurisdiction of this court, and that the matters, facts, and things alleged and complained of in the bill are matters relating to the political duties of his office; that this is in effect a suit against the state of South Carolina, which is prohibited by the eleventh amendment of the constitution of the United States. Also that the bill presents no questions arising under the constitution or laws of the United States and that this court has no jurisdiction of the case; that the bill presents no case for equity jurisdiction, as the plaintiff has a plain and adequate remedy at law; that the bill is multifarious, and not properly verified. He denies that the registration laws were intended, and that they in effect do, abridge, impede, and destroy the suffrage of the citizens of the state and of the United States, and he claims that they are reasonable and constitutional, and submits their proper construction to the court. The other matters set up in the return will not now be recited, but will be considered in substance as the questions arising are disposed of.

The question of jurisdiction is first to be determined. Defendant insists that this suit is, in effect, a proceeding against the state of South Carolina, and that it should not be entertained, because prohibited by the eleventh amendment to the constitution of the United States. It is not my intention at this time to consider separately the many cases cited by counsel in argument, bearing on this question. After carefully examining them all, I conclude that it is the duty of the circuit court of the United States to restrain a state officer from exercising an unconstitutional statute of the state, when the execution of it by him would violate or abridge the rights, privileges, and immunities of the complainant that are guaranteed by the

constitution of the United States. So far as this question is concerned, it is immaterial if the officer so restrained be the supervisor of registration, the auditor of state, the comptroller general, the treasurer, the attorney general, or the governor. We do not have, in this country, any class of people, state or national officials or private citizens, who are above the law, and who are not compelled to respect it. The constitution of the United States is the supreme law of the land, anything in the constitution or laws of any of the states to the contrary notwithstanding. The mandate of the nation's constitution is addressed to all officers of the United States as well as to all the officers of all the states. The judges of the state as well as of the federal courts must respect it, for it declares "that the judges of every state shall be bound thereby." As is said by the supreme court, in *Dodge v. Woolsey*, 18 How. 331:

"To make its supremacy more complete, impressive, and practical, that there should be no escape from its operation, and that its binding force upon the states and the members of congress should be unmistakable, it is declared that the senators and representatives, before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution."

It would be a strange admission—a startling decision—that the courts of the United States cannot open their doors to the citizens of the United States, who allege that they are, by the unconstitutional laws of a state, deprived of their privileges or immunities as citizens of the United States, and denied the equal protection of the laws within the jurisdiction of such state. I am not aware that any court of the United States has ever so held. I trust I will never be advised of such a decision, and I am sure, as I now see the law and my duty, that I will not so rule; not establish such a precedent.

The case of *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, relied on by defendant's counsel, does not, in my judgment, sustain the position taken by them. In that case the jurisdiction of the circuit court was denied, not because the officers of the state were sued, but because the court found that the act of the legislature complained of did not violate any contract, and because the bill did not allege any ground of equitable relief against the individual defendants for any personal wrong committed or threatened by them; because it did not charge against them in their individual character anything done or threatened which constituted, in contemplation of law, a violation of personal or property rights, or a breach of contract to which they were parties. In these particulars the *Ayers Case* differs materially from the case now before me. In that case the supreme court says:

"But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state, are guilty of personal trespasses and wrongs, nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

In *Davis v. Gray*, 16 Wall. 203, the supreme court held that a circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States when such execution will violate the rights of the complainant; that making a state officer a party does not make the state a party, although her law may prompt his action, and she may stand behind him as the real party in interest. That case was a suit by Gray against Davis, the governor of the state of Texas, and Keuchler, commissioner of the land office of that state; and the injunction issued by the circuit court of the United States for the Western district of Texas, restraining said officers from issuing and signing certain land warrants, was sustained, as I have mentioned, by the supreme court of the United States.

In the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, in which the supreme court reviewed the cases bearing on this subject, Mr. Justice Lamar, speaking for the court, said:

"But the general doctrine of *Osborn v. Bank* [9 Wheat. 738], that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would violate rights and privileges of the complainant which had been guaranteed by the constitution, and would work irreparable damage and injury to him, has never been departed from. On the contrary, the principles of that case have been recognized and enforced in a very large number of cases, notably in those we have referred to as belonging to the second class of cases above mentioned."

In the case just referred to he also used this language:

"The first class is where the suit is brought against the officers of the state as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91; *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608. The other class is where a suit is brought against defendants who, claiming to act as officers of the state, under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Tomlinson v. Branch*, 15 Wall. 460; *Litchfield v. Webster Co.*, 101 U. S. 773; *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962; *Board v. McComb*, 92 U. S. 531; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962."

Complainant insists that his case is included in the reasoning of the court in the cases last cited, and also that he is entitled to present his bill to this court, relative to matters therein set forth, because of the provisions of the constitution of the United States, and particularly the fourteenth and fifteenth amendments thereof. To the consideration of this point, and of the constitutionality of the registration laws of the state of South Carolina, I now come.

Complainant insists that the registration laws of South Carolina are in contravention of the provisions of the constitution of that state, and that they also violate the constitution of the United States, thereby so affecting his rights as a citizen of the same as to entitle him to be heard in this court on the complaint he now presents. The constitution of South Carolina contains the following provisions:

Article 1, § 31: "All elections shall be free and open and every inhabitant of this commonwealth possessing the qualifications provided for in this constitution shall have equal right to elect officers and be elected to fill public offices."

Article 8, § 2: "Every male citizen of the United States of the age of 21 years and upwards, not laboring under the disabilities named in this constitution, without distinction of race, color or former condition, who shall be a resident of this state at the time of the adoption of this constitution, or who shall hereafter reside in this state one year, and in the county in which he offers to vote sixty days next preceding any election, shall be entitled to vote for all officers that are now or hereafter may be, elected by the people, and upon all questions submitted to the electors at any elections; provided, that no person shall be allowed to vote or hold office who is now, or hereafter may be, disqualified therefor by the constitution of the United States, until such disqualifications shall be removed by the congress of the United States; provided, further, that no person while kept in any alms house or asylum, or of unsound mind, or confined in any public prison, shall be allowed to vote or hold public office."

Article 8, § 3: "It shall be the duty of the general assembly to provide from time to time for the registration of all electors."

Article 8, § 7: "Every person entitled to vote at any election shall be eligible to any office which now is, or hereafter shall be, elective by the people in the county where he shall have resided sixty days previous to such election, except as otherwise provided in this constitution or the constitution and laws of the United States."

Article 8, § 8: "The general assembly shall never pass any law that will deprive any of the citizens of this state of the right of suffrage, except for treason, murder, robbery or dueling, whereof the persons shall have been duly tried and convicted."

Section 2, art. 1, of the constitution of the United States is as follows:

"The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

Section 1, art. 14, Amend., is in these words:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 15 of the amendments to the constitution reads:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Sec. 2. The congress shall have power to enforce this article by appropriate legislation."

The congress has given to the circuit courts of the United States jurisdiction of all suits to enforce the right of citizens of the United States to vote in the several states. We now find that a citizen of South Carolina is a citizen of the United States residing in that state. The rights, privileges, and immunities belonging to him as a free citizen are his as a citizen of the United States, and do not depend upon his citizenship of that state. The plaintiff, Mills, a citizen of African descent, is a citizen of the United States and of the state of South Carolina. By the fourteenth amendment he has been made a citizen of the United States, and by the fifteenth amendment he is a voter in the state in which he resides. Previous to the adoption of these amendments, the race to which he belongs had no rights that the white men of this country were bound to respect, and it was not possible for any one belonging to it to be a citizen of the United States. In the *Slaughterhouse Cases*, 16 Wall. 68, the supreme court of the United States, referring to the time immediately preceding and following the adoption of these amendments, said:

"The institution of African slavery, as it existed in about half the states of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the states in which slavery existed, to separate from the federal government, and to resist its authority. This constituted the war of the Rebellion; and, whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery. In that struggle, slavery, as a legalized social relation, perished. It perished as a necessity of the bitterness and force of the conflict. When the armies of freedom found themselves upon the soil of slavery, they could do nothing less than free the poor victims whose enforced servitude was the foundation of the quarrel; and when hard pressed in the contest, these men (for they proved themselves men in that terrible crisis) offered their services, and were accepted by thousands to aid in suppressing the unlawful rebellion. Slavery was at an end wherever the federal government succeeded in that purpose. The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts when he declared slavery abolished in them all. But, the war being over, those who had succeeded in re-establishing the authority of the federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the executive, both of which might have been questioned in after-times, and they determined to place this main and most valuable result in the constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment of that instrument. Its two short sections seem hardly to admit of construction, so vigorous is their expression and so appropriate to the purpose we have indicated. '(1) Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction. (2) Congress shall have the power to enforce this article by appropriate legislation.' The process of restoring to their proper relation with the federal government and with the other states those which had sided with the Rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of congress, developed the fact that, notwithstanding the formal recognition by those states of the abolition of slavery, the condition of the slave race would, without further protection of the federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the states in the legislative bodies which claimed to be in their normal relations with the federal government were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty,

and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. They were, in some states, forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced. These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the federal government in safety through the crisis of the Rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.

"Before we proceed to examine more critically the provisions of this amendment, on which the plaintiffs in error rely, let us complete and dismiss the history of the recent amendments, as that history relates to the general purpose which pervades them all. A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the states, and the laws passed under the additional powers granted to congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those states denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage. Hence the fifteenth amendment, which declares that the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude. The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every state of the Union. We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested. We mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them, as the fifteenth. We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their full and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so, if other rights are assailed by the states, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is that, in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they



were designed to remedy, and the process of continued addition to the constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it. The first section of the fourteenth article, to which our attention is more especially invited, opens with a definition of citizenship; not only citizenship of the United States, but citizenship of the states. No such definition was previously found in the constitution, nor had any attempt been made to define it by act of congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the states composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott Case* [19 How. 393], only a few years before the outbreak of the Civil War, that a man of African descent, whether a slave or not, was not, and could not be, a citizen of a state or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the constitution. To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship, which should declare what should constitute citizenship of the United States and also citizenship of a state, the first clause of the first section was framed. 'All persons born or naturalized, in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' The first observation we have to make on this clause is that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state, and it overturns the *Dred Scott* decision by making all persons born within the United States, and subject to its jurisdiction, citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."

While it is true that the supreme court has held that the fourteenth amendment did not add to the privileges and immunities of a citizen, and that no new voters were necessarily made by it, it is equally true that it, in effect, held that it increased the number of citizens entitled to suffrage under the constitution and laws of the states. It also held that in the light of the history of the late amendments there was no difficulty in giving a proper meaning to their provisions, and that the existence of laws in those states where the emancipated negroes resided which grossly discriminated against them as a class was the end to be remedied by them, and that by them such laws are forbidden. It also fully determined that a citizen of a state is now simply a citizen of the United States residing in that state; that his rights as such are those that belong to him as a citizen of the United States; and that they are not dependent upon his citizenship of the state, do not rest upon its legislation, and cannot be destroyed by its power. As I understand the decisions of the supreme court, they sustain the claim of this plaintiff that the courts of the United States are open for the relief of citizens of the United States whose privileges have been abridged by the state in which they reside. Certainly they should be, and I will surely so hold until

advised by that court that I am in error. From those same decisions I find that, while the right of suffrage is not a necessary attribute of federal citizenship, it surely is such an attribute as is exempt from discrimination in the exercise of that right on account of race and previous condition; and that, while the right to vote in the states comes from the states, the right of exemption from the prohibited discrimination comes from the United States. While, as a rule, the rights of a citizen of a state are such as all citizens of the United States enjoy, yet this plaintiff has also certain rights under the constitution of South Carolina by virtue of the act of congress of June 25, 1868, which was accepted and acted upon by that state; in which it is provided that the constitution of said state shall never be so changed as to deprive any citizen or class of citizens of the United States of the right to vote in said state who are entitled to vote by the constitution of the same, recognized in said act, except as a punishment for crime. The constitution there referred to is the one from which I have before quoted, the present organic law of that state.

Are the registration laws of South Carolina constitutional? Do they prevent the plaintiff and those situated like him from exercising the rights conferred upon and guaranteed to him and them? A registration law is not per se unconstitutional, but is the one referred to in the bill such as should be upheld by the courts? Does the state of South Carolina, by this legislation, deprive the plaintiff of any of the privileges to which he is entitled by the constitution of the United States and of that state? Does it deprive him of his liberty by taking from him a right by which he can preserve that liberty? Does it deny him the equal protection of her laws by enacting a system of registration which does not protect, but destroys his rights? If it does disfranchise him, are not his liberty and his property taken from him? If it does prevent him from voting (it is shown that he is duly qualified) for delegates to the constitutional convention mentioned in the bill, which may so change the organic law of the state as to affect his life, his property, his liberty, his franchise; if it denies to him the right to vote for a member of congress, and for electors for president and vice president of the United States, when they are chosen,—does it not do him and the country a grievous wrong; and by what authority? As pertinent to this, I quote the words of Mr. Justice Swayne, in the Slaughterhouse Cases:

“Life, liberty, and property are forbidden to be taken without due process of law, and equal protection of the laws is guaranteed to all. Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity. ‘Due process of law’ is the application of the law as it exists in the fair and regular course of administrative procedure. ‘The equal protection of

the laws' places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty, and property, and the pursuit of happiness." 18 Wall. 127.

It is not my intention at this time to state in detail the requirements and effect of each section of said registration law, but simply the result that I reach after a careful scrutiny of them all, aided as I have been by the exhaustive analysis of the same made by counsel. I find no warrant in the constitution for the certificate required by the registration law to be issued to the voter, the production of which is required at the polls or his vote is to be rejected. This is not registration, which is simply the entering on the books or lists of voters of the names of those qualified under the constitution to vote, but it is an additional requirement to those mentioned in the organic law; not intended, I am constrained to believe, to facilitate the full, free, and legal expression of those entitled to exercise the right of suffrage. Such requirement is unreasonable, burdensome, and harassing, and clearly it impedes and abridges the right of the constitutional voters of the state to cast their ballots. The additional requirement that the voter moving from one place to another in the same precinct must surrender his old and secure a new certificate, is without reason, and vexatious. While the mode prescribed for securing a renewal thereof in case of loss is so cumbersome, and peculiarly stringent, that it likely fulfills its object in deterring the ordinary voter from making the effort. The registration of voters closes on the 1st day of July preceding a general election, which is held in November following. What possible reason is there for this unreasonable course? During the four months preceding an election—the period voters generally devote to the examination of questions then to be determined and to the placing of their names on the voting lists, when such lists are required—it is utterly impossible for any duly-qualified voter to have his name registered, and necessarily results in depriving many of them of the right of suffrage. The only parties permitted to register during the four months preceding the election are those becoming of age during the period, provided they furnish satisfactory proof. The constitution says that the citizen who shall have been a resident of the state for one year and of the county in which he offers to vote for sixty days next preceding any election shall be entitled to vote at such election, and yet he is prohibited by this requirement from so doing. He has completed his one year's residence after the 1st day of July, but he cannot register, because the books are closed, and he cannot vote, because his name is not upon the books; and there is no provision by which he can prove to the election officers at the polls that he is a qualified and legal voter. This entire provision is most peculiar, without a precedent, and without defense, even from the advocates of the law. Why the books should be closed for months before the election, and kept open for months after it is over, to the uninformed would be passing strange; and yet in the light of the recent history of this state, and the discussion of this cause, is easily understood. That such requirements are not only unreasonable, but unconstitutional, is shown by the following cases: *Morris v. Powell*,

(Ind. Sup.) 25 N. E. 221; *White v. Commissioners*, 13 Or. 317, 10 Pac. 484; *Kinneen v. Wells*, 144 Mass. 497, 11 N. E. 916; *State v. Williams*, 5 Wis. 308; *Quinn v. State*, 35 Ind. 485; *McCafferty v. Guyer*, 59 Pa. St. 109; *Green v. Shumway*, 39 N. Y. 418; *Monroe v. Collins*, 17 Ohio St. 686; *People v. Canaday*, 73 N. C. 198; *Cooley*, Const. Lim. 753; *Attorney General v. City of Detroit* (Mich.) 44 N. W. 388.

A careful examination of the registration enactment of the state of South Carolina—excluding the act of 1894—brings me to the conclusion that if a voter who was duly qualified and entitled to register in May and June, 1882, did not, on account of absence, sickness, inadvertence, or other cause, register when the books were open in that year, he was not only prevented from voting at the general election in November, 1882, but was and has been prevented—under the law—from voting at all elections held in the state subsequent to said election in 1882. This seems almost incredible, yet I think it is correct. The statement is appalling, the outrage stupendous, the result close to the border land that divides outrage from crime. It is not necessary to discuss it further; likely the least said about it the better.

Does the act of 1894,—the convention act,—with its four sections relating to registration, cure the defects I have alluded to, and render valid the former unconstitutional laws I have mentioned? In my opinion, it does not. These sections refer to the old law, in fact are to be considered as part of it,—as amendments thereto; and they contain all the bad features thereof, including the certificates to be produced at the polls, and the closing of the books many days before the election. They also add to the qualifications contained in the constitution relative to the residence of the voter in the state and county. And they make no provision for the registering of voters between the closing of the books and the election, when their names have been omitted on account of absence, or other usually sufficient reason. Again, the applicant for registration must make affidavit setting forth his full name, age, occupation, and residence at the time of the general registration in 1882, or at the time thereafter when he became entitled to register, and also give the place or places of his residence since the time when he became entitled to register. This affidavit must be supported by the affidavit of two respectable citizens who were each of the age of 21 years on the 30th day of June, 1882, or at the time the applicant became entitled to register. Our most intelligent voters would dread this ordeal, this history of their movements for years, this statement of the different places where they have lived, this securing of two reputable affiants who must have been 21 years of age in 1882, or at the time the applicant arrived at voting age. With what crushing force, then, must it strike the weaker race, which is thus made to suffer by the stronger. How difficult for them to thus write out the books of their lives, and have all the pages thereof attested by two witnesses, reputable in the estimation of the registrar who alone is to judge them. In my opinion, the fact that there still remain several days—prior to the election—during which the plaintiff may apply for registration

does not, in the light of the allegations of the bill, the proofs tendered, and admissions made, prevent him from asking, nor the court from granting, the relief prayed for.

I was asked, in case any portion of the said registration laws should be found invalid, to eliminate the part so found, and decree that the remaining sections should stand. I have not been able to make the separation, for I find it all so interwoven as to render it impracticable, so far as results are concerned; and I cannot winnow where there is no grain. In behalf of those so treated, all interested in the welfare of their country, and desirous of seeing its laws enforced, should protest, in order that public sentiment should no longer be dormant, but may, by its activity, rouse the community that has suffered by such outrages to a realization of their cause, and to an appreciation of the beneficial results to be secured by the abolishment of the system that has caused them.

If we may judge of what the intention of the legislature was by the inevitable result of its enactment,—as we are assured we can (*Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730; *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862),—then the one object that controlled the minds of those who formulated the enactment I have been considering was how to successfully destroy the greatest number of the ballots of the citizens of African descent, while at the same time to interfere with as few as possible of those of the white race. The fact is that, with a candor that was as frank as it was amazing, this was virtually admitted during the argument of this case. It is evident that the effect of this registration system is to fearfully impede the exercise of the right of suffrage by the colored voters of the state of South Carolina. It to a great extent defeats their constitutional right to vote, and it seems to be its leading—I must be permitted to say, its only—object, the effect being to so legislate as to apparently respect constitutional requirements, but at the same time to stab to the death the rights and immunities guaranteed by them. Finding, as I do, that the registration laws of South Carolina are unconstitutional, and that their enforcement will deprive the plaintiff, a citizen of the United States, of the rights of a citizen of the same, I conclude that this court has jurisdiction of this case, and that the same is not a proceeding against the state of South Carolina, prohibited by the eleventh amendment to the constitution of the United States. I find that the bill does present a question arising under the constitution and laws of the United States, and that the plaintiff has not a plain and adequate remedy at law; that the bill is sufficiently verified, and not multifarious. Under these circumstances it is the duty of the circuit court of the United States for the district of South Carolina to entertain this complaint, and grant the relief asked for.

I have noticed during the progress of this case a disposition to regard this court as a foreign jurisdiction, much to my surprise and my regret. This is as much a court of the state of South Carolina as is the circuit or supreme court of that state. The state of South Carolina assisted in forming the constitution and making the laws by virtue of which this court was organized and now convenes. This

court is and will be as careful and as jealous of the honor and the interests of that state as any of her citizens can be, and it hopes to merit their esteem by being worthy of it. A distinguished jurist of that state is my associate on the circuit, and the chief justice of the United States is its presiding justice. Why such a court of the United States, convening in South Carolina, administering the laws of the nation and of this state, should be regarded as a foreign court, is wonderful in the extreme, and as strange as is the story relative to which it is about to enter its decree.

I will pass an order as prayed for by complainant, restraining and enjoining the defendant individually and as supervisor of registration from the performance of any of the acts mentioned and complained of in the bill.

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GARNER v. SECOND NAT. BANK OF PROVIDENCE et al.

(Circuit Court of Appeals, First Circuit. April 16, 1895.)

No. 124.

1. EQUITY PRACTICE—DISMISSAL BY COMPLAINANT.

After an interlocutory decree on the merits referring the cause to a master to take an account, defendants acquire such an interest in the suit that plaintiff cannot discontinue as of right. If an order allowing such discontinuance can ever be properly entered after such a decree, it is only where some equity is shown therefor, and the same will not be granted where the expense and time involved in the litigation which resulted in such decree render it grossly inequitable to permit such a disposition of a part of the suit as would render possible a new contest over any question at issue.

2. ENJOINING ACTIONS IN STATE COURTS.

It is now thoroughly settled that the provision contained in Rev. St. § 720, forbidding the federal courts to enjoin the prosecution of suits in the state courts, does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court. *Held*, therefore, that a federal court, in which complainant, after obtaining a decree in her favor, was proceeding before the master for an accounting of rents and profits, had jurisdiction to enjoin a subsequent action brought by her in a state court to recover the same rents and profits.

3. APPEALS—REVIEW—QUESTIONS NOT RAISED BELOW.

An appellate court cannot be required to consider alleged irregularities. In that the court below proceeded to a final decree which was not based on the master's report in respect to an accounting, and that it gave affirmative relief by enjoining complainant from prosecuting an action at law without basing the same upon any cross bill, when the same were not objected to below, are not in terms covered by the assignment of errors, and are not shown to work substantial injustice.

4. SAME—HARMLESS ERROR.

Where an interlocutory decree has been rendered for complainant, and the cause referred to a master for an accounting of rents and profits, it is a contempt for the complainant, pending this proceeding, to bring an action at law to recover the same rents and profits, which contempt the court will have power to order purged by the dismissal of such action. Therefore, where no objection is made to the form of proceeding, it is harmless error for the court to incorporate its order requiring such dismissal into the final decree, instead of making it the basis of a separate order.

**5. SAME.**

After a master had filed his sealed report upon an accounting of rents and profits, neither party opened the same. Complainant had, pending the proceedings before the master, commenced an action at law to recover the same rents and profits, and subsequently moved to discontinue the equity suit. Defendant filed a petition asking that complainant be enjoined from prosecuting her action at law, and that she be required to dismiss the same. Upon the hearing of these motions the court refused permission to discontinue, and entered a decree awarding a nominal sum for rents and profits, and directing the dismissal of the action at law. Complainant did not insist that the award of rents and profits should be made upon the master's report, and her assignment of error, fairly construed, objected only to the making of any award in her favor, and raised no question of amount. *Held*, that it would be inequitable thereafter to allow her to insist that the decree was erroneous because not based upon the master's report.

**Appeal from the Circuit Court of the United States for the District of Rhode Island.**

This was a bill in the nature of a *quia timet*, filed by complainant (then Mary J. Graeffe, now Mary J. Garner) and her husband, Albert J. Graeffe, against the Second National Bank of Providence, R. I., and Christopher H. Shippee and Samuel W. K. Allen. The bill sought to enjoin defendants from selling and conveying certain real estate, and from attempting, by actions at law or otherwise, to oust the complainant from the peaceable and quiet enjoyment and possession of such property. The defendants Shippee and Allen claimed title adverse to the complainant through a purchase made by Shippee, February 28, 1882, at an execution sale of all interest held by Albert J. Graeffe in the property on March 5, 1881 (the date of the attachment in that case), Shippee having subsequently conveyed by quitclaim deed an undivided half of the estate purchased by him to the defendant Allen. The defendant the Second National Bank had also purchased upon January 7, 1882, at an execution sale, all the title and interest of Albert J. Graeffe which he held on the 16th of March, 1881. The cause came up originally upon the bill, and upon a cross bill of the defendants Shippee and Allen. The defendants prevailed in the circuit court in the first instance, and were awarded judgment dismissing the bill, and giving judgment as prayed for in the cross bill. From this decree an appeal was taken to the United States supreme court, where the decree below was reversed, and one directed to be entered dismissing the cross bill, and granting the relief prayed for in the original bill. 151 U. S. 420, 14 Sup. Ct. 390. Upon the mandate from the supreme court being presented, the circuit court proceeded to, and did, comply with the directions therein contained, and at the foot of the decree entered thereon on the 23d day of June, 1894, ordered a reference to a master to take proof of the rents, issues, and profits of the premises, received by the defendants, or either of them, from the time of the filing of the decree of the circuit court, so reversed, until surrender of the premises under the decree of reversal. While this proceeding before the master was so pending, and on the 22d day of October, 1894, the complainant commenced her action at law in the supreme court of the state of New York against the same defendants for the recovery of the same rents, issues, and profits. Thereafter, and on the 10th day of November, 1894, the master filed with the clerk of the circuit court a sealed package, said to contain his final report, with instructions that the same was not to be opened until payment of his fees. Thereupon the respondent the Second National Bank, acting separately and independently, moved the circuit court (1) for a hearing thereon; and (2) that the complainant open said package. The court, on the 20th of December, made an order on behalf of all the respondents that the complainant open the report on or before the 29th day of December, 1894; and, in default, that the defendants, or either of them, might apply to the court for such other relief as they might be advised. On the 27th day of December, 1894, complainant filed a notice of motion for leave to discontinue in said circuit court the then pending proceeding to

recover from the respondents said rents, etc. Afterwards, and on the 29th day of December, 1894, the Second National Bank, again acting separately and alone, and on its own behalf, filed its petition praying that the complainant be enjoined by the decree of said circuit court from the further prosecuting of her action at law in the supreme court of New York, and required to discontinue the same, and enjoined from commencing or prosecuting any other action against the defendants in respect to the matters embraced in the master's report until final judgment entered in said circuit court, and for other relief. The master then filed with the clerk of the court his consent that the package purporting to contain his report be opened, but the same was not opened by either party. Thereupon, the motion on behalf of the complainant for leave to discontinue the then pending proceeding in the circuit court came on to be heard, followed by the application on behalf of the Second National Bank for an injunction restraining the prosecution of the action at law, or any other action for the same cause, and directing complainant to discontinue and dismiss the same. And on the 4th day of January, 1895, said circuit court made its decree, as follows:

"This cause came on to be heard on the motion of the complainant, filed December 27, 1894, for leave to discontinue the proceedings under the decree entered on the 23d day of June, 1894, for the recovery of the rents and profits of the estate in said decree referred to, and on the petition of the respondents the Second National Bank, filed on the 29th day of December, 1894, to enjoin the complainant from the further prosecution of her pending action in the supreme court of the state of New York against the respondents for the recovery of said rents and profits, and other relief, and on the motion of the respondents for a final decree in said cause adjudging that the complainant is not entitled to recover anything on account of said rents and profits, or, at most, only a nominal sum on account thereof, and was argued by counsel. And it appearing to the court here that the complainant here has neglected, under the order entered on the 20th day of December, 1894, to open the master's report now on file in said cause, pursuant to the decree on the 23d day of June, 1894, and now declines to open the same, and that the same has not been opened; and it further appearing that all the costs heretofore accrued in favor of the complainant have been fully paid and satisfied; and it further appearing that the complainant Mary J. Graeffe, now Mary J. Garner, has, since the filing of this bill, commenced her action against these respondents for the recovery of said rents and profits in the supreme court of the state of New York; and it further appearing to the court here that the complainant has elected her remedy for the recovery of said rents and profits, by taking the decree of this court entered the 23d day of June, 1894, and by proceeding thereunder up to the final report of the master therein appointed,—it is now ordered, adjudged, and decreed as follows, that is to say: That the motion of the complainant to discontinue be, and the same hereby is, denied and dismissed; that the complainant Mary J. Graeffe, now Mary J. Garner, have and recover of each of the said respondents the sum of one dollar, in full satisfaction of the rents and profits of the estate under the said decree entered on the 23d day of June, 1894, and that she have execution therefor forthwith; that the complainant Mary J. Graeffe, now Mary J. Garner, be, and she hereby is, perpetually enjoined from the further prosecution of her said pending action in the supreme court of the state of New York, and that she be, and she hereby is, ordered forthwith to discontinue and dismiss the same; that neither of the parties hereto shall recover any further costs of this suit. Entered as the decree of this court, by order thereof, the 4th day of January, 1895."

Alexander Thain, for appellant.

James Tillinghast, for Second Nat. Bank of Providence.

Samuel W. K. Allen, for C. A. Shippee and S. W. K. Allen.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.



**PUTNAM, Circuit Judge.** Evidently, the controversy in the circuit court in this case related to two points only, namely, whether the complainant (now the appellant) was entitled to dismiss so much of her bill as related to the rents and profits, and whether it was in the power of the circuit court to enjoin the proceedings in the state court, under the circumstances of the case.

As to the first question, it is the settled practice that by a decree on the merits, like that of January 23, 1894, the party defendant acquires such an interest in the suit that the plaintiff cannot discontinue as of right. *Gregory v. Pike* (decided by this court Jan. 31, 1895) 67 Fed. 837. In order to obtain an order allowing such discontinuance, if such an order can ever properly be entered after an interlocutory decree (*Skip v. Warner*, 3 Atk. 558; *Egg v. Devey*, 11 Beav. 221), some equity therefor must be shown. In the present case the expense and time involved in the litigation which resulted in the decree referred to, independently of other considerations, render it grossly inequitable to permit such disposition of any part of the suit as would make possible a new contest over any question at issue.

With reference to the other question, the appellant relies on section 720 of Revised Statutes. But it is now so thoroughly settled that this provision of law does not apply to proceedings incidental to jurisdiction properly acquired by a federal court for other purposes than that of enjoining proceedings in a state court, that the proposition needs no discussion by us.

These observations dispose of all substantial questions in the case, and, indeed, of all the questions raised in the court below; but two incidental questions touching the regularity of proceedings were suggested at the bar. One grows out of the fact that the court below proceeded to a final decree, which was not based on the master's report; and the other is that, in the final decree, affirmative relief was given against the plaintiff, not based on any cross bill, directing that the plaintiff be enjoined perpetually from prosecuting her suit in the state court, and that she dismiss it. As these irregularities, if they are such, were not objected to in the court below, are not in terms covered by the assignment of errors, and are not shown to work substantial injustice, this court cannot be required to consider them. The authorities show clearly that the circuit court had power to restrain the plaintiff from commencing or prosecuting the suit in the state court under the circumstances. The leading case (*Mocher v. Reed*, 1 Ball & B. 318, decided in 1810) has always been held a sufficient authority. But, when issued against a plaintiff, the restraining order has been on summary proceedings; and, so far as we can perceive, the order has been of an ad interim character. *Harrison v. Gurney*, 2 Jac. & W. 563. In this case the form directed by Lord Eldon appears, and it ran "until further order." But in the case at bar the interlocutory decree in the circuit court was entered June 23, 1894, and the appellant brought her suit in the state court in October, 1894. Under those circumstances, the bringing of the suit without leave

was, according to *Mocher v. Reed*, *ubi supra*, in contempt of the circuit court. To the same effect is *Story*, Eq. Jur. § 889, though it seems the power to compel the complainant to make an election, and the corresponding right to elect, ended with the entry of the interlocutory decree. That court had, therefore, power to require the purging of the contempt by a dismissal of the suit. In the absence of any specific objection to the form of proceedings, the appellant was not prejudiced by the fact that this was incorporated in the decree, instead of being made the basis of a separate order. The order to dismiss was, of course, of such effective character that the order not to prosecute, contained in the same interlocutory decree, was immaterial. On the whole, in this particular, the case is met by the rule explained by this court in *King v. Hospital*, 12 C. C. A. 139, 64 Fed. 325,—that irregularities, if any exist, not substantially prejudicial, and not brought to the attention of the court below, do not furnish ground for reversal.

These observations also apply to the proposition that the court below did not proceed on the master's report, even if it were proper or necessary that it should do so. The appellant did not, either absolutely or in an alternative form, insist that it should. She resisted all proceedings, and took no note of the method. Her assignment of errors, fairly construed, object only to the making of an award in her favor, and raise no question as to the amount. The master's report could have been of use only with reference to the sum to be awarded, and therefore the assignment of errors does not touch it. It is clear the appellant's effort was to get wholly out of the circuit court, so far as an accounting was concerned, and she limited the issue to that purpose alone, and persistently refused to present the master's report, or offer proofs as to the amount of rents and profits; and it would be inequitable to allow her to raise other issues on appeal, under the circumstances explained.

The assignment objecting that the decree was entered against Shippee and Allen is clearly not available. It would have been an irregularity not to have entered a decree for or against them. Beyond that, the point is covered by the general propositions which we have already stated.

On the whole, the appellant had her day in the circuit court, and refused to make use of it. We cannot be required to give it to her again, and there is no substantial equity appearing in the record which would justify us in doing it. The decree of the circuit court is affirmed.

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GREGORY v. PIKE. SAME v. KEMP VAN EE. TALBOT v. PIKE et al.  
BUTTERFIELD v. GREGORY et al.

(Circuit Court of Appeals, First Circuit. January 31, 1895.)

Nos. 98-101.

1. ATTORNEY AND CLIENT—LIEN FOR SERVICES.

A suit in equity was brought by one claiming ownership of certain notes to recover possession thereof from a person with whom they had been pledged as collateral security by a third party. Various other par-

ties set up claims to an interest in the notes, and, pending the proceedings, an attorney was employed by the pledgee to bring an action at law, which action resulted in the payment into court of the amount due. This fund was then transferred from the action at law into the registry in the equity suit. *Held* that, as the attorney was employed solely by the pledgee of the notes, he had no lien as against the other parties, upon the fund produced, either before or after its transfer.

2. SAME—STATE AND FEDERAL COURTS.

The federal courts recognize no lien at common law in behalf of an attorney, beyond that given by the local law.

3. PLEDGE—NOTES HELD AS COLLATERAL SECURITY—EXPENSE OF COLLECTION.

One who takes notes as collateral security for a debt is entitled, as against the owner thereof, to be allowed the cost of realizing upon the collateral, including a reasonable attorney's fee for suing upon the notes.

4. SAME—IMPOUNDING OF NOTES—RIGHTS OF PLEDGEE.

Where a suit in equity was brought to recover possession of certain notes which had been pledged as collateral, and which, in the course of the proceedings, were impounded in the hands of the clerk, *held*, that the pledgee was entitled to control the notes so far as necessary for the purpose of bringing an action at law thereon and having the proceeds paid into court; and that it was proper thereafter to have such fund transferred from the law side of the court to the registry in the equity suit.

5. PARTIES IN EQUITY.

One claiming an interest in the subject of litigation cannot ordinarily be made, under the practice of the federal courts, a party defendant, merely upon the petition of the defendant, and against the objection of the complainant; and hence a cross bill filed by a party who thus comes into the cause should be dismissed.

6. SAME—APPEAL.

Where, however, notwithstanding this irregularity, the court enters a decree in favor of the complainant in such a cross bill, there is no reason, on the facts of this case, why, upon an appeal, the appellate court, after deciding that such cross bill should be dismissed, may not regard the same as a summary petition filed by the party himself pro interesse suo, which petition he might have filed in the court below.

7. SAME—COSTS.

Such party, however, having volunteered himself as a party defendant, instead of proceeding by the less expensive method of filing a petition, should be required to pay the costs on the cross bill, both in the appellate court and the court below.

8. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.

Judiciary Act March 3, 1875, does not contain the restriction which appears in the act of August 13, 1888, touching the residence of the petitioner for removal. The former act is of a broader range than the latter, and the restriction contained in section 1 thereof, prescribing the jurisdiction of the circuit courts, does not apply to removals under section 2. *Held*, therefore, that a cause was removable thereunder when it appeared that each party was a citizen of a different state or of a foreign state.

9. EQUITY PRACTICE—RIGHT OF COMPLAINANT TO DISMISS AS AGAINST ONE OF THE DEFENDANTS.

No such practice as dismissal by an order as of course seems to be known in the federal courts, except under equity rule 66, although it existed in the English chancery at the time its practice was adopted by the supreme court, in cases where the plaintiff was entitled to have his bill dismissed without prejudice.

10. SAME.

An order giving complainant leave to discontinue as to one defendant, "reserving all rights of parties other than said plaintiff," requires further consideration and a formal decree before the dismissal becomes effectual, and for this reason, and because the case is under the control of the court until final decree, such order granting leave may be

subsequently revoked, upon its being made to appear that such dismissal was under a mistake and was not equitable.

11. SAME.

Where a suit was brought by one claiming to be the owner of certain notes pledged as collateral, against the pledgee thereof and the maker, *held* that the complainant had no right to dismiss the bill as to the pledgee after the maker had paid the amount of the note into court and had been dismissed from the case. *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 3 Sup. Ct. 594, 109 U. S. 702, applied.

12. REHEARINGS ON APPEAL—NEW EVIDENCE — CIRCUIT COURT OF APPEALS—RULE 29.

Petitions for rehearings, in the circuit court of appeals, are regulated by rule 29 (11 C. C. A. cxil., 47 Fed. xlii.), and no new matter can be introduced upon such a petition. Therefore, except in special cases, and then only by leave of court, no papers can be filed except the petition itself in the form prescribed by the rule.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

These were four separate appeals from a decree of the circuit court in the suit of Charles A. Gregory against Frederic A. Pike and others. The cause was originally brought in the supreme judicial court of Massachusetts, December 16, 1884, and was afterwards removed to the circuit court. The original bill sought to recover possession of certain notes which had been pledged as collateral, and to enjoin the payment thereof to the pledgee. Pending the suit the notes were collected by an action at law, and the proceeds transferred to the registry in this cause. At various times additional parties came into the suit, in the manner more fully stated in the opinion of the court. The facts out of which the controversy arose were substantially as follows:

In 1880 or 1881, one George W. Butterfield, who owned an interest in certain mining property, including the May Lundy mine and the Lake View and Lucky Morton mines, situated in Mono county, Cal., sold the same to Frederic A. Pike, of Calais, Me. Afterwards, Butterfield conceived the plan of organizing a mining company in London or elsewhere, and selling to it the property in question. To this end, on January 29, 1883, he made a contract with said Pike for the purchase of his interest in the mines. This contract by its terms was to expire on July 30, 1883, unless the purchase was completed by that time. Butterfield, being without funds, associated with himself one Charles F. Jones, who made a cash payment under the contract with Pike. Afterwards, for the purpose of providing funds for carrying out the scheme, Butterfield and Jones approached the complainant Charles A. Gregory and one J. C. Kemp Van Ee, who each owned a large amount of stock in the Great Sierra Consolidated Silver Mining Company. As a result of their negotiations, Gregory transferred to Butterfield 80,000 shares of said stock, and Kemp Van Ee 79,000 shares. At the time this assignment was made, Butterfield gave to Gregory the following receipt or declaration of trust:

"Boston, March 30, 1883.

"Received of Charles A. Gregory 80,000 shares of the stock of the Great Sierra Consolidated Silver Company of Chicago, Illinois. I take the same to have it registered upon the books of the company in the name of George W. Butterfield, of San Francisco, as trustee, and I will deliver the same to said Gregory on demand, and in the meantime hold the same in trust for him as his property.

G. W. Butterfield."

Afterwards, and on April 7, 1883, the following written agreement was executed between Butterfield and Jones on the one part and Kemp Van Ee on the other:

"Memorandum of agreement between George W. Butterfield and Charles F. Jones, parties of the first part, and J. C. Kemp, party of the second part, and all of the city and county of San Francisco, in the state of California: Whereas, said parties of the first part have purchased the May Lundy, Lake

View and Lucky Morton mines, situate in New Homer mining district, Mono county, state of California, for the sum of two hundred and fifty thousand dollars lawful money of the United States, upon the following conditions, to wit: Ten thousand dollars cash, and the balance on or before the 30th day of July, A. D. 1883; and whereas, said parties of the first part have bonded various other properties in said district from one Howk, one Carpenter, and one Gilchrist, and also contemplate bonding other properties to be included; and whereas, it is the purpose, desire, and intention of the said parties of the first part to sell all or a part of said properties either in the United States or Europe, upon such terms and conditions as they may think advantageous for all parties to this agreement: Now, this agreement witnesseth that said parties of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the further consideration hereinafter mentioned, do hereby covenant and agree to and with the said party of the second part to give him, the said party of the second part, a one-eighth ( $\frac{1}{8}$ ) part of all the moneys or values realized from the sale of said May Lundy, Lake View, and Lucky Morton mines, over and above the price paid for the same; also an eighth ( $\frac{1}{8}$ ) part of all the moneys or other values realized from the sale of said mines bonded from one Howk, one Carpenter, and one Gilchrist or others included in this sale. It is further agreed that, in case said mining properties are not sold or otherwise disposed of, then the said parties of the first part shall assign, transfer, and set over to said party of the second part an undivided one-eighth ( $\frac{1}{8}$ ) part of all the mines now bonded from said Howk, Carpenter, and Gilchrist. It is further agreed, by and between the parties of the first and second parts to this agreement, that said party of the second part shall devote his time and energies in assisting said parties of the first part to make a sale of all or any part of said mining properties, under and subject to the direction and approval of said parties of the first part or either of them. It is further agreed by and between the parties of the first and second parts that the expenses of said party of the second part pending said negotiations shall be defrayed by said parties of the first part.

"In witness whereof we have hereunto set our hands and seals this ——— day of ———, A. D. 1883.

G. W. Butterfield. [Seal.]

"Chas. F. Jones. [Seal.]

"J. C. Kemp. [Seal.]

"Witness present: J. H. Moyle."

Early in April, 1883, Butterfield sold the entire 159,000 shares of stock in the Great Sierra Consolidated Mining Company which he had acquired from Gregory and Kemp Van Ee to one W. C. N. Swift, of New Bedford, Mass., receiving \$10,000 in cash, and four notes, aggregating over \$80,000. These notes were made payable to the order of Butterfield, and were negotiable. On April 9th, two of these notes, each for \$20,334.60, were delivered by Butterfield to Gregory. On the same day Gregory passed the notes back again to Butterfield, who then delivered them to Jones. Upon receiving back the notes, Butterfield gave Gregory the following agreement or declaration of trust:

"New York, April 9th, 1883.

"I hold in my hand notes of W. C. N. Swift, dated New Bedford, Mass., 1883, 4m. 4th, one due two years after date for \$20,334.60, one due three years after date for \$20,334.60, payable to order of Geo. W. Butterfield, with interest at six per cent. per annum. These two notes belong to Chas. A. Gregory, and the proceeds of them; and I agree to deliver the same to him upon request, or the full amount of money expressed therein; and I also owe an account and payment to said Gregory for \$730.80, being his pro rata of the two other notes of similar description held by me belonging to J. C. Kemp. Gregory is entitled to one-half of this \$730.80 in two years, and one-half in three years, with interest as above.

G. W. Butterfield."

On April 20, 1883 (Butterfield, Gregory, and Kemp Van Ee, being then in England, for the purpose of promoting the organization of a company to

take the mines), Jones surrendered all four of the notes to Swift, the maker, and in place thereof received five other notes, payable to the order of Jones, three of which were nonnegotiable. The contract of purchase with Pike expired before the scheme was consummated. Butterfield, in the meantime, had returned to America, and on July 31, 1883, he entered into a new contract of purchase with Pike, the purchase price being \$242,666, payable \$25,000 in cash, and the balance on or before the 1st day of January, 1884; but at the foot of the contract there was appended the following modification in respect to the cash payment:

"For the first payment of \$25,000, specified in the above agreement, the said Butterfield has lodged in the hands of said Pike the notes of W. C. N. Swift, of New Bedford, dated April 20, 1883, for \$15,000 and \$20,334.60, payable in two and three years from date, which notes are to be held by said Pike until Jan. 1, 1884, unless sooner redeemed by said Butterfield by the payment of \$25,000, and at that time the said Pike is authorized to raise \$25,000 out of them by pledging them on the most favorable terms he can obtain.

F. A. Pike.  
"G. W. B."

The notes thus pledged with Pike were two of the nonnegotiable notes made by Swift to Jones, and it is in respect to them that the suit was brought. The contract under which they were pledged, like the one which preceded it, was not complied with by Butterfield and his associates; and, according to its terms, all payments made before the expiration thereof were to be forfeited to the said Pike. Gregory, in his amended bill, and also in his testimony, alleged that the contract of July 31, 1883, was not an extension or renewal of the contract of January 29, 1883, but was a new contract, made without his knowledge, and in which he had no interest whatever, either as partner with Butterfield and Jones, or in any other way; and it appeared that on December 15, 1883, Gregory had procured from Butterfield the following order upon Pike for the delivery of the notes:

"F. A. Pike, of Calais, Me., U. S. A.—Dear Sir: Please deliver to Charles A. Gregory, of Chicago, Ill., or to his order, the note made by W. C. N. Swift, of New Bedford, dated April 20, 1883, for \$15,000, payable in two years from its date, placed in your possession by me, the same being the property of said Gregory now and at the time I placed the same in your possession.  
G. W. Butterfield."

"London, Dec. 15, 1883."

Butterfield, in his answer in the cross bill, alleged that the contract of July 31, 1883, was a mere renewal of the previous contract, which had expired; that it was made for the benefit of all the associates; and that they were in partnership, sharing in the benefits and burdens of the contract. In the cross bill of Butterfield it was alleged that the original notes made by Swift to him "were both in law and in equity his notes, to be used by him as the best interest of said associates might require; that he had full right to deliver said notes to said Jones to be used for the purpose aforesaid; and that said notes were properly deposited with the said defendant Pike." The cross bill contained also the following allegations: "Your orator further shows unto your honors that the expenses of said associates in their endeavor to carry out their scheme have been very large; that the amount received from the other notes of said Swift has been insufficient to pay such expenses; that your orator intrusted with said Gregory a large amount of money received from the discount of said two notes for the purpose of paying the debts of said associates, but the said Gregory converted the same to his own use, by reason whereof your orator paid said debt from his own resources," etc. In respect to the assignment made to him by Gregory of the 80,000 shares of Sierra Company stock, Butterfield alleged in his cross bill that it was expressly understood and agreed that the assignment was for the purpose of enabling Butterfield to raise money to carry out the scheme, and that the receipt given by him at the time of the assignment of the stock was merely as a security for the reassignment of the same in case it was not sold for the purpose stated. He further alleged that Gregory had the same interest in the project that Kemp Van Be held

under the written contract of April 7, 1883; that the receipt or declaration of trust given by him to Gregory in relation to the Swift notes was a mere memorandum to be held by Gregory until a written contract, in the same form as that with Kemp Van Ee, could be made; that afterwards, and about the 9th of May, 1883, Gregory in fact accepted a contract in writing in that form; and that thereupon the memorandum of April 9th was discharged. Upon these allegations Butterfield prayed, in his cross bill, that he might be declared entitled to the proceeds of the notes for the purpose of adjusting the claims of all the associates, and especially for the purpose of reimbursing himself for the money advanced by him to Gregory to pay the debts of the associates, which he had alleged that Gregory misappropriated to his own use. Kemp Van Ee, having been made a party to the suit, filed an answer and also a cross bill, showing that by reason of the relations of the parties, and the use made of the stock which he had transferred to Butterfield in pursuance of the scheme, he was entitled to one-half the proceeds of the \$15,000 note in controversy in the case.

Francis A. Brooks, for Gregory.

John Lowell and Thomas H. Talbot, for Mary H. Pike.

A. Lawrence Lowell, for Kemp Van Ee.

Thomas H. Talbot, pro se.

George D. Noyes, for Butterfield.

Before PUTNAM, Circuit Judge, and WEBB and CARPENTER, District Judges.

PUTNAM, Circuit Judge. These four cases are appeals from the decree of the circuit court in a bill in equity originally brought in the supreme judicial court of Massachusetts and removed to the circuit court. The bill was brought by Gregory against Frederic A. Pike, the testator of the present respondent, Mary H. Pike, and against William C. N. Swift, to recover two certain nonnegotiable promissory notes, made by Swift, and held by Mr. Pike, and alleged by Gregory to be his own property. On the petition of Swift and John C. Kemp Van Ee, who claimed to be interested in the notes, Kemp Van Ee was made a party respondent by order of the court, and against the objection of Gregory. He then filed a cross bill, in which the respondents were Mr. Pike and Swift, and also George W. Butterfield. Butterfield has been made a defendant on the application of himself and Swift, but there is no assignment of error touching this. He claimed an interest in the notes, and filed a cross bill, in which his interest is alleged as will hereafter appear. The notes were finally impounded in the hands of Mr. Stetson, then clerk of the circuit court, and afterwards such proceedings were taken that actions at law in the name of the payee of the notes were brought on the law side of the circuit court by Thomas H. Talbot, as attorney for Mr. Pike and his estate, and judgments obtained, which were paid into court by Swift, and the proceeds were transferred to the registry in this cause.

The cause came to final hearing, and a decree was made as follows, on the 8th day of March, 1894:

"(1) That from the fund in the registry of the court in this cause there be paid to the clerk of this court, as required by law in such case, one per cent. upon the whole of said fund. (2) That there be paid from said fund to the administrator of the defendant Swift, deceased, costs, to be duly taxed in favor of said defendant. (3) That for special services in connection with

said fund, as set forth in his petition, there be paid to John G. Stetson the sum of eight hundred dollars. (4) That there be paid to the defendant John C. Kemp Van Ee one-half of the proceeds of the fifteen thousand dollar note, with the accumulations thereon. (5) That there be paid to Mary H. Pike, executrix of the original defendant, Frederic A. Pike, since deceased, the sum of twenty-five thousand dollars, with interest thereon from January 1, 1884, if the fund remaining in the registry of the court shall be sufficient for the payment, and, if not sufficient, the balance of said fund. (6) That the cross bill of the defendant George W. Butterfield be dismissed. (7) That, after the payments hereinbefore decreed to be made to said clerk, the administrator of Swift and Stetson, and the amounts decreed to be paid to Kemp and Pike, as hereinbefore provided, the remainder of the fund, if any, be paid to the plaintiff Charles A. Gregory."

It appears, by a comparison of the amounts thus decreed with the amount in the registry, that nothing will remain to be paid Gregory under the seventh clause of the decree. From this decree appeals have been taken by Gregory and Butterfield. Mr. Talbot, also, having filed in the court below a petition for an allowance for his counsel fees and costs out of the fund, appeals from the decree because there was no allowance of the former. We will proceed to examine such of the assigned errors in this decree as have been presented in the argument, so far as such examination seems necessary, in order to reach a conclusion on the appeals; and we will first refer to the petition of Mr. Talbot.

He was employed by Mr. Pike and his estate to collect the notes which produced the fund now in the registry of the court. He was not employed, either expressly or by implication, by Gregory. He was, moreover, not employed by Kemp Van Ee or Butterfield. He seems to have been acting throughout solely in the interest of Mr. Pike and of his estate. Therefore on no principle of law has he any claim except against them, or on their interest in the fund. By the thoroughly settled law in Massachusetts, he had no lien on the fund while on deposit on the common-law side of the circuit court, except for his taxable costs. All the cases cited by Mr. Talbot to establish a lien relate to the compensation of a trustee or his attorneys, or otherwise to the administration of a trust estate, or are of that kind wherein one person in a class of persons interested, having secured the fund for the common benefit, is entitled to be reimbursed his legal expenses out of it, and there seems to be no other lien in equity. *Meddaugh v. Wilson*, 151 U. S. 333, 14 Sup. Ct. 356, is the latest case of this class.

There is no federal case establishing a lien at common law in behalf of an attorney beyond that given by the local law. The extent of the lien, therefore, of Mr. Talbot, while the fund was on the law side of the court, was his bill of costs. The transfer of the fund to the equity side of the court did not change the legal rights of any person in the fund, so that the extent of Mr. Talbot's lien was precisely the same after the transfer as before. So far, however, as that part of the fund is concerned in which Kemp Van Ee has no interest, it is the proceeds of notes which Mr. Pike held as collateral, and his estate is entitled to be allowed, as against Gregory, the cost of realizing the collateral. This is a clear principle of law. Therefore the decree below should have allowed Mrs. Pike, in addi-



tion to the amount of her claim and interest, the expenses of herself and Mr. Pike in realizing the fund, including the reasonable charges of Mr. Talbot; and this allowance should rank first against the proceeds of that part of the notes which belonged to Gregory. As Mrs. Pike makes no objection, the decree in this particular may run in favor of "Thomas H. Talbot, attorney of Mary H. Pike."

In regard to the appeals of Gregory, the assignments of errors disclose no controversy as to the merits of the decision of the court below. They relate solely to matters of procedure during the progress of the suit, and to a claim that the circuit court had no jurisdiction to determine the controversy. We will state these points so far as it seems necessary to discuss them.

As to the collection of the notes which were in Mr. Stetson's hands, and the transfer of the funds from the law side to the equity side of the circuit court, some of the steps will be stated in another connection. Mr. Pike had a right, as against Gregory, to put the notes in judgment, and to realize the judgments, at least to the extent of having the fund paid into the common-law side of the court; and he had a right to control the notes so far as necessary for that purpose. Independently of the orders of the circuit court, it was the duty of Stetson to permit the notes to be made available. If those orders were authorized, Stetson was required to comply with them. If not authorized, Stetson must be considered as having done voluntarily what he could have been required by Mr. Pike to do by some suitable proceeding; and there can be no question that, in some way, Mr. Pike, or his estate, could have compelled Stetson to make the notes available for the purpose of obtaining judgments against Swift and a realization of the judgments. And, when this had been accomplished, the prayer against Swift, contained in Gregory's original bill, justified, and, indeed, required, for Swift's protection, that the fund should be brought into the court in equity. The most orderly method to accomplish this result, in the absence of the consent of all parties, would, perhaps, have been to have made some person receiver of the notes, and directed him to collect them, and pay the proceeds into the registry of the court in equity. What was done accomplished the same result in a less expensive manner. As the objections relate, not to the method of doing it, but to the doing of it at all, it is not necessary to consider them further.

As to the proceedings by which Kemp Van Ee was made a defendant in Gregory's bill, and permitted to file a cross bill, Swift, who was a defendant, petitioned that Kemp Van Ee should be made a defendant, and Kemp Van Ee also petitioned to be made defendant, and both petitions were allowed; so that he properly stands as a defendant, if he could be made such, either on the petition of Swift or on his own. It now appears that Kemp Van Ee had an interest in the notes in Swift's hands, and there is no doubt that Swift was entitled to be protected against this claim, if he proceeded in due form. One due form was to file a bill of interpleader, and pay the amount of the notes into court, and bring in nonresident parties, as provided in the act of March 3, 1875, c. 137, § 8 (18 Stat. 473); *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24. If Gregory's bill had then been

pending, Swift might have brought his bill of interpleader in the circuit court, under the rulings in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, and *Morgan's L. & T., etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 11 Sup. Ct. 61. Then, on motion, the circuit court would either have consolidated the two suits, or postponed Gregory's case until the interpleader was disposed of. In this way Swift would have proceeded according to the well-settled practice in an orderly manner, and there would have been proper pleadings covering all questions which could arise.

In the way attempted in the present case, there are no pleadings on behalf of the original plaintiff as against Kemp Van Ee, and could be none. The whole basis of making him a party defendant was in the allegations of Swift's answer. This practice, although prevailing in some localities, is condemned, by necessary implication, in *Shields v. Barrow*, 17 How. 130, 145, by Justice Bradley, in 1873; in *Searles v. Railroad Co.*, 2 Woods, 621, 625, Fed. Cas. No. 12,586; by Justice Blatchford, in 1868, in *Drake v. Goodridge*, 6 Blatchf. 151, Fed. Cas. No. 4,062; and in the notes to *Daniell*, Ch. Prac. (6th Am. Ed.) 286, 287. Some of the reasons for this are highly meritorious, others technical,—meaning not technical in the narrow sense of the word, but in its better sense.

First. Complainants ought not to be compelled into litigation with parties not of their own seeking. One may commence a proceeding very simple in its nature, and be content to take the risk of it; but, if other persons can force themselves into the litigation, what he conceives to be simple may become complicated, expensive, and interminable.

Second. There are ample remedies in case the plaintiff fails to unite all parties required to do equity, either by a bill of interpleader, or in the methods pointed out by Judge Curtis in *Shields v. Barrow*, *ubi supra*. Therefore there is no occasion to resort to the extraordinary proceeding of making new parties without complainant's consent.

Third. As already said, a case made up as this was presents no proper issue on which to base proofs for the determination of the court. This is not technical, in the narrow sense of the word, but leads to extraordinary results, as will be seen by reference to the next paragraph.

Fourth. The result which may come from bringing in a defendant, as was done in this case, shows the impropriety of it. A defendant thus brought in answers, and complainant refuses to file a replication. The only remedy is for the defendant to move a dismissal as against himself. The result is that he is dismissed from the case, and the case stands exactly as it did before he was brought in. Thus, by failing to reply, the plaintiff is able to bring the bill into its original state. It cannot be said that this can be avoided by setting down the case to be heard on bill and answer, because, as already said, there are no proper allegations on behalf of the new defendant which would enable this to be effectually done.

It is true that in the case at bar, if Kemp Van Ee was properly made a party, he was able to file a cross bill; so that, although the

original bill was dismissed as to the new defendant, bringing him in would not necessarily fail of results. We must, however, judge of the question by general rules, applicable to suits where there would be no basis for filing cross bills. In England, legislation was necessary to accomplish what was attempted in this case by making Kemp Van Ee a defendant, and under that legislation proper orders have been passed, requiring an amended statement, so as to raise a proper issue as against defendants brought in by other defendants. So admiralty rule 34 provides proper pleadings in the case of an intervener, but no equity rule meets the difficulty on this point in the case at bar.

This question of making defendants is entirely different from that of an intervention *pro interesse suo*, as authorized in *Harrison v. Nixon*, 9 Pet. 483, 540; *Krippendorf v. Hyde*, *ubi supra*; and in *Morgan's L. & T., etc., Co. v. Texas Cent. R. Co.*, *ubi supra*; and in the notes to *Daniell*, Ch. Prac. (6th Am. Ed.) 1853. There seems to be no doubt that, under the authority of these cases, Kemp Van Ee would have been entitled to an intervention by summary petition after the fund came into the registry of the court in equity, and to thus maintain his interest. This, however, would have been an essentially different proceeding from that of making parties to the main controversy, and would have been of the character of the intervention of Mr. Talbot in the case at bar. This question has no relation to the so-called "class suits," nor to the coming in of a cestui que trust or a stockholder, nor to cases like *White v. Hall*, 1 Russ. & M. 332, where new parties come into the accounting after a decree. In none of these are the issues presented by the bill substantially changed by the interposition of the new parties.

As Kemp Van Ee was improperly made a defendant, it follows that his cross bill was unauthorized, and should be dismissed. So far as the original bill was concerned, he was dismissed from it on his own motion under equity rule 66; so that, when his cross bill is dismissed, the irregularity will have been wholly obviated. In *King v. Asylum*, 12 C. C. A. 145, 64 Fed. 331, the authorities to the effect that an irregularity, subsequently obviated, is not ground for a reversal or modification, were collected, and the rule was reaffirmed. On the principles and cases already referred to, Kemp Van Ee was entitled, at some stage of the cause below, after the fund was accumulated in the registry of the court in equity, to intervene *pro interesse suo* by summary petition. There is no rule touching the merits or the necessities of technical proceedings which prevents this court from regarding his cross bill as such a petition. His interest is not disputed by Pike or Gregory, at least so far as these appeals are concerned. There is no error in reference thereto assigned by them, and none suggested by their counsel. As no error has been assigned to the effect that Butterfield's cross bill was not properly filed, so that nobody objects to it, the issue made by him can properly be determined by this court on the present record, and the interest of Kemp Van Ee in the fund, and the extent of it, be thus determined as between all parties. This court may, therefore, on the principles already laid down, treat the cross bill of Kemp

Van Ee as in effect a petition to intervene, and confirm the decree in his behalf for the amount determined to be due him.

As, however, he volunteered himself as a party defendant, and brought a cross bill, instead of the more summary and less expensive proceeding by a petition, he ought to be required to pay costs on the cross bill in this court and in the court below. The court perceives no ground on which any question of jurisdiction can be raised. The removal from the state court was under the act of March 3, 1875, c. 137, § 3 (18 Stat. 471), and an examination of the papers shows it was correctly made. The provision touching the residence of the petitioner for removal, found in the act of 1888 (*Martin v. Snyder*, 148 U. S. 663, 13 Sup. Ct. 706), is not found in the act of 1875; and the act of 1875 has a range so broad that the restriction contained in section 1 does not apply to removals under section 2. *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507. Each party was a citizen of a different state, or of a foreign state, so that in every aspect there was a controversy "between citizens of different states," or "between citizens of a state and foreign citizens or subjects." The jurisdiction being otherwise sufficient, any difficulty arising from residence may always be waived under any of the statutes. *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982; *Shaw v. Mining Co.*, 145 U. S. 444, 453, 12 Sup. Ct. 935; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 206, 13 Sup. Ct. 44.

The objections made on behalf of Gregory, that the bill filed by him January 10, 1887, was treated by the court as a supplemental bill, and that that bill and the original bill were held to be one cause, and were retained as against Mary H. Pike, involve matters as to which he can make no complaint. He made her a party, and in the form and at the time which he himself elected, and he expressly described the bill filed January 10, 1887, as in the nature of a supplemental bill. It clearly was supplemental in all its aspects. Gregory cannot take any advantage of errors of his own creating, if there were any in these matters.

On the application of Gregory for leave to discontinue as against Mary H. Pike, filed September 19, 1890, leave was granted, with the following qualification: "Reserving all rights of parties other than said plaintiff, acquired by reason of said Mary H. Pike having been made a party defendant." This leave was granted January 24, 1891. October 30, 1890, Gregory filed an order as of course, dismissing his bill against Mrs. Pike. No such practice as dismissal by an order as of course seems to be known in the federal courts, except under equity rule 66, although it existed in the English chancery, at the time its practice was adopted by the supreme court, in cases where the plaintiff was entitled to have his bill dismissed without prejudice. The dismissal stands on the order entered by the court on Gregory's petition, and this order was entered, not as of course, but in view of all the equities. It subsequently appeared to the court on the petition of Mrs. Pike, filed May 1, 1893, that the dismissal was under a mistake, and was not equitable, and therefore it was revoked. This, of course,

was within the power and reasonable discretion of the court below, unless for one of two reasons, namely: First, that the dismissal ended the litigation as to her, and that, as several terms had elapsed before she was restored to the case, the court had no power thus to restore her; second, that, at the stage of the litigation at which the bill was dismissed as against her, plaintiff had a right to have the bill so dismissed without prejudice, so that the dismissal was a matter of right, and not of equitable consideration, and the court had no power, therefore, to rescind the order.

As to the first, no formal decree had been entered dismissing as against her. The phraseology of the order of the court, "reserving all rights," required further consideration and a formal decree, before the dismissal was effectual; and, independently of this, the case was under the control of the court until the final decree was entered, March 8, 1894.<sup>1</sup>

So far as the second point is concerned, the state of the case when the dismissal was entered was as follows: There had been the cross bill filed by Butterfield, in which Mary H. Pike, as executrix, was made a defendant, it had been answered by her, replication filed, and evidence taken and filed. In *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, *Bank v. Rose*, 1 Rich. Eq. 294, is cited with apparent approval. In that case a cross bill had been filed, and affirmative relief asked for, and the case prepared for hearing, and it was held that the motion to dismiss could not be granted. The following proposition, however, seems decisive. Gregory's original bill was filed before either of the Swift notes came due, and it prayed no relief against Swift, except that he should be enjoined from paying to any other person than Gregory. The supplemental bill, however, prayed direct relief against Swift, to the effect that Swift might be ordered to recognize the right of Gregory to collect and receive the amount of the judgment which had already been entered in the suit at law on the note of \$20,334.60, although no special relief was prayed against him as to the note of \$15,000. At the time of the filing of the supplemental bill, Swift had already paid into the registry of the court, in the suit at law, the amount of that judgment. On the law side of the court an order was entered, January 10, 1887, that the above amount be transferred to the equity side in this cause, and remain subject to the order of the court in that connection. No corresponding order seems to have been entered by the court in equity, but a copy of this order was ordered to be filed on the equity side on the same day. The transfer of the fund, moreover, was recognized by all parties, because it appears that March 26, 1887, Gregory moved in the equity cause that it be deposited with the Boston Safe-Deposit & Trust Company, and an order was entered directing \$24,000 to be thus deposited, the order showing that all parties in interest consented.

<sup>1</sup> See *Bank v. Smith*, 156 U. S. 330, 15 Sup. Ct. 358, decided since this opinion was announced.

It thus appears that Swift had indirectly paid into the registry the amount of the larger note and interest, subject to the disposal of the court in this cause. Further, he afterwards, in the same indirect way, paid into the registry of this court in this cause the amount of the \$15,000 note. Thereupon, Swift having in effect complied with all the relief prayed for against him, and being no longer personally needed in the cause, the bill was dismissed as against him, October 19, 1889, the order stating that no objection was made. The effect of these proceedings we have already referred to. The result was not at all like ordinary interlocutory orders, by which persons not parties to the issues in the bill pay money into court, because, in this case, Swift was made one of the defendants; so that all issues which could affect Swift were disposed of, and the bill had, therefore, passed the stages subsequent to which, according to the opinion of the supreme court in *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, *ubi supra*, a plaintiff has not the right to require that his bill be dismissed. The result was that, at the stage of the case at which the bill was dismissed as against Mrs. Pike, it could only have been dismissed on equitable grounds, by the consent of the court; and the court perceiving that the supposed equitable grounds for dismissal did not exist, and that the dismissal was in fact inequitable, had the right, so long as it retained control of the case, to revoke its order.

As Butterfield was the appellant on his own bill, Gregory is not limited by any assignment of errors in relation thereto. It is too clear to require discussion that Butterfield's bill was strictly a cross bill, and that the parties were correctly made, as they included the parties to the original bill and none others. Kemp Van Ee should not be held to be such a party, and was correctly not joined. Gregory's objections in relation to the service made on Butterfield's cross bill, and as to the general right to entertain jurisdiction of such bills, are clearly not well founded. All his other objections are rendered immaterial by our determinations of other parts of the case.

Butterfield's assignment of errors on his appeal, Nos. 9 and 10, set out that the proceeds of the notes should have been held subject to an accounting by him. This probably means "to" him. They complain that the decree does not recognize the notes as partnership property, or as property to be used for the adjustment of equities between partners. The assignments do not conform to the case made for Butterfield, either in his cross bill or in his answer to Gregory's bill, or his answer to Kemp Van Ee's cross bill or his deposition. In his cross bill he says the notes were, both "in law and equity, his notes, to be used by him as the best interests of such associates might require." Although this alleges nominally a title in himself, yet it is such a title as would be held to make him a trustee of them, and not an owner in his own interest or a holder of them in any partnership relationship. His answer to Gregory's bill is to the same effect. He there says that the shares of stock in the Sierra Company, of

which the notes were the proceeds, were given to him, "to be used by him, and sold, if possible, for the purpose of raising money to be used in promoting the interests of all,"—that is to say, Gregory, Kemp Van Ee, Jones, and Butterfield,—in carrying out the scheme out of which arose the contract with Pike.

Neither the cross bill nor the answer sets out facts constituting a partnership in the notes. Their sensible and fair construction, taken as a whole, is that the Sierra stock, and the notes which were the proceeds of it, were placed in Butterfield's hands to be used by him to raise money to advance the common scheme; that, therefore, so far as they were used for that purpose, they were legitimately used; that, subject to whatever liens might thus be imposed on them, they remained always the property of Gregory and Kemp Van Ee; so that they always had the right to recover them by paying off the liens; and that, finally, as there is no lien on them except the pledge to Mr. Pike, Gregory and Kemp Van Ee have a right to redeem them, or their proceeds, from his estate, and when redeemed they become their property.

None of Butterfield's statements are supported by anything aside from his own deposition, except the deposition of Guy. This, even, if accepted without reservation as to all the facts concerning which Guy had any personal knowledge, would be of no weight against the great mass of facts in the case, as it relates only to an incidental matter; but Guy was a solicitor, and had, at least, some general knowledge of the rules governing the conduct of witnesses, and his disregard of them renders his deposition worthless. Against the deposition of Butterfield are those of Gregory and Kemp Van Ee, which are supported by four important documents, each of them of principal, and not of subordinate or incidental, character, and clearly showing that Butterfield had no interest in the notes. These are Butterfield's receipt to Gregory of March 30, 1883, for the Sierra stock, his acknowledgment touching the notes to Gregory of April 9, 1883, his order on Pike for the notes of December 13, 1883, and the unanswerable contract of April 7, 1883. The claim of Butterfield is in no way established, and we fully concur with the conclusions of the circuit court touching it. As he had no interest in the notes, he goes wholly out of the case, and all his other alleged errors become, of course, irrelevant.

It is ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for in his intervening petition; that the amount so recovered rank as explained in the opinion filed this day in this case; that the cross bill of Kemp Van Ee stand as an intervening petition *pro interesse suo*; that Mary H. Pike, executrix, recover her costs against Gregory in this court and in the circuit court; that Gregory recover his several costs against Butterfield and Kemp Van Ee on their cross bills, both in this court and in the circuit court; that no other costs be recovered in either court, except as expressly stated in the decree entered in the circuit court March 8, 1894; that Mary H. Pike, executrix, and Kemp Van Ee be allowed, respectively,

accumulations and interest to the time of the entry of the final decree, on the rules applied to him or her in said decree entered said March 8th; and that the case be remanded to the circuit court, with directions to enter a final decree conforming to this order so far as it goes, and in all other respects to said decree entered March 8, 1894.

(March 21, 1895.)

Petitions for a rehearing have been filed by appellants Gregory and Butterfield. The court finds nothing in the petition filed by Butterfield, except what has been fully considered by it, barring the fact that some reference has been made to evidence which it is said was not rightfully read in the case. As to this, it is sufficient that no such question was raised in the court below, and therefore it cannot be raised in this court. In the petition for a rehearing filed by appellant Gregory as against Pike, it is insisted that the court has overlooked the point made by Gregory touching the alleged abatement of his original bill. This was rendered unimportant by what was held in our opinion with reference to his bill filed January 10, 1887. The petition also insists that this court overlooked the order passed July 9, 1887, touching the \$15,000 note. The petitioner is mistaken, as the opinion of the court covers both notes. It is also insisted that an award of \$25,000, with interest, has been made to Mary H. Pike, "in the absence of any claim asserted by her in any formal manner to said amount, or to any amount whatever, and in the absence of any proofs of petition or pleadings or evidence offered by her." In the absence of any precise definition, this may be taken very broadly or very narrowly. There is no assignment of error touching it, unless it be the fifth, which, unless limited by the specifications following it, is so broad that, by the practice of the courts of appeals in all the circuits, this court is not bound to search through the record on account of it. It may be presumed that this proposition in the petition for a rehearing relates to a claim made at the original hearing, that, under the pleadings, neither Mr. Pike, nor his estate, could obtain a lawful recovery or decree against any one anywhere, and that the decree of the circuit court provided for no right of redemption on the part of Gregory as pledgee. If the decree in favor of Mary H. Pike was personal against any individual, and not limited to the fund, the error would be so palpable that this court might be obliged to consider it, even under very inartificial assignments. But the decree does not take on that character; and the rest of these suggestions, in the absence of any specific assignment touching them, are too technical to require our attention.

The petition also requests the court to state on what ground it made its decree in favor of Mary H. Pike. Inasmuch as we had no occasion to pass on the merits of the claim of Mary H. Pike, it is beyond our province to attempt any explanation of the grounds on which the merits were decided in her favor by the court below. For all those matters the appellant Gregory is referred to the proceedings and decrees of the court below. Not only do our rules limit an



appellant to his assignment of errors, but they provide that his brief shall exhibit a clear statement of the points of law or fact to be discussed. Without a fair compliance with these requirements, it would be impracticable for this court to perform its work understandingly. In order that the petition for a rehearing should obtain respectful consideration, we have carefully gone over anew the assignment of errors filed with the appeal, and also the points stated in the brief at the original hearing of the appellant Gregory, and find that all the points raised were covered by our opinion, so far as they were within the scope of the errors assigned, except, also, so far as the disposition by us of some points rendered it unnecessary to consider certain others.

Attached to appellant Gregory's petitions for a rehearing are certain affidavits. The petition as against Mary H. Pike refers to new matter, which it is said has been learned by the appellant Gregory since the argument of the appeals in this court. We have not examined the affidavits to ascertain whether or not they sustain this statement. Since the decision of the supreme court in *Brown v. Aspden*, 14 How. 25, holding that a rehearing is not a matter of right, petitions for rehearsings in the supreme court are held to be regulated by rule 30 of that court (3 Sup. Ct. xvi.), and, consequently, in this court must be held to be regulated by our rule 29 (11 C. C. A. cxii., 47 Fed. xiii.). It is thoroughly settled that on a petition for a rehearing in the supreme court, especially in an equity cause, and by consequence in this court, no new matter can be introduced. *Russell v. Southard*, 12 How. 139, 159; *Maxwell Land-Grant Case*, 122 U. S. 365, 375, 7 Sup. Ct. 1271. The practice, of course, is less strict in the circuit court, or other courts of the first instance. Therefore, except in special cases, and then only after leave is granted by the court, no papers can be filed under rule 29, or as a petition for rehearing, except the petition itself in the form provided by that rule. The clerk was not authorized to file the affidavits without leave of court first obtained, and they cannot be considered by us. If any new matters have arisen changing the equities, probably due relief will be found, but it is not in this form; and, according to the general practice in equity, it cannot ordinarily be applied for in any form which will delay the final disposition of an appeal, or the execution of the judgment following therefrom. *Southard v. Russell*, 16 How. 547; *Ricker v. Powell*, 100 U. S. 104, 108; *Gaines v. Rugg*, 148 U. S. 228, 242, 13 Sup. Ct. 611; *Watson v. Stevens*, 3 C. C. A. 411, 53 Fed. 31; *Smith v. Weeks*, 3 C. C. A. 644, 53 Fed. 758; *Daniell, Ch. Prac.* (6th Am. Ed.) 1582.

In the petition for a rehearing filed by appellant Gregory, as against *Kemp Van Ee*, the fifth assignment of error is reiterated; but in this connection the petition seems to assent to the view that its expressions, which are too broad standing alone to oblige this court to regard them, are limited by the specifications which follow. Those specifications were disposed of by us, although no express allusion was made to the demurrer or the plea referred to in them; nor was any necessary, because the subject-matters of them were made unimportant by other parts of the opinion. After the de-

murrer and plea were disposed of, appellant Gregory answered the cross bill of Kemp Van Ee, proofs were taken touching the merits of Kemp Van Ee's claim, and the merits were heard by the court below. The assignment of errors, as already said, raised no question as to the merits of that claim, and we were, therefore, to assume that they were not in issue. As with reference to the petition as against Mary H. Pike, we have re-examined in this connection the assignment of errors and the points made in the brief against Kemp Van Ee, and find nothing which was not duly considered by us. After considering the several petitions for a rehearing, no judge who concurred in the judgments desires that a rehearing be granted, or permitted to be argued, and therefore orders will be entered as follows: After duly considering the petition for a rehearing, no judge who concurred in the judgment desiring that it should be granted, or permitted to be argued, it is denied. Mandate will issue forthwith.

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## BALDWIN v. NATIONAL HEDGE &amp; WIRE-FENCE CO.

(Circuit Court, E. D. Pennsylvania. May 14, 1895.)

No. 28.

## REFORMATION OF CONTRACTS—EVIDENCE—ASSIGNMENT OF PATENT.

An assignment of all the patentee's interest in a patent will not be reformed, on the ground of mistake, so as to assign merely his rights for one county, where the allegations of the bill are denied, and the proofs to support the same are not clear and satisfactory.

This was a bill by William Baldwin against the National Hedge & Wire-Fence Company for the purpose of reforming a contract purporting to assign all of complainant's rights in a certain patent.

Meade D. Detwiler, H. Sargent Ross, Baldwin & Oliver, and F. Carroll Brewster, for complainant.

James Kell and John G. Johnson, for defendant.

DALLAS, Circuit Judge. Upon the day of its date an instrument of writing was executed and delivered, as follows:

Plashed Fences, William Baldwin.

York, Penna., March 4th, 1889.

Know all men by these presents, that I, William Baldwin, of Marion, Indiana, for one dollar to me in hand paid, and other valuable considerations, the receipt whereof is hereby acknowledged, I do hereby assign, transfer, and set over all my title and interest in patent No. 274,895, date April 3, 1888, being the sole owner and patentee, to the National Hedge and Wire-Fence Company, of York, Penna.

William Baldwin. [Seal.]

Witness:

E. H. Neiman,  
S. B. Gleason,  
J. Jessup.

This suit is brought by the assignor against the assignee. The bill alleges that "it was by mutual mistake of the parties that said instrument was so written as to assign or transfer all the right of the

orator under his patent, and that he did not intend at any time to make such a transfer or assignment, and the defendant did not intend that such assignment or transfer should be made, but both parties then and there meant and intended that only a right in and to (said) county of Baltimore should be assigned and transferred." The relief sought is "that the mistake in said instrument \* \* \* be corrected; that said instrument be so reformed as to assign and transfer to the defendant a right in and to said county of Baltimore, Maryland," etc. The answer denies the material allegations of the bill.

If the question of fact presented might be dealt with as a doubtful one, a discussion of the evidence would be necessary; but as, in suits of this kind, equity will withhold relief if the mistake is not made entirely plain, it is sufficient to say that in the present case this certainly has not been done. Upon attentively considering all the proofs, I am constrained to hold that they are, at most, not clear and satisfactory. They are by no means "free from doubt and uncertainty, and such as to entirely satisfy the conscience of the court." *Baltzer v. Railroad Co.*, 115 U. S. 634, 6 Sup. Ct. 216; *Van Vleet v. Sledge*, 45 Fed. 743. The rule to which I have referred is thoroughly well settled, both in England and in this country, and in my judgment the present case is one which peculiarly calls for its enforcement. The bill is dismissed.

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DONALD v. SCOTT et al.

(Circuit Court, D. South Carolina. May 8, 1895.)

1. CONSTITUTIONAL LAW—SUIT AGAINST A STATE.

The statute of South Carolina known as the "Dispensary Law" prohibits citizens of that state from bringing into it, for their own use, alcoholic liquors purchased in other states, and directs the seizure and confiscation of such liquors, but provides for the purchase of such liquors either in or out of the state by state officials, and for their sale by such officials. One D., a citizen of South Carolina, purchased in other states, and imported, for his own use, certain alcoholic liquors, which were seized by the state constables, acting under the dispensary law. D. filed a bill in the federal court for an injunction to restrain such constables from continuing their interference with his importation of alcoholic liquors; alleging that the dispensary law was an interference with interstate commerce, and in contravention of the acts of congress relating thereto. *Held*, that the suit was not a suit against the state.

2. UNITED STATES COURTS—JURISDICTION—FEDERAL QUESTION.

*Held*, further, that the suit involved a federal question, and was within the jurisdiction of the courts of the United States.

3. INTERSTATE COMMERCE—DISCRIMINATION—SOUTH CAROLINA DISPENSARY LAW.

*Held*, further, that so far as the dispensary law prohibited citizens of the state from purchasing alcoholic liquors, for their own use, in other states, and from importing them into South Carolina, it was a discrimination against the products of other states and the citizens of such states not patronized by the state officials of South Carolina, and was void as an interference with interstate commerce.

4. SAME—POLICE POWER.

*Held*, further, that such interference could not be justified as an exercise of the police power.

This was a suit by James Donald against J. M. Scott, M. T. Holley, Sr., R. M. Gardner, and E. C. Beach for an injunction to restrain the defendants from seizing liquors, the property of the complainant. Complainant moved for a preliminary injunction. Granted.

Bryan & Bryan, for complainant.

Wm. A. Barber, Atty. Gen., and C. P. Townsend, Asst. Atty. Gen., for defendants.

SIMONTON, Circuit Judge. This is a bill against the defendants, the state constables of the state of South Carolina. The bill states: That the complainant is a citizen of the United States and of the state of South Carolina, and was the owner of certain packages of alcoholic liquor, to wit: One barrel of Rochester beer, made in the state of New York, and shipped to him by ocean and land routes to the city of Charleston, his place of residence; one package of Pickwick Club whisky, containing six quart bottles, purchased in Baltimore, in the state of Maryland, and shipped to him by steamer and railroad to Charleston, S. C., his residence; and one case of domestic California claret, containing one dozen quart bottles, shipped to him from the place of purchase, Savannah, in the state of Georgia, to Charleston, by rail. That these packages contained liquors for his own personal use and consumption, and not for sale in any way. That none of them contained any product of the state of South Carolina, but their contents were products of other states of the Union. That each package was openly marked in his name. That upon the arrival of each of the said packages at Charleston, its destination, it was forcibly seized by the defendants, claiming to act as state constables, and taken and carried away by them, under the pretense of authority of the act of the general assembly of South Carolina, approved January 2, 1895, commonly known as the "Dispensary Law." That, before the arrival of each shipment, the complainant had given notice to the defendants of his intention to import the same for his own personal use from points without this state; and that defendants, when they made their several seizures, had knowledge of all the facts connected with the importation, shipment, and proposed use of the packages. That upon each seizure, and after demand and refusal, he brought his action for the unlawful trespass on his rights by the defendants; and that, notwithstanding this, they persist therein, and manifestly propose to drive him to a multiplicity of suits. That he has no adequate remedy at law for these repeated violations of his rights, as the defendants are notoriously insolvent and pecuniarily irresponsible. He avers that so much of the dispensary law as is set up in justification of these acts of the defendants in preventing him from importing for his own use and consumption alcoholic liquors, the products of other states, into this state, violates the interstate commerce law as established by the constitution and laws of the United States, and is null and void. His bill, filed as well in his own behalf as in that of other citizens of this state in like plight with himself, prays an injunction against the defendants, forbidding them to continue their unlaw-

ful search and seizure of packages imported as these were. Upon filing the bill, a rule was issued requiring the defendants to appear and show cause why an injunction should not issue, as prayed for in the bill. The defendants have appeared, and have filed their return. After denying the jurisdiction of the court, because this suit is, in fact, one against the state, and because it presents no question arising under the constitution and laws of the United States, and because the allegations of the bill show no ground of equity jurisdiction, they answer in detail the allegations of the bill, excusing and justifying their conduct in the premises under the provisions of the dispensary law.

The arguments at the hearing on both sides have been able and exhaustive. The time at the command of the court forbids for the present any extended discussion of the important points raised and elaborately discussed. This must be reserved for a future occasion. Conclusions only can at this time be given. It is not a suit against the state of South Carolina, nor is she in any way a party thereto. Certain persons claim to act in the name of the state, basing their claim on the dispensary law. Their justification depends on the validity of that law; and if it, or that part of it which authorized them to seize and carry away the property of the complainant under the circumstances charged in the bill, be in conflict with the constitution of the United States, or any law made thereunder, it is null and void, is as if it never existed, and they are left without justification. These questions made in the bill are federal questions.

Are the acts complained of in violation of the constitution of the United States or of any law passed thereunder? This court, sitting in equity, has jurisdiction over the matters stated in the bill to prevent a multiplicity of suits, and because the complainant has no plain, adequate, or complete remedy at law.

We come, then, to the all-important question on the merits of the bill. Is the provision of the dispensary law, which forbids a citizen of the state himself to import for his own use, from the other states, alcoholic liquor, sustainable under the act of congress commonly known as the "Wilson Bill"? It is, if these provisions of the dispensary law are the lawful exercise of the police power of the state. The dispensary law nowhere declares that the use and consumption of alcoholic liquors in themselves are injurious to the morals, good health, and safety of the state, or of her people. On the contrary, the dispensary law makes the most ample provision for the purchase of alcoholic liquors in this state and elsewhere, for their distribution in convenient packages, within the reach of nearly every person throughout all portions of the state, for use and consumption by the people of the state, and in every way it encourages such use and consumption. Even in localities in which the majority of the inhabitants refuse to have a dispensary, provision is made for the procurement of alcoholic liquor by those persons within the locality who desire to use it. Alcoholic liquor is declared to be contraband, and against the morals, good health, and safety of the state, only when it is not imported by the dispenser, or is not in his hands or in the hands of some one with his permission. Alcoholic liquors

imported into this state, and declared contraband and injurious to the morals, good health, and safety of the state, and so subject to seizure, just as soon as they are seized, and passed into the hands of the dispenser, lose their injurious qualities, are put into the channels of distribution, and are sold to the people of the state for their use and consumption.

It is not necessary to go into a minute and detailed examination of all the provisions of the dispensary law, nor to determine whether all these provisions are or are not in the exercise of the police power. It is sufficient for the purposes of this case to say that in so far as the dispensary law forbids a citizen to purchase in other states, and to import into this state, alcoholic liquors for his own use and consumption, the products of other states, it discriminates against the products of other states. Such discrimination cannot be made under the guise of the police power. *Walling v. People of Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, cited and approved in *Plumley v. Massachusetts*, 155 U. S. 471, 15 Sup. Ct. 154; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367. And, further, in so far as this act permits the chief dispenser to purchase in other states alcoholic liquors, and to import them into this state for the purpose of selling them, for use and consumption, at retail within the state, and forbids all other persons from so purchasing and importing for their individual use and consumption, it discriminates against all other citizens of the state. It also makes a discrimination against all persons in the trade in other states who are not patronized by the state dispenser, forbidding them to seek customers within the state, and to enjoy a commercial intercourse secured to others in this state. These conclusions rest on this discrimination. If it did not exist, and if all alcoholic liquors were excluded from the state, or if all persons were forbidden to import alcoholic liquors, or if the laws of South Carolina had declared that all alcoholic liquors were of such poisonous and detrimental character, and that their use and consumption as a beverage were against the morals, good health, and safety of the state, other and different questions would arise.

Let an injunction issue as prayed for in the bill.

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YARDLEY v. TORR et al.

(Circuit Court, E. D. Pennsylvania. April 26, 1895.)

No. 5.

1. FRAUDULENT CONVEYANCES—INNOCENT PURCHASER.

T., a stockholder to a large amount in an insolvent bank, on the day of the failure of such bank conveyed a large quantity of real estate, constituting all his property, to his children, in consideration of natural love and affection. The children of T. subsequently conveyed portions of such real estate to purchasers for valuable consideration, and mortgaged other portions. None of the purchasers or mortgagees had actual notice of T.'s indebtedness at the time of the conveyances to his children. *Held*, that the record of the deeds in consideration of love and affection was not enough to put such purchasers or mortgagees upon inquiry, and they were entitled to hold the land, as against the receiver of the bank.

## 2. SAME—VOLUNTARY CONVEYANCE.

*Held*, further, that the voluntary conveyances to the children of T. were void, as against the bank, and the lands, or the proceeds of sales or mortgages thereof, in the hands of such children, were subject to T.'s indebtedness as stockholder.

### Hearing on Bill, Answer, and Proofs.

This was a bill in equity filed by Robert M. Yardley, as receiver of the Keystone National Bank of the City of Philadelphia, against William S. Torr, Charles C. Torr, Margaret Boyd, William Smith, John Mahony, James Welsh, James Tully, Lucy Torr, Charlotte Grosse, J. Edward Addicks, Robert C. Laird, Morris W. Schaeffer, Anna Bringham, Charles E. Taber, Washington H. Bringham, Harry Torr, the George Nugent Home for Baptists, the Pennsylvania Museum & School of Industrial Art, Ark Building & Loan Association, the Fidelity Insurance, Trust & Safe Deposit Company (trustee for Josephine Y. Delbert), Goethe Building Association No. 2, the Pennsylvania Company for Insurance on Lives and Granting Annuities (trustee for Fannie Y. Riter), Gilbert Riter (trustee for Caroline Y. Riter), and City Hall Building & Loan Association. It averred: That on the 20th day of March, 1891, the said Keystone Bank was declared insolvent, and taken charge of by the comptroller of the currency of the United States, and that on the 9th day of May, 1891, the said complainant was appointed receiver of the said institution. That, on the day of the failure, William S. Torr was a shareholder of said bank, and was the owner and holder of 755 shares of the capital stock thereof. That the said comptroller subsequently ordered an assessment of \$50 per share upon the shareholders, in pursuance of the act of congress in such case made and provided; that is to say, the sum of \$37,750 upon William S. Torr, as the holder of the shares before mentioned. That subsequently the complainant commenced a suit for the recovery of the said sum against the said William S. Torr, and obtained a judgment against him for the sum of \$39,781.88, with interest, on the 23d day of January, 1893. That complainant on the 23d day of February, 1893, issued a writ of fieri facias on said judgment against said William S. Torr, which writ was duly returned nulla bona. That said judgment was yet in force, and the whole amount, with interest, was due thereon. That on the 20th day of March, 1891,—the day of the failure of the Keystone Bank,—said William S. Torr was the owner in fee simple of certain real estate situate in the county of Philadelphia, and within the Eastern district of Pennsylvania, particularly described in the bill, and consisting of several lots or pieces of ground referred to and designated as A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z. That said real estate was unincumbered, and of the value of \$40,000 and upwards, and that said William S. Torr had no other real estate, and that he has no personal property which is subject to levy and execution. That for and with the purpose and intent to hinder, delay, and defraud his creditors of their just and lawful actions, debts, and damages, said William S. Torr did convey all of the said real estate without any valuable consideration whatever, but for the alleged consideration of natural love and affection, as in his deeds of conveyance expressed,—that is to say, on the 9th day of May, 1891, he executed and delivered five several deeds of conveyance, the first to his son Charles C. Torr, his heirs and assigns, for the real estate described as A to K, inclusive; the second to his daughter Lucy Torr, her heirs and assigns, for the premises described as L to S, inclusive; the next two to his daughter Anna Bringham, her heirs and assigns, for the premises described as T to X, inclusive; the last to his son Harry Torr, his heirs and assigns, for the premises described as Y and Z. That by the act of 13 Eliz. c. 5, which is part of the common law of Pennsylvania, the said five conveyances are void, frustrate, and of none effect. That said defendant Charles C. Torr subsequently mortgaged and conveyed the said several premises to the said defendants the George Nugent Home for Baptists, the City Hall Building & Loan Association, William Smith, James Welsh, and James Tully. That said Lucy Torr subsequently, by various conveyances, conveyed the said several premises to others of the said defendants,

and that said Harry Torr did the same. That said Anna Bringhurst and Washington H. Bringhurst, her husband, subsequently conveyed the said several premises, for the consideration of five dollars, to Charles E. Taber, trustee, and the said Charles E. Taber, trustee, on the same day, for the consideration of five dollars, conveyed the said several premises to the said Washington H. Bringhurst, husband of said Anna Bringhurst, who now holds the same. That all the grantees, mortgagees, purchasers, and takers from the said children took with notice that the deeds of conveyance from said William S. Torr were wholly without consideration and void, as against the creditors of the said William S. Torr, and made with intent to hinder and defraud his creditors. Wherefore the bill prayed relief by cancellation of the said conveyances and mortgages. The defendants other than the four children filed separate answers, denying that they had notice that the said deeds were void in law, and made with intent to defraud creditors, and averred that full consideration had been paid for the same, asking that the complainant be put to his proofs.

Cases cited by counsel for complainant:

Hanson v. Eustace, 2 How. 688; McKibbin v. Martin, 64 Pa. St. 352-356; Mateer v. Hissim, 3 Pen. & W. 160; Treadway v. Turner (Ky.) 10 S. W. 816; Clements v. Moore, 6 Wall. 299; Post v. Stiger, 29 N. J. Eq. 554.

Cases cited by counsel for defendants:

Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329; Bailie v. Bailie, 166 Pa. St. 472, 31 Atl. 246; Kennedy v. Gibson, 8 Wall. 498-505; Buckley v. Duff, 114 Pa. St. 596-603, 8 Atl. 188; Ditman v. Raule, 124 Pa. St. 225, 16 Atl. 819.

Read & Pettit, for plaintiff.

John G. Johnson, George P. Rich, W. C. Ferguson, J. Willis Martin, and Francis F. Kane, for defendants.

BUTLER, District Judge. Not only were the conveyances from W. S. Torr voluntary and therefore ineffectual as against existing creditors, but the time and circumstances under which they were made raise a strong presumption that they were executed in anticipation of a call to respond to his statutory obligation as a stockholder of the bank. For the purposes of this case however, it is sufficient that the transfers were voluntary, and that the properties transferred constituted substantially all he owned.

His obligation to the creditors of the bank was a debt, in no respect different from other debts subject to contingencies. Here indeed no contingency existed; the bank was insolvent and a large amount of indebtedness existed which the stockholders were responsible for. The transfers are therefore void as against the plaintiff; and to the extent that the properties remain in possession of the original grantees, and also to the extent of all proceeds in their hands, of sales or mortgages made by them, the bill is sustained.

As respects purchasers from these grantees for valuable consideration, and mortgagees who have loaned money on the properties, without notice, the bill must be dismissed. The plaintiff concedes that all transfers and mortgages by the grantees were for full value, and without actual notice, except that made by Mrs. Bringhurst to her husband. It is urged, however, that the conveyances from Torr were, on their face, sufficient to put purchasers and mortgagees to inquiry. I do not think so; presumably the conveyances were honest. This is the natural and legal inference. It could not



be inferred that the grantor was indebted, or that he had not retained sufficient property to pay his debts, if he had any. Besides, of what avail would inquiry have been—of whom could it be made? The grantor and grantees would say the transaction was honest; their acts said so. If they had believed the transfers to be unlawful, and intended to perpetrate a fraud, the face of the deeds would be otherwise, the considerations would have been different. It is quite probable that the grantor did not regard the liability arising out of his relation to the bank as a debt, and he would therefore have answered that he was not indebted, if the question had been asked. The purchasers and mortgagees could not be expected to know or suspect that he was such stockholder and consequently to inquire at the bank. I will not pursue the subject, nor comment on the authorities cited by counsel. The cases are not entirely harmonious nor generally in point. Most that is said on the subject is mere dicta. The weight of authority, however, is against the plaintiff.

As respects the property transferred to Mr. Bringham the bill is sustained.

I do not find anything in the case which calls for further comment.

A decree may be prepared as indicated.

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WESTERN MORTG. & INV. CO., Limited, v. BURFORD et ux.

(Circuit Court, N. D. Texas. April 1, 1895.)

No. 202.

1. HOMESTEAD—ESTOPPEL—CONSTITUTION OF TEXAS.

The constitution of Texas provides (article 16, § 50) that no mortgage or other lien on the homestead shall ever be valid, except for purchase money or improvements made thereon, whether created by the husband alone, or with his wife, and all pretended sales of the homestead, involving any condition of defeasance, shall be void. *Held*, that where the possession and use of the home on the land, claimed by a husband and wife as their homestead, is open and obvious, they are not estopped to claim it as such by a declaration in a mortgage of the land, executed and acknowledged by both of them, that such land is not their homestead.

2. SAME—WHAT CONSTITUTES—TEXAS STATUTE.

B. purchased, in 1880, 120 acres of land in Texas, and, at different times afterwards, he purchased other lands adjoining, in his own name, and his wife inherited a large adjoining tract. In 1884, B. built a house on the 120-acre tract, first purchased, and from that time, continuously, he and his wife made their home thereon. All the land of both husband and wife was inclosed and cultivated or used for pasture by them, in one body. In 1888, B. made an affidavit, for the purpose of obtaining a loan on his land, that such land was not his homestead, and executed and filed a designation of part of the tract belonging to his wife, as his homestead. In 1889, B. and his wife executed a mortgage on B.'s land, in which they disclaimed homestead rights in such land. Rev. St. Tex. art. 2336, provides that the homestead of a family, not in a town, shall consist of not more than 200 acres of land, in one or more parcels, provided the same shall be used for the purposes of a home. *Held*, that the homestead of B. and his wife was on the 120-acre tract, first purchased by B., and that such tract was exempt from the lien of the mortgage made by B. and his wife.

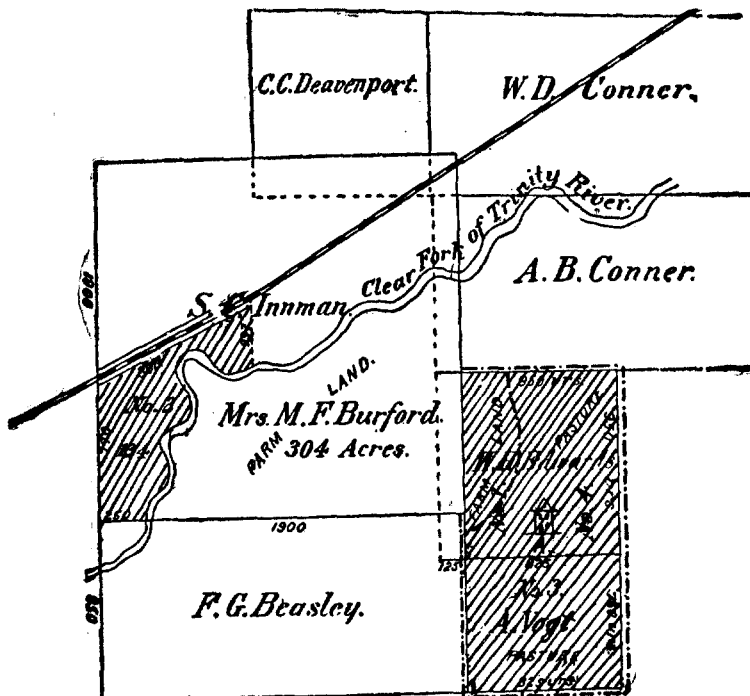
This was a suit by the Western Mortgage & Investment Company, Limited, against John W. Burford and Matilda F. Burford, to foreclose a mortgage. The cause was heard on the pleadings and proofs.

W. M. Alexander, for complainant.

A. M. Carter, for respondents.

Before McCORMICK, Circuit Judge, and RECTOR, District Judge.

RECTOR, District Judge. 1. On December 10, 1889, the respondents, John W. Burford and his wife, Matilda F. Burford, borrowed \$14,000 from the complainant company, and executed their note therefor of the same date, payable to complainant on the 10th day of December, 1892. They also at the same time executed three coupon notes to cover the annual interest on the main sum borrowed, at the rate of 10 per centum per annum. These coupons were in the sum of \$1,400 each, and were due, respectively, on December 10, 1890, 1891, and 1892. To secure the money so borrowed, respondents, on December 10, 1889, executed and delivered to complainant, at the time they received said money, a trust deed on 134 acres of the S. C. Inman survey, on 160 acres of the H. H. Edwards survey, and on 111 acres of the A. Vogt survey. The sketch here below shows these surveys, indicated by shaded portions, and also the 304 acres of the S. C. Inman survey, which belonged to Mrs. Matilda Burford by inheritance from her father.



EXPLANATION:

A - IS THE FAMILY RESIDENCE

----- IS THE FENCE.

In this trust deed there is an averment by respondents, both husband and wife, that the land mortgaged is not their homestead, and that "we have other property which we occupy and claim as such."

#### Deed of Trust.

"The State of Texas, County of Tarrant. Know all men by these presents, that we, J. W. Burford and wife, Matilda F. Burford, of Fort Worth, in the county of Tarrant and state of Texas, for and in consideration of the sum of five dollars, to us in hand paid by Zeno Carl Ross, of Fort Worth, Tarrant county, in the state of Texas, trustee, the receipt whereof is hereby acknowledged, and in further consideration of the debt and trust hereinafter mentioned, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said Zeno Carl Ross, trustee, and to his successor or substitute in this trust, and to his and their assigns, forever, all and singular the following described property, situated, lying, and being in the county of Tarrant and state of Texas, viz.: Being three certain tracts or parcels of land situate, lying, and being about 3 miles S., 34° W., from Fort Worth, and particularly described as follows: First tract: Being the H. H. Edwards survey of 160 acres of land, patented to Jesse Guin, assignee of H. H. Edwards, on August 16th, 1870, by patent No. 238, volume 19, and beginning at the southwest corner of the A. B. Conner 320-acre survey, in the east line of S. C. Inman's survey; thence south, with the Inman survey, 950 varas, to the southeast corner of the said Inman survey; thence east 950 varas, stake in mound; thence north 950 varas, a stake in the south line of A. B. Conner's survey; thence west 950 varas, to the place of beginning. Second tract: Being the Adam Vogt survey of 111 acres of land, patented to J. Hays, E. J. Kennedy, W. A. Wilson, and H. B. Wright, assignees, on January 9th, 1874, by patent No. 525, volume 41, and beginning at the southeast corner of the F. G. Beasley and the northwest corner of the T. B. Taylor 320-acre survey, a pile of rock; thence east, with north line of the T. B. Taylor survey, 825 varas, to rock in said line; thence north 760 varas, to the southeast corner of the H. H. Edwards 160-acre survey, a pile of rock in prairie; thence west 825 varas, with the south line of said Edwards survey, to a rock in the east line of said F. G. Beasley survey; thence south, with the east line of said F. G. Beasley, 760 varas, to the place of beginning. Third tract: Being 134 acres of the S. C. Inman survey of 640 acres, patented to L. J. Edwards, assignee, on May 30th, 1854, by patent No. 230, volume 10, said tract of 134 acres being a part of a 267-acre tract out of said Inman survey not sold by L. J. Edwards, and lying south of the Texas and Pacific Railway, and north of Clear Fork of Trinity river, and being described by metes and bounds as follows: Beginning at the south boundary line of said survey, 250 varas to center of river; thence down said river, with its meanderings, to the southwest corner of a 40-acre tract owned by L. M. Funck; thence north, with said Funck's west line, 266 varas, to right of way of Texas and Pacific Railway; thence south, 63½° west, with said right of way, 890 varas, to the west line of said Inman's survey; thence south, with the west line of said survey, 770 varas, to the place of beginning. To have and to hold the herein described premises, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Zeno Carl Ross, trustee, to his successor or substitute in this trust, and to his and their assigns, forever. And we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises, unto the said Zeno Carl Ross, trustee, to his successor or substitute, and to his and their assigns, forever, against every person whomsoever lawfully claiming or to claim the same or any part thereof. This conveyance is intended, however, as a trust for the better securing of four certain promissory notes, given by us, the said J. W. Burford and Matilda F. Burford, the grantors herein, bearing even date herewith, payable in gold coin of the present standard of fineness, if so required by the holder, to the order of the Western Mortgage and Investment Company, Limited, at the office of the Western Securities Co., Fort Worth, Texas (with current rate of exchange on New York), with interest thereon after maturity at the rate of twelve per cent. per annum, until fully paid, and which said notes are substantially as follows: One principal note for fourteen thousand dollars, payable

December 10th, 1892; one interest coupon note for fourteen hundred dollars, payable December 10th, 1890; one interest coupon note for fourteen hundred dollars, payable December 10th, 1891; one interest coupon note for fourteen hundred dollars, payable December 10th, 1892,—with a special agreement in making and delivery thereof: That if any one of the above-mentioned notes remain unpaid for ten days after maturity thereof, or should any breach be made of any of the covenants, or should any tax be imposed on this deed of trust or on the notes secured hereby, by or within the state of Texas, then, at the option of the said the Western Mortgage and Investment Company, Limited, or of the holder of said promissory notes, the whole principal, with interest then accrued, shall at once become due and payable, and the holder may proceed to collect the same by sale under this deed of trust or otherwise, as such holder may elect; and should such holder elect, or should it become necessary to foreclose this deed of trust by suit or proceedings in court, then we agree to pay, as attorney's fees, ten per cent. on the amount so collected.

"And whereas, for the better securing of said notes, with interest due thereon, to the payee or indorsee or other holder thereof, we, the said grantors herein, do hereby covenant with the said the Western Mortgage and Investment Company, Limited, and its assigns, as follows: That the herein-described property is not our homestead, nor claimed, used, or enjoyed by us as such, and that we have other property which we occupy and claim as such, and that the principal note secured by this deed of trust is given partly for and in lieu of a certain note of \$6,300.00, and recorded in volume 11, page 302, of records of mortgages and deeds of trust for Tarrant county, Texas; said note of \$6,300.00 being now this day paid off for us, and at our special instance and request, by the said company, with the express understanding and agreement that said company is thereby subrogated to all the rights, both legal and equitable, of the payee in and holder of said note so paid off, including all their rights against said land, and under said deed of trust given to secure said note of \$6,300.00. That we will pay the said notes and interest thereon as the same become due and payable. That we have a good and perfect title in fee simple to the said lands, and have the right to convey the same to the said Zeno Carl Ross, trustee. That we will execute, or procure to be executed, such further assurances upon the said land as may be requested from us by the holder of said notes or by said trustee. That the said land is free and clear of all incumbrances. That we will maintain all buildings and improvements in their present condition, and will not do or suffer any waste of the premises. And that we will pay all taxes or assessments levied by or within the state of Texas upon the said premises, and also (should the holder of said notes so desire) upon this deed of trust or the notes thereby secured before the same become delinquent.

"And it is hereby agreed between the parties hereto that the said the Western Mortgage and Investment Company, Limited, or other holder of said notes, may pay all insurance, taxes, or rates that may from time to time fall due and be unpaid in respect of the premises herein described, and this deed of trust, or the notes hereby secured, and charge such payments with interest thereon at the rate of twelve per centum per annum, on the said premises; and in case the said the Western Mortgage and Investment Company, Limited, or any holder of said notes, satisfy any charge on the lands, or make any further advances for insurance, taxes, or otherwise, to, or on account of, the grantors herein, or be put to any expense in defending the title to said premises, the amount paid in respect thereof shall be payable forthwith, with interest thereon at the rate of twelve per centum per annum until paid, and the said the Western Mortgage and Investment Company, Limited, or any holder of said notes, shall be entitled to all the equities of the person to whom such moneys shall have been paid: Now, therefore, if the said promissory notes be well and truly paid, principal and interest, as the same become due and payable, according to the true tenor and effect thereof, and if the said covenants and agreements be faithfully kept and performed, then, and in that event only, this conveyance of said premises shall become null and void, and the property herein described shall become again wholly ours, and these presents shall be released in due form, at our cost; otherwise to continue in full force and effect. But, in case of any failure or default on our part to keep or perform any of the covenants or agreements

herein contained, we, the said grantors, do fully authorize and empower the said Zeno Carl Ross, trustee hereunder, and his successor or substitute in this trust, and it is hereby made his or their special duty, at the request of the said the Western Mortgage and Investment Company, Limited, or other holder of said notes, at any time made after default as aforesaid, to sell the above-described property to the highest bidder for cash in hand, or on credit, at the courthouse door in Tarrant county, Texas, at public outcry, between the hours of 10 o'clock a. m. and 4 o'clock p. m. of the first Tuesday of the month, after giving public notice of the time, place, and terms of said public sale, and of the property to be sold, as is now required in judicial sales under the laws of the state of Texas; said trustee having the privilege to sell such property together, or in lots or parcels such as to him shall seem expedient, and, after said sale as aforesaid to make, execute, and deliver to the purchaser or purchasers thereof, in our names, good and sufficient deed or deeds in law to the property so sold in fee simple, and receive the proceeds, and apply the same in order as follows: First, to the payment of the proper expenses of advertising the sale; second, to the payment of said notes so in failure or default, together with all interest due thereon, and also the taxes, insurance, and other advances as aforesaid, with interest; third, to the payment to said trustee of five per cent. upon the whole amount due and unpaid as a fee for executing the provisions of this trust; and, lastly, to hold the remainder of the moneys, if any, subject to our order. The said the Western Mortgage and Investment Company, Limited, or other holder under it, shall have equal rights with other persons to be a purchaser at such sale, being the highest bidder; and such sale or conveyance shall forever be a perpetual bar against us, and our heirs and assigns, and all other persons claiming under us or them or any of them. And should the said Zeno Carl Ross, trustee, fail or refuse or be disqualified from acting hereunder, the said the Western Mortgage and Investment Company, Limited, or its assigns, shall have full power to appoint a substitute in writing, who shall have the powers which are hereby delegated to the said Zeno Carl Ross, trustee. And we, the said grantors, do hereby absolutely ratify and confirm any and all acts that the said trustee, or his successor or substitute, may lawfully do in the premises: provided, that nothing herein shall authorize such a release of the lien of this deed of trust as shall affect the rights of the said the Western Mortgage and Investment Company, Limited, or its assigns, without the concurrence in writing of the said the Western Mortgage and Investment Company, Limited, or of its assigns in such release. And it is further and lastly specially agreed by the parties that, in any deed or deeds given by any trustee hereunder, any and all statements of facts or other recitals therein made as to the nonpayment of the money secured, or as to the time, place, terms of sale, and property to be sold, having been duly published, or as to any other acts or thing having been duly done by any trustee, shall be taken by any and all courts of law and equity as prima facie evidence that the said statements or recitals do state facts, and are without further question to be accepted.

"Witness our hands this tenth day of December, A. D. 1889.

"J. W. Burford.

"Matilda F. Burford.

"The State of Texas, County of Tarrant. Before me, Geo. Massie, a notary public in and for Tarrant county, Texas, on this day personally appeared J. W. Burford, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed.

"Given under my hand and seal of office this 20th day of December, A. D. 1889.

Geo. Massie,

"[Seal.]

A Notary Public, Tarrant County, Tex.

#### "Form of Wife's Acknowledgment.

"The State of Texas, County of Tarrant. Before me, Geo. Massie, a notary public in and for Tarrant county, Texas, on this day personally appeared Matilda F. Burford, wife of J. W. Burford, known to me to be the person whose name is subscribed to the foregoing instrument. And having been ex-

amined by me privily and apart from her said husband, and having the same fully explained to her, she, the said Matilda F. Burford, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and considerations therein expressed, and that she did not wish to retract it.

"Given under my hand and seal of office this 20th day of December, A. D. 1889.

"[Seal.]

Geo. Massie,  
Notary Public, Tarrant Co., Tex.

"The State of Texas, County of Tarrant. This certifies that the foregoing deed, with its certificate of authentication, was duly recorded by me on the first day of January, A. D. 1890, in Vol. M-15-R, pages 401, 2 & 3, at 9:30 o'clock a. m. Witness my official seal and signature, at my office in Fort Worth, the day and year last above written.

Jno. P. King,

"Clerk County Court, Tarrant County, Texas.

"[Seal.]

By C. J. Hohl, Deputy."

**"Real Estate Deed of Trust Note.**

**"\$14,000.00**

**Secured by First Deed of Trust.**

**No. —**

**"Interest Payable Semiannually.**

**"Real Estate Deed of Trust Coupon Note.**

**"Fort Worth, Texas, December 10th, 1889.**

"On the tenth day of December, 1892, for value received, I promise to pay to the order of The Western Mortgage and Investment Company, Limited, a corporation organized under the laws of England, the principal sum of fourteen thousand dollars, at the office of the Western Securities Company in Fort Worth, Texas, in gold coin of the United States, of the present standard of fineness, if so required, with exchange on New York, and with interest thereon after maturity, and until finally paid, at the rate of twelve per cent. per annum, payable semiannually. Interest on this note at the rate of ten per cent. per annum is payable semiannually, as evidenced by the certain coupon notes bearing even date herewith, and numbered from one to three, inclusive. It is hereby specially agreed that if this note is placed in the hands of an attorney for collection, or if collected by suit, the maker hereof agrees to pay ten per cent. additional on the full amount due, as attorney's fee. This note is secured by deed of trust duly recorded in Tarrant county, state of Texas.

J. W. Burford.

"Matilda F. Burford.

**"\$1,400.00**

**Fort Worth, Texas, December 10th, 1889.**

"On the tenth day of December, A. D. 1890, for value received, I promise to pay to the order of the Western Mortgage and Investment Co., Limited, the sum of fourteen hundred dollars, at the office of the Western Securities Co., in Fort Worth, Texas, with exchange on New York, being the interest due that day on my note of even date herewith, for \$14,000.00. This coupon bears interest from maturity at the rate of twelve per cent. per annum, payable semiannually, and is secured by deed of trust of even date herewith on real estate, and properly recorded.

J. W. Burford.

Matilda F. Burford.

"No. 1.

**"\$1,400.00**

**Fort Worth, Texas, December 10th, 1889.**

"On the tenth day of December, A. D. 1891, for value received, I promise to pay to the order of the Western Mortgage and Investment Co., Limited, the sum of fourteen hundred dollars, at the office of the Western Securities Co., in Fort Worth, Texas, with exchange on New York, being the interest due that day on my note of even date herewith, for \$14,000.00. This coupon bears interest from maturity at the rate of twelve per cent. per annum, payable semiannually, and is secured by deed of trust of even date herewith on real estate, and properly recorded.

J. W. Burford.

Matilda F. Burford.

"No. 2.

**"\$1,400.00**

**Fort Worth, Texas, December 10th, 1889.**

"On the tenth day of December, A. D. 1892, for value received, I promise to pay to the order of the Western Mortgage and Investment Co., Limited, the

sum of fourteen hundred dollars, at the office of the Western Securities Co., in Fort Worth, Texas, with exchange on New York, being the interest due that day on my note of even date herewith for \$14,000.00. This coupon bears interest from maturity at the rate of twelve per cent. per annum, payable semiannually, and is secured by deed of trust of even date herewith on real estate, and properly recorded.

J. W. Burford.

"No. 3.

Matilda F. Burford."

On April 18, 1888, John W. Burford had borrowed \$6,300 from the Texas Loan Agency of Corsicana, Tex., and had secured it by a mortgage on the same land above described as mortgaged to complainant. Said Burford, on the 13th of April, 1888, had made affidavit before a notary public, with the view of securing this loan of \$6,300, that the land to be mortgaged was not "my homestead, nor claimed, used, occupied, or enjoyed by me as such, but I have other property in Tarrant county which I occupy and claim as my homestead, described as follows: I own 304 acres adjoining this land, which I use as my homestead." On the 2d day of May, 1888, John W. Burford designated the 304 acres of the S. C. Inman survey belonging to his wife as his homestead, duly acknowledged the same before a notary public, and said designation was filed for record the day of its date in the office of the county clerk of Tarrant county. The \$6,300 loaned John W. Burford by the Texas Loan Agency of Corsicana was paid off by complainant out of the \$14,000 sued for in this case, and the deed of trust now sought to be foreclosed contains an express subrogation of complainant to all the rights of the payee, the Texas Loan Agency of Corsicana, of said \$6,300 note.

2. Complainant on the 16th day of February, 1892, filed its bill against John W. Burford and his wife, Matilda Burford, asking judgment for its principal debt of \$14,000, and for its debt on three coupons of \$1,400 each, interest and attorney's fees, and also asking the foreclosure of its mortgage to secure said notes, and to be subrogated to the lien of the \$6,300 loan. Charles Rentz and John Page were also made respondents in said bill, but disclaimed, and were dropped from the case. John W. Burford and Matilda Burford, his wife, filed their answer, in which they set up that all of the H. H. Edwards survey of 160 acres, and 40 acres off of the north end of the A. Vogt survey, was their homestead at the date of the execution by them of the trust deed of April 18, 1888, to H. G. Damon, to secure the Texas Loan Agency of Corsicana in the loan of \$6,300 and interest, and also on the date of the execution by them on December 10, 1889, of the trust deed to Zeno Carl Ross to secure the complainant in the sum of \$14,000 and interest coupons above referred to.

3. The testimony shows that John W. Burford purchased 120 acres of the H. H. Edwards survey in December, 1880; 111 acres of the A. Vogt survey in May, 1883; 134 acres of the S. C. Inman survey in February, 1881; and he purchased, in 1885, the 40 acres of the H. H. Edwards survey which lies immediately east of the 120 acres of said survey above referred to,—all of the above surveys amounting to 405 acres. The testimony shows that respondents were husband and wife, and that Burford built a house and made other improvements on the H. H. Edwards survey near the south line on the 120

acres first bought by him, and settled thereon with his family, and used said place as a home continuously since the year 1884; that the 405 acres mortgaged to complainant were inclosed and used by respondents; that 40 acres out of the northwest corner of the H. H. Edwards survey were inclosed with the 304 acres of the S. C. Inman survey belonging to Mrs. Burford, and were in cultivation; respondents were married in 1874; that they lived on the Edwards survey, and had their home on it since 1884; that at different times they went to Ft. Worth, and lived there for the purpose of educating their children, but such absence from their home was temporary; that they left some of their domestic animals on the place, and sometimes their household furniture, during such absences, and never intended to abandon their home on the H. H. Edwards place, and returned to it at different times; that they were living on the H. H. Edwards place in March, 1886, and remained there until the fall of 1890. The testimony further showed that the larger part of said 304 acres belonging to Mrs. Burford was in cultivation. The evidence was clear that the home was on the H. H. Edwards survey, the 120 acres first bought by Burford; that J. W. Burford was a farmer and stock raiser, and used the 304 acres, his wife's land, and the several tracts which he had purchased, amounting to 405 acres, which, added to that of his wife, made 709 acres in a solid body, in his business, sometimes renting parts of the land, and at other times using it himself.

4. There are two legal questions that arise under the foregoing pleadings and facts that will determine this case: (1) Where was respondents' homestead located at the date of the \$6,300 mortgage to the Texas Loan Agency of Corsicana, and at the date of the \$14,000 mortgage to complainant? (2) Are respondents estopped from claiming it on the land mortgaged to complainant?

Article 2336 of the Revised Statutes of Texas provides "that the homestead of a family not in a town or city shall consist of not more than 200 acres of land, which may be in one or more parcels, with the improvements thereon, provided that the same shall be used for the purposes of a home." In *Philleo v. Smalley*, 23 Tex. 503, Justice Bell says: "A man's homestead must be his place of residence; the place where he lives; the place where he usually sleeps and eats." In *Railway Co. v. Winter*, 44 Tex. 611, Justice Roberts says: "The object of the constitution was to protect the house and farm, tan yard, mill, gin, or whatever had been used, in connection with the residence, to make a support for the family." "If the land bought is contiguous to that on which the purchaser lives, and the two pieces do not exceed 200 acres, it at once becomes part of the homestead, by virtue of the actual use of the land as a homestead. Not so if it is remote from the home place. Then there must be a user as homestead, and not merely an intention to use it, to make it homestead." *Brooks v. Chatham*, 57 Tex. 33. "When there are more than 200 acres of land in a rural homestead, the husband may designate the homestead, but he cannot defraud the wife in so doing as to the actual homestead." *Freeman v. Hamblin*, 1 Tex. Civ. App. 163, 21 S. W. 1019.



We think that the homestead of Burford and wife was on the 120-acre tract out of the H. H. Edwards survey, and that the designation was a fraud upon the homestead rights of the wife, though she joined with the husband in disclaiming homestead as to this land in the trust deed of December 10, 1889. Very likely the respondents had the right to take with the family home and improvements 10, 15, or 20 acres out of the 120-acre H. H. Edwards survey, and then select the balance to make up 200 acres out of the 304-acre S. C. Inman survey adjoining; but they did not pursue that course, and the court, when called upon to designate the homestead of the family, cannot see its way clear to do so, except by setting apart the tract of 120 acres, upon which the homestead or family house stood, and which was in use for homestead purposes, in common with other adjoining lands belonging to respondents.

Are the respondents estopped from claiming their homestead on the H. H. Edwards 120 acres? The constitution of the state of Texas provides that "no mortgage, trust deed or other lien on the homestead shall ever be valid except for the purchase money thereof or improvements made thereon, as hereinbefore provided, whether such mortgage or deed of trust or other lien shall have been created by the husband alone or together with his wife, and all pretended sales of the homestead involving any condition of defeasance shall be void." Const. Tex. art. 16, § 50. "Every person dealing with land must take notice of an actual open and exclusive possession, and where this, concurring with interest in the possession, makes it homestead, the lender stands charged with that fact, it matters not what declarations to the contrary the borrower may make." *Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12; *Kempner v. Comer*, 73 Tex. 203, 11 S. W. 194. "The privy acknowledgment of the wife does not cure the invalidity of the trust deed for a loan upon the homestead. The estoppel, therefore, must be made out by proof of facts outside the instrument itself. It cannot directly, or by its recitals, bind the homestead." *Mortgage Co. v. Norton*, 71 Tex. 689, 10 S. W. 301. In *Haswell v. Forbes* (Tex. Civ. App.) 27 S. W. 568, Justice Rainey says: "If parties own more than one tract, and part of it is not in the actual possession of the owner, and is not used openly and notoriously in connection with his home, for the comfort and convenience of his family, and the mortgagee has no notice of its homestead character, if any, and is not put upon inquiry, then the owner making such representations would be estopped from claiming it as his homestead." The subrogation of complainant to the rights of the Texas Loan Agency of Corsicana does not strengthen or enlarge its claim to the land in controversy, as the same state of facts existed on April 18, 1888, as to the homestead, as existed on December 10, 1889, when the mortgage to complainant in this case was executed. Whenever there is more land than is necessary for the rural homestead used in connection with the home and appurtenant thereto, whether such land adjoins the home place or is separated therefrom, a mortgage of so much of said land as does not trench upon the homestead by the husband, or by the husband and wife, as ownership may require, is within their election, and binding upon them. In such cases the

doctrine of estoppel rarely arises, because seldom needed. The act of dedication of homestead or mortgage out of such lands settles the rights of parties, without going further. But where, in such cases, there have been solemn declarations by the husband and wife that the land so mortgaged is not their homestead, and such declarations are not contradicted by open and notorious use of the land in connection with the home for the comfort and convenience of the family, and have been relied on and acted on by the mortgagee, and were made to induce the mortgage, there would be an estoppel if invoked. *Haswell v. Forbes* (Tex. Civ. App.) 27 S. W. 567. Again, where the use of the rural homestead by the family as a home, in whole or in part, is not obvious and apparent, and the husband and wife join in a declaration that such whole or part of the home is not their homestead, or any part thereof, but that other lands constitute their home, and such declarations are made to procure a mortgage, and are believed and relied on by the mortgagee, without neglect or other knowledge on his part, and money loaned by him on such whole or part of the homestead, the husband and wife will be estopped. *Mortgage Co. v. Norton*, 71 Tex. 683, 10 S. W. 301. The doctrine of *Loan Co. v. Blalock*, 76 Tex. 86, 13 S. W. 12, has taken deep root in this state. Without it the money lender can easily enter the home, and eject the wife and children. We find that the respondents, Burford and wife, were not estopped by their declarations in this case from claiming their actual homestead on which they lived; that their possession and use of the home on this 120 acres was open and obvious. Let judgment be entered for complainant for its debt of \$14,000 and interest, and for the three coupon notes, of \$1,400 each, and interest, and for attorney's fees and costs. Let its mortgage lien be foreclosed on all the land described in the trust deed except the 120 acres first purchased of the H. H. Edwards survey, upon which the home is situated, and for that 120 acres let a decree be entered for respondents, Burford and wife.

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UNITED STATES v. CERTAIN TRACT OF LAND IN CUMBERLAND  
TOWNSHIP, ADAMS COUNTY, PA. (two cases).

(Circuit Court, E. D. Pennsylvania. April 22, 1895.)

Nos. 34 and 64.

EMINENT DOMAIN—RIGHT OF, IN UNITED STATES GOVERNMENT—PUBLIC USE—  
WHAT IS—NATIONAL CEMETERY AT GETTYSBURG.

The act of congress approved March 3, 1893, appropriating money for the purchase of land at Gettysburg, Pa., for the purpose of preserving the lines of battle there, and of marking the leading tactical positions of the battlefield with tablets, and for opening avenues, etc., does not indicate such a public use under the constitution as to justify condemnation proceedings under the subsequent act of June 5, 1894. Butler, District Judge, dissenting.

These cases arose from the filing of two separate petitions of Ellery P. Ingham, Esq., United States district attorney for the Eastern District of Pennsylvania, praying the court to appoint

two juries to estimate and determine the value of the estates and interests of all parties concerned in two certain tracts of land situate in Cumberland township, Adams county, Pa., more particularly described by metes and bounds in the said petitions, which tracts were said to be owned by the "Gettysburg Electric Railroad Company."

The petitions, after reciting the act of congress conferring jurisdiction upon the department of justice in land condemnation proceedings, and the act of assembly of Pennsylvania of June 8, 1874, providing a method of vesting the title to lands in that state in the United States when no agreement of purchase could be made with the owners thereof, recited that by an act of congress approved on the 3d day of March, A. D. 1893, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30th, 1894, and for other purposes," it is provided, *inter alia*, as follows: "Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the secretary of war." (4) That by a joint resolution of congress, approved June 5, 1894, entitled "Joint resolution, authorizing the purchase or condemnation of land in the vicinity of Gettysburg, Pennsylvania," it is provided as follows: "Whereas, congress appropriated by the act of March third, eighteen hundred and ninety-three, the sum of twenty-five thousand dollars to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia, on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading tactical positions of both armies; and whereas, an appropriation for the further sum of fifty thousand dollars is now under consideration by congress for like purposes which has passed the house of representatives during the present session and is now pending in the senate; and whereas, it has been recently decided by the United States court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the war department to execute the purposes declared in the act aforesaid; and whereas, there is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March third, eighteen hundred and ninety-three: Therefore, be it resolved, by the senate and house of representatives of the United States of America in congress assembled, that the secretary of war is authorized to acquire by purchase (or by condemnation) pursuant to, the act of August first, eighteen hundred and eighty-eight, such lands or interest in lands, upon or in the vicinity of said battlefield as, in the judgment of the secretary of war, may be necessary for the complete execution of the act of March third, eighteen hundred and ninety-three: provided, that no obligation or liability upon the part of the government shall be incurred under this resolution nor any expenditure made except out of the appropriations already made and to be made during the present session of this congress." (5) That in order to carry out the purposes of the aforesaid act of March 3, 1893, it is necessary that the United States acquire title in fee simple to the said tracts of land. That the said tracts include many important tactical positions occupied by many different commands and bodies of troops while engaged in the battle of Gettysburg, at some of its most critical periods. That if title to the said tract be not vested in the

United States it will be impossible to carry out effectually upon this part of the battlefield the purposes expressed in the said act of congress, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets." That no agreement can be made with the owners of the said tracts for the purchase thereof.

The jury of view in the first case subsequently filed a report assessing damages for the taking of the property; and on March 26, 1895, the Gettysburg Electric Railroad Company filed exceptions thereto, alleging, in substance, that the purposes specified in the petition were not public uses or purposes, authorizing the condemnation by the United States of private property. In the second case a motion to quash the petition was filed upon substantially the same reasons. The two matters were argued at the same time.

Ellery P. Ingham, for plaintiff.

Thomas Hart, Jr., and Chas. Heebner, for defendant.

DALLAS, Circuit Judge. The right of the United States to take private property for public use, upon making just compensation, though questioned in *Pollard's Lessee v. Hagan*, 3 How. 212, is now fully recognized; but that this right cannot be exercised, within the limits of the several states, for any purpose which is not incident to some power delegated to the general government, and necessary, or at least adapted, to its execution, is equally well settled. 1 Hare, Const. Law, p. 346; *Kohl v. U. S.*, 91 U. S. 367; *U. S. v. Fox*, 94 U. S. 315; *Van Brocklin v. Tennessee*, 117 U. S. 151, 6 Sup. Ct. 670; *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S. 641, 656, 10 Sup. Ct. 965.

The end sought to be promoted in the present instance highly commends itself to patriotic sentiment and strongly appeals to the generous impulses of all who justly esteem the services of those by whom the great battle of Gettysburg was fought and won; but such feelings may not be indulged in a place where justice is judicially administered without respect to persons, and where the constitution of the United States must be regarded as imperatively prescribing the paramount rule of civil conduct as well for the government as for the people. Therefore, the only question is whether the object to the furtherance of which these petitions are directed is germane to the execution of any power vested in the general government; and upon this question I have reached a conclusion which to me seems irresistible. The powers of congress are distinctly enumerated in the constitution, and in that enumeration none is included to which the uses for which it is proposed to condemn this land can be related, without, in my opinion, enlarging the constitutional grant by grafting upon its express terms a construction so lax and comprehensive as to be subversive of its limited character. The learned district attorney has referred to but a single clause (article 1, § 8, cl. 1) as conferring the authority now claimed, and that clause is wholly irrelevant. The "power to lay and collect taxes \* \* \* to pay the debts and provide for the common defense and general welfare of the United States" is quite distinct

from the right to take private property for public use; and it is not the power of taxation, but the right of eminent domain, which is here asserted. Government may, in time of war, appropriate or destroy private property. This is justified by "the necessities of war." *U. S. v. Pacific R. R.*, 120 U. S. 234, 7 Sup. Ct. 490. But no deduction from this doctrine of the public law can be made and applied in time of peace, be the incentive what it may, without violation of "the supreme law of the land."

Entertaining these views, with which no judicial decision that has been brought to my notice conflicts, it is impossible for me to sustain these proceedings. In the first case the exceptions to which this opinion is applicable are sustained. In the second case the motion to quash is granted.

BUTLER, District Judge (dissenting). I regret that I cannot unite in the above conclusion. I do not propose to enter upon an argument to sustain my views, but to state very briefly the reasons on which they are founded.

While the government may take land for public use, the use must be such as arises out of the exercise of its legitimate functions. It is not necessary, however, that the land or the use be indispensable. It is sufficient if it be convenient and serviceable. Within this limitation congress and the executive cannot be controlled; they are the judges. The courts can only interfere where the limit is transcended. The constitution does not define the special uses for which land may be taken; they could not be so defined; the occasion for them changes with the change of circumstances. As for instance, the government has the care and wardship of the Indian tribes. It must provide for them, protect its citizens against them, and keep the public peace in this respect. Of recent times it has come to be believed that this duty can best be discharged by teaching them the arts and industries of civilized life. The government has adopted this view, and consequently established schools for the purpose. Schoolhouses have thus become necessary. In some instances government buildings have been appropriated to this use, and in others buildings have been rented. That land may be taken for the erection of such schoolhouses I cannot doubt.

That land may be taken for customhouses, courthouses, post offices, etc., is not now questioned, though it was formerly denied. Here the use is virtually indispensable. If however, it were a convenience merely, which facilitated the discharge of the government's duties, the right to take would be equally clear.

It is the duty of the government to raise and maintain armies, and to fight battles when necessary. As a consequence, it is necessary to establish military schools, barracks, hospitals, etc. That land may be taken for these purposes is plain. It is absolutely necessary to a discharge of the duty. The right to take, however, is just as clear in the absence of such necessity, when the use aids the government in this respect. If the construction of a railroad between the capital and the seaboard, or any other point where none exists, should become a military necessity or a useful con-

venience in the discharge of these duties, by facilitating the transportation of troops or munitions of war, the government might take land and construct it—without seeking for authority in any other constitutional provision. The power to raise and maintain armies imposes the duty of caring for its soldiers, promoting their welfare during life, and providing for decent burial (at least) after death—whether they die in battle or in time of peace. It may, therefore, do whatever is necessary to these ends. Consequently it may establish hospitals, take land for cemeteries, etc. It could not leave its dead to fester where they fall. To do so would not only outrage public decency, but would raise a serious obstacle to the discharge of its express duty—the maintenance of armies—by inclining men to avoid its service. It may erect monuments to commemorate special acts of heroism, and award pensions for meritorious services; because these and similar acts, directly and materially tend to aid it in discharging the duty stated.

The land described in the petition is adjacent to the Gettysburg National Cemetery. I cannot doubt that it might have been taken to enlarge and improve that property. How much is necessary to that purpose congress and the executive are the judges of. This however is not the purpose named in the statute.

The land is required to carry out the provisions of the act of 1893, to wit:

“For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend.”

In my judgment this is a legitimate public use of the land. The battle was a great lesson in military science, the greatest ever taught on this continent, at least—a most important illustration in strategy, and the art of war. That it may be fully understood and appreciated hereafter, it is necessary to do just what is proposed—preserve the battle field in its original condition, mark the positions and movements of the troops, and the different arms of the service, at the various stages of the battle; so that it may be seen, as upon a great chart, precisely how the battle was fought. The government proposes to perpetuate and secure this lesson for the sake of what it may teach to those who at present constitute its armies, as well as to those who will hereafter constitute them. In my judgment this is a legitimate purpose; and it can only be accomplished by taking the land. The power to take it is, I believe, embraced in the power to maintain armies and teach them military science.

I understand the very able counsel who opposes the proceeding to say that the government should own the land, but should obtain it by purchase. If the government should own the land, it is because the government has a legitimate use for it; otherwise it has

no power to purchase, or even to accept it as a gift, and expend money for its improvement. By what authority can the government take and hold land in trust for such purposes, unless they serve a legitimate public use, and especially expend money upon them? A concession that it may purchase, or accept the land as a donation, for the uses stated, seems to me to be a plain concession of the right to take. The government has repeatedly accepted and improved lands for such uses; and the propriety of it has not even been questioned. It so accepted and improved the lands embraced in the Gettysburg National Cemetery and in the Chickamauga and Chattanooga National Park, expending large sums of money on each.

Furthermore this battle field is of transcendent national interest. The ground is hallowed and made sacred by the blood shed upon it, at the most important epoch in the nation's history—in the supreme hour of its life. All right-minded men would say, I think, that it is fitting the nation should own and preserve it from desecration. It may be replied that this is mere sentiment. I think, however, it is something more. But if it is not, it is a most healthy sentiment, the encouragement of which directly tends to preserve the nation, and thus to aid the government in discharging its highest duty. It may be said the same reasons require the ownership of all other important battle fields of the nation; I think not. If they do, however, the government should own them, for the sake of what they teach, and the love of country which they inspire. I believe the other objections urged against the proceeding, as well as the exceptions to the report of the jury, should also be dismissed.

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CONSOLIDATION NAT. BANK OF PHILADELPHIA v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. April 23, 1895.)

No. 40.

**PENAL BONDS—CONSTRUCTION—SURETYSHIP FOR EMPLOYEE.**

A bond of suretyship for an employé of a bank was conditioned for the reimbursement of any loss sustained "by reason of fraud or dishonesty" in connection with his duties. It further provided that any claim made under the bond "shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of discovery of the act or default upon which such claim is based." *Held*, that the bond covered not only embezzlements made during the year preceding their discovery, but also earlier embezzlements, which would have been discovered within a year from the time they were committed, but for the fact that such discovery was prevented by the act of the employé in falsifying the books during the year preceding the actual discovery.

**Rule for a New Trial.**

This was an action founded upon two certain bonds executed and delivered by the defendant, the Fidelity & Casualty Company of New York, to the plaintiff, the Consolidation National Bank, of the city of Philadelphia, wherein and whereby, in the first bond, the said

defendant agreed to make good and reimburse to the said plaintiff (at the expiration of three months after proof of loss) such pecuniary loss to the extent of \$10,000 as should be sustained by said plaintiff by reason of the fraud or dishonesty of one Theodore F. Baker in connection with his duties as general assistant and clerk while in the service of the plaintiff for the year ending September 3, 1888, at 12 o'clock noon, renewed by agreement to the same day and hour of 1889; and in the second bond, dated September 30, 1889, wherein and whereby the defendant agreed to make good and reimburse to the plaintiff, as before, such pecuniary loss to the extent of \$14,000 as should be sustained by said plaintiff by reason of the fraud or dishonesty of the said Baker in connection with his duties as paying teller while in the service of the plaintiff during the year ending September 30, 1890, at noon. The second bond was renewed from year to year, the last renewal being to cover the yearly term ending September 3, 1894. The plaintiff claimed to have lost, through the fraud of said Baker, between September 3, 1887, and September 3, 1889, the sum of \$2,300, and between the 30th day of September, 1889, and January 9, 1894, the sum of \$14,100. The discovery of the dishonesty of said Baker was first made by the plaintiff on January 9, 1894, and the plaintiff claimed that it was impossible to state with accuracy the details of the fraud, as, by virtue of his positions in the bank, the said Baker was enabled to embezzle moneys which were intrusted to him, and he did embezzle them to the amount averred. By false entries and otherwise he concealed the facts and the dates of his embezzlement.

The conditions of the policy essential to the understanding of the case are as follows:

The defendant agreed to make good and reimburse to the plaintiff "to the extent of the sum of fourteen thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, \* \* \* which has been committed during the continuance of the said term, or within any renewal thereof, and discovered during said continuance, or within six months thereafter, and within six months from the death, dismissal, or retirement of the employed." "Any willful misstatement or suppression of fact by the employer in any statement or declaration to the company concerning the employed, or in any claim made under this bond, or a removal thereof, renders this bond void from the beginning." "Any claim made under this bond, or a renewal thereof, shall embrace and cover only for acts and defaults committed during its currency, and within twelve months next before the date of discovery of the act or default upon which such claim is based."

The evidence at the trial showed that Baker's misconduct was disclosed on January 10, 1894 (not 9th, as averred in the statement of the plaintiff), when the last renewal had been running 3 months and 10 days only.

The court charged the jury partly as follows:

["The plaintiff is entitled, therefore, to recover its pecuniary loss resulting from this misconduct during the preceding twelve months; that is, it is entitled to recover its pecuniary loss resulting from his misconduct during one year prior to January 10, 1894. This period carries you back to January 10, 1893. The misconduct consisted of embezzling money and in the falsification of books and balance sheets. The embezzlement within the period amounted to \$5,000. This sum, with interest, the plaintiff is entitled to re-



cover, if the bond and renewals are sustained, together with such other pecuniary loss, if any, as resulted from Baker's falsification of books and balance sheets within that period. If this latter misconduct prevented the discovery of previous embezzlements, and thus prevented the recovery on this account from the defendant of money which it would otherwise have recovered, the plaintiff is entitled to recover the loss thus sustained during a period of twelve months preceding the time when such embezzlements would have been discovered but for this concealment. In other words, if the evidence satisfies you that the plaintiff would have discovered Baker's misconduct before January 10, 1894, but for the falsification of books and balance sheets, and would, consequently, have been able to hold the defendant responsible for embezzlements made during the twelve months immediately preceding this discovery, you should find against the defendant for this pecuniary loss (in addition to the \$5,000)—that is, the amount of embezzlement preceding the time when the embezzlements would have been discovered during the last year, but for the falsification of books and balance sheets. Thus, you see, your inquiry may, and probably will, extend over a period of two years prior to January, 1894. \* \* \* What is the pecuniary loss resulting from his misconduct during that year (ending January 10, 1894)? Clearly it is the amount of embezzlements made during the year (conceded to be \$5,000), and also such other loss as may have resulted from his falsification of books, etc., during that period."]

On April 8, 1895, the jury rendered a verdict in favor of the plaintiff of \$9,675, whence this rule was taken by defendant, alleging, *inter alia*, that the court erred in the construction of the bond, and in instructing the jury that they could go back for two years, there being no evidence of any embezzlements within the terms of the bond except those within one year.

George R. Van Dusen and John G. Johnson, for plaintiff.  
White, White & McCullen, for defendant.

BUTLER, District Judge. Under the court's construction of the contract the question arose, what embezzlements, if any, occurred within 12 months of the time at which such embezzlements might have been discovered, (during Baker's last year in the bank), but for his misconduct in altering books or falsifying balance sheets? This question was submitted to the jury. The court was not asked to withhold it—on the ground that there was no testimony to justify its submission. It could not however have been withheld if a request to do so had been made, because there was evidence on which something might be found within the period. The defendant admits that a finding of \$1,000, would be justifiable. Complaint is made, however, that upwards of \$2,000, additional, was found. In submitting the question the jury was reminded that the plaintiff had the burden of proving the amount taken during this time, and that no more could be found than is distinctly proved. The court was misled, by a paper handed up, respecting the period (embraced in the 12 months alluded to) within which the amount claimed was supposed to have been taken; and consequently the jury was instructed that it covered the whole of January, 1892—thus including 10 days back of the 12 months stated. This was an error however against the plaintiff.

A careful examination of the evidence has not satisfied me that the jury found a larger amount of embezzlement during the period in

question, than is justifiable. I think it might have found from the evidence that Baker's misconduct about January, 1893, prevented the plaintiff discovering at that time, the amount with which the plaintiff is charged, as having taken during the period referred to. It is not a question whether the court would so find, but whether the jury might.

The rule is dismissed.

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MCCULLOCH v. CHATFIELD et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 528.

**EQUITY—SHARING CONTRACT IN PROCEEDS OF LAND.**

A. and C., and two others, entered into an agreement for a speculation in land, which was to be purchased in the name of C., and by him sold for the common benefit. A. was to receive a three-tenths interest in the proceeds, in consideration of certain services, and the others, each, a one-tenth interest, in consideration of the contribution by each of \$10,000. Subsequently A. made an agreement with complainant, who paid \$5,000 for an interest, and, a difference having arisen between them, a compromise agreement was made between complainant and A. by which it was agreed that complainant's interest should be three-fortieths of the proceeds of the land. Complainant brought suit against all the parties to compel C. to give him a written recognition of his three-fortieths interest in the land, and to have his interest in the land, to that extent, decreed by the court. C. admitted complainant's claim to a one-twentieth interest in the proceeds of the land, but alleged that he had no knowledge whether he was entitled to a greater interest, as that depended on an agreement between complainant and A. *Held*,—First, that the trust agreement was of such nature that it gave complainant no interest in the land, but only an interest in the proceeds of sale when sold; second, that, as the trustee was not shown to be insolvent, and as it did not appear that he had been negligent or inefficient in the discharge of his duties, and as the beneficiaries were largely indebted to the trustee for advances which were a first lien on the land, a court of equity would not, for the present at least, decree that the complainant had a specific interest in the land to the extent claimed, or any other extent, as it might embarrass the trustee in disposing of the property pursuant to the terms of the trust.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

The case presented by the appellant, John McCulloch, who was also the plaintiff in the circuit court, is as follows: By an original and amended bill of complaint which was filed by him against the appellees in the circuit court of the United States for the Eastern district of Arkansas, the plaintiff charged, in substance, that in February, 1882, the appellees, H. R. Allen, William Woods, T. B. Handy, and William H. Chatfield (who has since died, and who is represented in this suit by his successor in interest, A. H. Chatfield) entered into an agreement among themselves with a view of acquiring a large body of land in the state of Arkansas, which then belonged to the Memphis & St. Louis Railroad Company; that, by the terms of said agreement, William H. Chatfield was to become trustee of all of said parties, and others who might become associated with them, to hold and dispose of the land when it was acquired; that said Chatfield, Handy, and Woods were each to have a one-tenth interest in the proceeds of said lands on contributing each \$10,000 towards the acquisition of the same; that said Allen was to have a three-tenths interest therein for his trouble and expense in looking up the lands,

and in securing the same; that the remaining four-tenths interest was to be disposed of to other persons who might thereafter become interested in the speculation; that in May, 1882, by an agreement entered into between the plaintiff, McCulloch, and the said Allen, the plaintiff, on the payment of \$5,000 towards the acquisition of the lands, acquired a one-tenth interest therein, which placed him on terms of equality with Chatfield, Handy, and Woods; that thereafter, in consequence of a dispute that had arisen between the plaintiff and said Allen relative to the amount of the plaintiff's interest acquired by the payment of the \$5,000 aforesaid, a compromise agreement was entered into by and between Allen and the plaintiff, whereby the latter became entitled to one-fortieth of the proceeds of all the lands held by Chatfield as trustee, in addition to the one-twentieth interest therein originally acquired by the payment of \$5,000, so that thereafter the plaintiff's interest in the proceeds of the land was, as between himself and Allen, agreed to be three-fortieths. The bill further averred that he had attempted, from time to time, to secure from said Allen, as well as from William H. Chatfield in his lifetime, and thereafter from A. H. Chatfield, his successor in the trust, a written certificate or statement that he was entitled to a three-fortieths interest in the proceeds of said lands, but that said parties had refused to give such a written declaration; that Allen had eventually repudiated his right to said additional one-fortieth interest claimed under the compromise agreement aforesaid; and that the trustee, A. H. Chatfield, while recognizing and admitting his interest in the proceeds of said lands to the extent of one-twentieth, yet declined to acknowledge an interest to any greater extent. The bill also contained an allegation that, as said Allen had represented to his associates that he would secure lands for the purposes of the speculation to the extent of 620,000 acres, the plaintiff was entitled, as against Allen, by virtue of such representation to three-fortieths of that amount of land, namely, lands to the amount of 46,500 acres. The bill thereupon prayed the court to enter a decree that the plaintiff was entitled to a three-fortieths interest so as aforesaid claimed in the lands held by the trustee, and for general relief. Separate answers to the bill were filed by the appellee A. H. Chatfield, trustee, and by the appellee Allen. The answer of the trustee admitted that the interests of the various parties in the proceeds of the lands in controversy were as stated in the bill, except the interest of the plaintiff, McCulloch. With respect to the interest of the latter, the answer averred that the trustee had always recognized the plaintiff's right to one-twentieth of the proceeds of the land, but that he had declined to make a written declaration that he was entitled to a greater interest, because that was outside of his duties and depended upon an agreement between Allen and the plaintiff with which he was not fully acquainted. Furthermore, the answer averred that by the original agreement made in 1882, creating the trust, the trustee was to have the full and absolute control of the land, and of the sale thereof, he being only required to account for the proceeds of the sale, and that the execution of a formal declaration of a trust therein, in favor of any one, would have the effect of defeating sales by the trustee according to his own judgment, as purchasers would require the beneficiary to join in the execution of deeds for said lands after such declaration of trust was made and filed of record. The trustee further averred that the plaintiff had utterly failed during the existence of the trust to contribute anything towards paying the taxes on the land, or other expenses incident to the execution of the trust; that the trustee and his predecessor, W. H. Chatfield, had already expended on that account \$153,861, and had received from sales only \$65,707, leaving a balance due to the trustee, at the date of filing his answer, of \$88,153, without any allowance for services, which sum was a first charge upon the land and the proceeds of the sale thereof. The defendant Allen denied, in substance, that the plaintiff was entitled to more than one-twentieth of the proceeds of the land, to which extent he conceded that he was entitled to share in the proceeds of the sale. He averred that the pretended agreement by himself to give the plaintiff an additional one-fortieth interest therein was secured by false and fraudulent representations, and was, for that reason, not obligatory. After a full hearing of the case on the merits, the circuit court dismissed the plaintiff's bill for want of equity, and from such decree an appeal has been prosecuted to this court.

Charles C. Collins and C. S. Collins, for appellant.  
F. N. Judson and S. M. Shepard (L. C. Balch, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is obvious from an inspection of the record that, in so far as there is any substantial controversy developed by the pleadings or the testimony, the plaintiff, McCulloch, on the one side, and the defendant H. R. Allen, on the other, are the only interested parties. It is conceded by all that by contributing \$5,000 towards the objects of the speculation in which H. R. Allen, W. H. Chatfield, William Woods, and T. B. Handy became interested by the agreement of February 3, 1882, the plaintiff, McCulloch, became, and now is, entitled to one-twentieth of the proceeds of the sale of the land in controversy, after the large sum now due to the trustee for advances and other expenses of the trust have first been paid. Whether, in addition to that interest, he is further entitled, under the agreement with Allen, to another one-fortieth, making his total interest in the proceeds three-fortieths, is a question that in no wise concerns the trustee, or the other defendants besides Allen. The one-fortieth interest thus in controversy belongs either to the plaintiff or to the defendant Allen, as all of the parties agree. With the exception of this one issue, which, according to the answer filed by Allen, seems to turn largely on the question whether the alleged agreement to give him such additional interest was obtained by fraud, there is no other issue in the case, so far as we are able to discern. The question arises, therefore, on this state of facts, whether the record discloses any adequate ground for equitable relief. It is clear, we think, that the plaintiff has no estate in the land, as distinguished from the proceeds of sale, which entitles him to a decree of partition, or to a decree adjudging that he has a three-fortieths, or any other, undivided interest therein. The agreement of February 3, 1882, evidently contemplated that the trustee thereby appointed, Mr. W. H. Chatfield, should hold the title to such lands as might be acquired under the agreement, dispose of the same to the best advantage possible, and convey the same, when sold, by his individual deed. The only limitation placed upon his powers was that he should not sell any of the land for less than one dollar per acre without the consent of all parties in interest. The trust so created plainly belongs to that class of trusts where the beneficiaries acquire no estate in lands held by the trustee until after they are sold, when their rights attach to the proceeds of sale. It was one of those agreements which operated to convert into personalty the realty that might be purchased, so far as the parties to the speculation were concerned, until, by mutual agreement, they had otherwise determined, inasmuch as the title to the land acquired was taken in the name of the trustee for the express purpose of enabling him to sell it without let or hindrance, and to divide the proceeds among those who might become

interested in the speculation. *Nicoll v. Ogden*, 29 Ill. 323, 377, 378; *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. E. 228; *Pom. Eq. Jur.* § 992, and cases there cited. For these reasons, the plaintiff was not entitled to a decree adjudging that he was the owner of an undivided interest in the property, as a decree of that nature would very likely interfere with the dominion over the property which the trustee is entitled to exercise so long as he acts in good faith, and is guilty of no dereliction of duty.

It is also worthy of notice that the bill does not allege that the trustee is insolvent, and that the proof does not show that he has been either negligent or inefficient in the discharge of his duties. No right to relief, therefore, arises upon either of these grounds. It is not the fault of the trustee that a controversy has arisen between two of the beneficiaries as to the extent of their several interests, and he is not guilty of any misconduct in refusing to assume the responsibility of deciding that controversy until it becomes necessary to make a distribution of the trust fund. When that time arrives, it is to be presumed that the trustee, for his own protection, will take the proper steps to ascertain the plaintiff's true interest in the trust fund. So far as we can see, the only ground upon which the plaintiff can fairly lay claim to equitable relief is found in an allegation of the amended bill wherein the plaintiff avers that he is now ready and willing to pay his proportion of the expenses of executing the trust. On the strength of that allegation, it has been suggested that he cannot contribute to the payment of such expenses until the amount of his interest is ascertained and has been fixed by judicial decree, and that it is competent for a court of equity to entertain jurisdiction of the case, and settle the existing controversy, on that ground. With reference to this suggestion, it is only necessary to say that we have become satisfied, by a careful examination of the testimony, that this claim is not made in good faith. We think that the plaintiff has no present intention of refunding to the trustee his proportion of the large sum of money which the trustee has already advanced in paying taxes and otherwise administering the trust, and that a decree determining the extent of the plaintiff's interest would not induce him to contribute either to the payment of expenses heretofore or hereafter incurred. The result is that the plaintiff is, for the present, at least, without right to equitable relief. The trustee has notice of the plaintiff's claim, and has thus far shown no disposition to ignore his rights, whatever the same may be. The trustee is also solvent, and the large sum now due to him must first be paid before any of the proceeds of the land can be distributed among the beneficiaries. It is not improbable that the entire proceeds may be consumed in reimbursing the trustee for his expenses, so that it will be unnecessary to decide, either now or hereafter, whether the plaintiff's interest is one-twentieth or three-fortieths. For these reasons, we think that the circuit court properly dismissed the plaintiff's bill of complaint, and its decree in that behalf is hereby affirmed.

## NORTHERN PAC. R. CO. v. POIRIER.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1895.)

No. 185.

## 1. NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, a brakeman in the employ of defendant railway company, while performing his duty on a regular freight train, was injured in a collision caused by a special or wild train running into the regular train while it was stopped at a junction with a spur track, to leave certain cars. The special train, which was running on telegraphic orders, was only a few minutes behind the regular train, and the conductor of the special had not been informed that the regular would stop at the spur track. The rules of the company provided that a following train should keep 10 minutes behind the train in front of it, but also made it the duty of the train dispatcher to keep trains known to be running too close at the proper distance apart. *Held*, that it was a question for the jury to decide upon these facts whether the railway company was guilty of negligence in the management of the second train, which contributed to the accident, and that it was not error to refuse to direct a verdict for the railway company.

## 2. SAME—INSTRUCTION TO JURY—SUBSTANCE OF CHARGE.

*Held*, further, that an instruction which substantially submitted it to the jury to decide whether the company was negligent in sending out the special train without notifying the conductor that the first train would stop where it did, and in failing so to control the running of the special train as to avoid the accident which happened, was not rendered erroneous by some expressions which, apart from their context, might be taken to mean that the company would be responsible for the negligence of the conductor of the special train in disobeying orders, and to disregard the fact that he was a fellow servant of plaintiff.

## 3. MASTER AND SERVANT—DUTY TO PROVIDE SAFE APPLIANCES, ETC.

The duty which an employer owes to his employé to provide proper means, facilities, and appliances for carrying on the work in reasonable safety cannot be delegated to any subordinate, so as to exempt the employer from liability to an employé if injury happens to him through neglect of that duty.

In Error to the Circuit Court of the United States for the District of Washington.

This was an action by Narcisse Poirier against the Northern Pacific Railroad Company to recover damages for personal injuries. Judgment was rendered in the circuit court for the plaintiff. Defendant brings error.

Ashton & Chapman and John R. McBride, for plaintiff in error.  
Aylett R. Cotton, S. C. Hyde, John J. Reagan, W. S. Glass, and J. L. Cretty, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. On October 7, 1892, Narcisse Poirier, plaintiff (defendant in error), while in the employ of the Northern Pacific Railroad Company, defendant (plaintiff in error), and acting in the capacity of middle brakeman upon a regular freight train, designated as the "first train," when it stopped at Clyde Spur, and while he was standing upon the rear end of one of the flat cars,  
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about midway of the train, and engaged in the performance of his duty in attempting to uncouple the cars, received certain injuries in a collision which then occurred by a second train running into and against the first train at the rear end thereof. For the injuries thus received, the plaintiff obtained a verdict for \$21,600, which was afterwards reduced, upon a motion for a new trial, to \$7,500. There is no conflict in the evidence as to the manner in which the collision occurred; but there is a direct conflict or difference of opinion between the respective counsel as to the deductions to be drawn from the evidence as to who was guilty of the negligence which caused the collision,—whether it was the conductor of the first train, or the conductor of the second train, or some undiscovered vice principal of the corporation. It is conceded that the plaintiff was entirely free from any fault or negligence upon his part.

The assignments of error call in question the correctness of the rulings of the trial court in refusing to give certain instructions asked by the defendant, and in giving other instructions, in its charge to the jury, touching the liability of the defendant, and of its negligence in the premises. To obtain a thorough understanding of the true meaning and effect of these instructions, it will be necessary to state the facts relative to the position, condition, and manner in which the respective trains were being operated on the night in question. The collision occurred about midnight. The first train was a regular local freight train, running on schedule time, under the management, control, and direction of the conductor. The second train was running under telegraphic orders, without any schedule or time card, known in railroad parlance as a "wild train." At Moscow, a station on the railroad, the second train was standing upon the track when the first train left that station. At Vollmer, another station, the first train stopped to drop some cars. It was detained about 10 minutes, when it resumed its course over the mountain grade. The second train was then in sight, standing on the track a short distance in the rear, with its lights plainly visible. Clyde Spur, where the collision occurred, is about six miles from Vollmer. It is a place on the road where there is a spur track running out to a logging camp, where saw logs and cordwood are loaded on the cars. There is a side track or switch upon which cars are left to be run out on the spur track. It is not a regular station, and the regular freight train only stops there when there are empty cars to be left, or loaded ones to be taken away. The first train, on the night in question, had certain cars to be left at this place, and stopped there for that purpose. There were three brakemen on the train. The head brakeman, when the train was slowing up, left his place, and started forward to open the switch. The rear brakeman at this time saw the second train rounding a curve in the road, and immediately signaled it to stop, and at the same time shouted as loud as he could. The second train was then about one-quarter of a mile behind the first train. The first train had barely come to a full stop when the second train, moving at a speed of about four miles an hour, struck it,

by running the cowcatcher of its engine under the rear end of the caboose on the first train. The conductor of the first train had been lying down, but was in his seat, in the lookout of the caboose, and passed out of the rear end just before the collision occurred. The conductor of the second train had not been informed that the first train would stop at Clyde Spur.

The defendant offered no evidence in relation to its care or negligence in running the respective trains, except certain of its rules, which provide how its trains shall be run. Rule 120 provides that:

"A train must not leave a station to follow a passenger train until five (5) minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending, under any circumstances, until such trains are duly reported at next telegraph station. Freight trains must not follow each other descending mountain grades. \* \* \*

This rule, it will be noticed, relates principally to passenger trains. Clyde Spur is not a telegraph station.

Rule 122: "Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting and passing points) unless some form of block signal is used."

Rule 129: "All trains must approach the end of double track and junctions prepared to stop, and must not proceed until the switches or signals are known to be right, and the track is plainly seen to be clear."

Counsel for defendant contends that there is no testimony in the record to justify the statement that the second train was a wild train, running on telegraphic orders, without any schedule or time card. As some of the objections urged to the instructions are dependent upon this fact, it is deemed proper at this point to state the facts as shown by the record, and our conclusion in regard thereto. The witness Allen, who was the rear brakeman on the first train, in answer to plaintiff's question, "Go on and tell all about the accident," said: "We done our work there [referring to the station where the first train stopped after leaving Moscow], and went on down the hill, and they [the second train] followed with an extra, or wild train, and it was running by telegraphic orders, and had no schedule orders or time card." Here the witness was interrupted by counsel for defendant asking: "How do you know? You need not state if you do not know." No answer was given by the witness. The counsel for plaintiff then said to the witness: "State what else you know about it." The witness proceeded to tell what occurred after leaving Vollmer. Neither at that time nor at any other time was it shown that this witness had no personal knowledge of the manner in which the second train was running. There was no motion made to strike out his testimony upon the ground that it was hearsay, or upon any other ground. He stated the fact as if it was within his knowledge, and there is no testimony that contradicts, or tends to contradict, the fact as stated by him. If his statement was not true, the defendant could easily have offered testimony showing what the facts were as to how the second train was being run, or ordered to be run. It did not do so. Our conclusion upon this point is that the trial court did not err in stat-



ing to the jury that the second train was running by telegraphic orders, without any schedule or time card.

The general principles of law, applicable to the facts of this case, concerning the liability of the defendant, are few and simple, and may be classed under three heads: (1) The conductor of the first train, within the rule announced in the Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, as limited and explained in the Baugh Case, 149 U. S. 369, 13 Sup. Ct. 914, was the vice principal of the defendant, and, if the collision occurred through his negligence, the defendant was liable. (2) The conductor of the second train was a fellow servant with the plaintiff, and, if the collision was caused solely by his negligence, the defendant would not be liable. *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Andrews*, 1 C. C. A. 636, 50 Fed. 728; *Railroad Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 129; *Mase v. Railroad Co.*, 57 Fed. 286; *Railroad Co. v. Smith*, 8 C. C. A. 663, 59 Fed. 996. (3) The agent of the defendant who was clothed with the duty of sending out the second train, and giving the orders as to how it should be run, having the control, management, and direction of its movements, whether such agent was the train dispatcher, master mechanic, division superintendent, or other agent of the defendant, was the vice principal of the defendant, and, if the collision occurred by his negligence, the defendant would be liable. *Railroad Co. v. Wilson*, 1 C. C. A. 25, 48 Fed. 57; *Railroad Co. v. Charless*, 2 C. C. A. 380, 51 Fed. 562; *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 583; *Hough v. Railway Co.*, 100 U. S. 214; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756.

Did the court err in any of its rulings? Is the charge of the court, taken in its entirety, in accordance with the general principles we have announced? At the close of the testimony, the defendant moved the court to give the following instruction:

"In this case there is no evidence that the defendant the Northern Pacific Railroad Company was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that, if there was any negligence, it was that of the engineer and conductor, or one of them, of the second train; and, such conductor and engineer being fellow servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

The contention of defendant in support of this instruction is that it appears from the evidence that the collision occurred by reason of the conductor of the second train disobeying the general rules of the company which required him to keep his train 10 minutes behind the first train, and it is claimed that, if he had obeyed this rule, the collision would not have occurred. But this rule of the company must be taken in connection with rule 228, offered by the plaintiff, which declares that "it is the duty of dispatchers to hold following sections of trains when they are known to be running too close, and keep them the prescribed

time and distance apart," and of the further fact that the second train was running under telegraphic orders, without any schedule or time card. It devolved upon the company to show that it had in all respects exercised due and reasonable care in providing for the safe running of the second train. The court would not, under the facts, have been justified in taking the case from the jury. The case should not have been withdrawn from the jury unless the conclusion necessarily followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish. *Railroad Co. v. Cox*, 145 U. S. 594, 12 Sup. Ct. 905.

There were other questions in this connection, not embodied in the instruction, that should have been and were left to the jury to decide. It was a question of fact for the jury to determine, from all the evidence, whether the railroad company was guilty of any negligence in the management of the second train which contributed to the accident, and, if negligent, whether the collision would have occurred if the company had not been negligent in sending out the second train without notifying the conductor thereof that the first train would stop at Clyde Spur, which was not a regular station. The mere fact that an injury to a servant was partly caused by the negligence of a fellow servant does not relieve the master from liability therefor, if it clearly appears that the accident which caused the injury would not have happened had not the master himself been negligent. *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493; 7 Am. & Eng. Enc. Law, 828, and authorities there cited; *Coppins v. Railroad Co.* (N. Y. App.) 25 N. E. 915; *Town v. Railroad Co.* (Mich.) 47 N. W. 665. The instruction asked by defendant entirely ignored the question whether there was any negligence upon the part of the defendant in setting the second train in motion without any schedule or time card as to how it should be run, and in failing to notify the conductor of said train that the first train would stop at Clyde Spur, and whether the collision occurred by reason of such negligence. There was certainly sufficient evidence to justify the submission of this question to the jury. Upon this ground alone, the court did not err in refusing to instruct the jury to find a verdict for defendant.

The defendant then asked the court to instruct the jury as follows:

(1) "In determining the question of whether the defendant the Northern Pacific Railroad Company was guilty of negligence in the management of these trains, or either of them, the jury are instructed that they may consider the rules of the company which have been read in evidence; and that if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants."

(2) "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train, in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or engineer of the extra train, then I instruct you that the defendants are not liable, and that you shall return a verdict for the defendants."

The record shows that the court gave the first instruction as asked by defendant, adding thereto the following qualification:

"Unless it appeared that the conductor of the train, or some one under whose orders he was acting, had authority in the special case to deviate from the rules."

This qualification, under the facts, was not erroneous. It was not necessary for the court, in its charge, to have repeated the second instruction asked by defendant. The principle that, if the collision occurred by reason of the negligence of the conductor of the second train in disobeying the rules of the defendant, the plaintiff could not recover, substantially covers every proposition embraced in the second instruction, subject only to the qualification which was added by the court.

Was there any error committed in other portions of the charge? The court, after correctly stating the rule of law as to the liability of the railroad corporation for the negligence of its conductors and agents, its duty to its employes, and the risks assumed by its employes, among other things, stated that the duty which an employer owes to his employes, whether the employer is a corporation or natural person, to provide proper means, facilities, and appliances for carrying on the work with reasonable safety cannot be so delegated to any subordinate or agent so as to exempt the employer from liability to an employe if an injury happens to him through a neglect of that duty. "So that whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety, and to guide the operation of dangerous agencies, whether he is a conductor on a freight train or a superintendent or the train dispatcher, or whoever is clothed with that power and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects." The portion of this charge above quoted is objected to; but we are of opinion that the principle enunciated therein is clearly within the third rule hereinbefore announced as a correct rule to be applied to the facts of this case, and that it is supported and sustained by the authorities cited in support of said rule.

The other portions of the charge to which exception is taken follow immediately after the portion quoted, and may be classified under three heads:

(1) "Now, applying that general principle to this case, if the evidence shows you that the conductor of either one or both of these trains was clothed with authority to control the movements of the trains, without any restrictions upon their judgment and discretion, if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company."

(2) "Now, it is not charged that there was any negligence in the management of the first train, except the negligence of the conductor; and if the

conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that. If he was not negligent, the defendants are not liable for this accident. If he was not negligent, the defendants would not be liable for this injury by reason of its occurrence; and just so, if the proof fails to show this jury that the conductor had the power and responsibility to manage the trains, the defendants would not be liable, even if he was negligent, because, if he was acting in subordination to somebody else, who had the power and controlled the operations of the trains, he would occupy the position of a fellow servant to the plaintiff, and the defendants would not be liable for his negligent acts."

(3) "If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence in the case as a special or extra train, called 'a wild train,' running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations; and it was the duty of the defendants to have some one in control of the operations of trains on that road to prevent that train from coming into collision with the regular trains on the road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train, or any one else in authority to control the movements of the trains running over that piece of road."

We here add another portion of the charge, not objected to:

(4) "Now, you will consider from the evidence in this case whether there has been any negligence on the part of any one having the authority and power and responsibility for the operation of the road as to the second train. If there was such neglect, the defendants are liable for the consequences to the plaintiff in this case of that neglect. If there was no such neglect of duty, there would be no liability, and no ground upon which the plaintiff can insist that the defendants shall compensate him for the injury he has sustained."

In considering the portions of the charge to which exceptions are taken, it may be conceded that sentences here and there may be found which if separated from the context, where the correct principle is announced, might either be calculated to mislead the jury, or, if standing alone, unaided or unexplained in other portions of the charge, might be considered erroneous. But this method of construing a charge is unfair to the trial court. Its charge upon any particular subject must be considered in its entirety.

The question which is to be determined by the appellate court is not whether some technical error may not have inadvertently crept into the charge, but whether the charge, when taken as a whole, has presented the law of the case fully, fairly, and correctly to the jury. *Crew v. Railway Co.*, 20 Fed. 94; *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 574, 588; *Railroad Co. v. Horst*, 93 U. S. 295. Notwithstanding the severe criticism of the learned counsel for defendant as to the expressions of the court in certain portions of the charge, our conclusion is that the general principles of the law applicable to the facts of this case, as we have heretofore announced them, were constantly recognized in the charge given by the circuit court. The charge of the court in its entirety is not fairly susceptible of the construction sought to be placed upon it by counsel. The jury evidently did not understand from the charge that the defendant would be liable for the negligent acts and conduct of the conductor or engineer of the second train. No portion of the charge was intended to convey any such meaning. All

that is said about the conductors fastening responsibility upon their employer by their acts, in subdivisions 1 and 3, when read in the light given by the other portions of the charge, refers to the status of the conductors with regard to their respective trains, whether under the facts they were to be considered as vice principals of the master or fellow servants with the other employés. This is made perfectly clear. In subdivision 2 the court told the jury that if the conductor of the first train was the responsible man—the vice principal of defendant—in managing that train, and he was negligent, the defendant would be liable for his negligence; that, if he was not negligent, the defendant would not be liable; and further on the court told the jury that, if the conductor of the first train did not have the entire charge, power, and responsibility of managing the train, the defendant would not be liable, even if the conductor was negligent, because if he was only running the train in subordination to somebody else, who had the power and authority to direct the movements of the train, “he would occupy the position of a fellow servant to the plaintiff, and the defendant would not be liable for his negligent acts.” This same idea is again announced in subdivision 3 with reference to the conductor of the second train.

Who was the person that had the charge and responsibility of running the trains? This question was placed before the jury in many different phases. But is it not clear that the jury, as sensible men, could not have understood the latter portion of subdivision 3 as stating that the conductor of the second train was a vice principal of the defendant, and that, if he was negligent, the defendant would be liable? The instructions and charge of the court must be considered in the light of the evidence. All of the testimony tended to show that the conductor of the second train did not have the exclusive management and control of the train. There was no evidence tending in the slightest degree to show that he did. He was running the train under telegraphic orders, without a schedule or time card. Neither under the testimony nor under the instructions could the jury have found as a fact that the conductor of the second train was the vice principal of the defendant, for whose negligent acts it would be responsible. It is manifest that the jury could not have been misled upon this point by the language of the court in the latter part of the charge in subdivision 3, even if it should be conceded as being technically erroneous.

It is urged that certain portions of the charge are erroneous in this: that the jury were therein authorized to fix the liability upon any employé of the defendant, and did not require that its negligence should be proven against any particular agent. This position is not well taken. All that is said about “some one else” or “whoever else” had reference to the agent of the corporation who had the care, management, and control of the movements of the trains. Whoever was invested by the corporation to provide for the running of the trains was the vice principal of the defendant. These portions of the charge were in accordance with the general principles we have previously announced. There is nothing said

in the charge that would justify the jury in fixing the liability of the defendant indiscriminately upon any one of its employés. The jury must necessarily have understood the charge to be that if the particular agent of the defendant who put the second train in motion, and who was clothed with the power and authority to control and direct its movements, was guilty of negligence in failing to properly provide for the running of the train, and that if he failed to notify the conductor of the train at what stations or places the first train would stop, and that the conductor of the second train obeyed his orders and the rules of the corporation in regard to the running of such train, then the defendant would be liable; but if the conductor of the second train disobeyed such orders or disregarded the rules of the company as to the manner in which its trains should be run, and the accident was solely caused by his negligence, then it would not be liable. It was the duty of the defendant, when it put the second train in motion, to make suitable provision, and to exercise ordinary and reasonable care, for its safe management, to guard against danger or accidents. This was a positive duty upon the part of the defendant, which it owed to its employés; and if this duty was delegated to any particular agent, and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the defendant. This principle is distinctly announced in the Baugh Case, where the court, in speaking of the positive duty which the master owes to his employés, said:

"That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employé by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. \* \* \* If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

The charge of the court is not in opposition to these views. The proof shows in this case that the conductor of the second train was running it under telegraphic orders, and that he was not notified that the first train which he was following would stop at Clyde Spur. It was a question for the jury to determine whether such action upon the part of the defendant, in providing for the running of the second train, was the exercise of that ordinary care and prudence which the law demands. If it was not, and the collision occurred by reason of the neglect of such duty, then the defendant was liable for the injury which plaintiff received.

Sheehan v. Railroad Co., 91 N. Y. 332, is in many respects a case directly in point. There the railroad company was prosecuting its business by running its trains over a single-track railway, and, through the direction of its superintendent, it put a wild train in motion, running irregularly, without reference to any schedule or

to its regular trains, and moving by special orders. The fireman of the regular train was injured, as claimed by him, by reason of the negligence of the agent of defendant in sending certain orders to the conductors of the respective trains. The court, after announcing the general rule that, "where the master delegates to another entire control over a branch or circumstance of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servant, and his acts or omissions relative thereto are the acts or omissions of the master himself," held that the trial court did not err in submitting to the jury the question "whether the defendant had omitted the doing of anything which it ought reasonably to have done to prevent the casualty which resulted in the plaintiff's injury."

Patterson, in his work on *Railway Accident Law* (section 296), speaking of the duty of railways to their servants in the operation of their lines, among other things, says:

"A railway is not negligent to its servants if it varies from its regular timetable in running its trains, provided that it gives to its servants reasonable notice of any change which, if unknown to them, may endanger their safety; but where, on a single-track line, a special train is ordered to run when a regular train is due, and, no effort having been made to hold the regular train, a collision ensues, and a servant is injured, the railway is liable, for the negligence of its superintendent is its negligence."

The judgment of the circuit court is affirmed, with costs.

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UNITED STATES v. NORTHERN PAC. R. CO. et al.

(Circuit Court, D. Oregon. May 11, 1895.)

No. 1,477.

DAMAGES—UNINTENTIONAL TRESPASS.

The N. Ry. Co. cut certain timber on lands which were, in good faith, supposed to be included in a grant to it, and caused the same to be manufactured into lumber. In an action against the railway company for trespass, it was afterwards adjudged that the land on which the timber was cut was public land. *Held* that, the trespass having been unintentional, the true measure of damages was the value of the standing timber at the time it was cut, and not that of the manufactured lumber after increased value had been added by the defendant's labor. *Wooden-Ware Co. v. U. S.*, 1 Sup. Ct. 398, 106 U. S. 434, followed.

This was an action by the United States against the Northern Pacific Railroad Company and others to recover the value of certain lumber. After the receipt of a mandate from the supreme court, to which the case had been taken on appeal, a judgment was entered by the plaintiff, without notice to the defendants. Defendants moved to set aside such judgment, and enter one in accordance with what was claimed to be the true intent of the mandate.

D. R. Murphy, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty. Dolph, Mallory & Simon and Carey, Idleman, Mays & Webster, for defendants.

GILBERT, Circuit Judge. An action was brought in this court by the United States against the defendants to recover the value of certain lumber manufactured from logs alleged to have been unlawfully cut and removed by the defendants in the year 1886, from the public lands, to wit, from the N. W.  $\frac{1}{4}$  of section 7, township 8 N., range 5 W. of the Willamette meridian, in the state of Washington. The defendants made answer that, at the time of the alleged wrong, the title to these lands had passed from the United States, and that the defendant Aaron Kinney was then the owner. It was the decision of this court (Sawyer, J.) upon the trial of said cause that the title had passed by grant from the United States to the Northern Pacific Railroad Company, and that the same was by mesne conveyances from said company vested in the defendant Kinney. 41 Fed. 842. Upon writ of error to the supreme court (152 U. S. 285, 14 Sup. Ct. 598), it was held that the land in controversy was included in the grant of lands to aid the Oregon Central Railroad Company, by the act of congress of May 4, 1870, which grant took effect before the joint resolution of May 31, 1870, granting lands to aid the Northern Pacific Railroad Company in the construction of a railroad and telegraph line between Portland and Puget Sound, and that, therefore, the title to the land in question never passed to the Northern Pacific Railroad Company, and hence was never vested in the defendant Aaron Kinney, but that, by virtue of the forfeiture of said grant to the Oregon Central Railroad Company, said land was at the time the timber was cut therefrom public land of the United States. It was the mandate of the supreme court upon said decision that the cause be remanded to this court, with direction to enter judgment for the United States upon the special findings of fact. The special findings of fact so referred to were the findings of the circuit court upon the trial, and they were, in substance, that the defendants had cut from the lands in controversy 293,505 feet of lumber, board measure; that the value of the lumber, when manufactured at Portland, was \$9 per thousand feet, and that its value in the tree, when cut, and in the log, was as stated in the testimony offered and made a part of the judgment roll. Upon receipt of the mandate in the circuit court, without notice to defendants' counsel, a judgment was entered on behalf of the United States for the sum of \$2,095, which was the value of the timber cut at the rate of \$9 per thousand feet. The defendants now petition for an order setting aside the said judgment, and for an entry of a judgment in accordance with the true intent and purport of the decision of the supreme court and the mandate thereupon issued, contending that in a case of this kind, where there was no willful trespass upon the lands of the United States, and where the timber was cut in good faith, and in the honest belief that the title to the lands whereon the same was cut had passed in the grant to the Northern Pacific Railroad Company, the true measure of damages is not the value of the manufactured lumber at the market, but the value of the standing timber before an increased value has been added thereto by the labor of the defendants. The supreme court, in *Wooden-Ware Co. v. U. S.*, 106 U. S. 434, 1 Sup. Ct. 398, has declared the doctrine that "where



the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern." This case comes clearly within the rule thus defined. It was the general belief at the time the timber was cut that the land in question was within the grant to the Northern Pacific Railroad Company of July 2, 1864, and that the date of said grant was anterior to that of the Oregon Central Railroad Company. Judge Sawyer so held in this case, in the judgment which was reviewed on writ of error from the supreme court. There can be no doubt that the defendants honestly believed that the title to the land had passed to the Northern Pacific Railroad Company, and that it was no longer public land. The testimony shows that the value of the standing timber at the time it was cut was about 75 cents a thousand feet, and it is the judgment of the court that the entry of judgment heretofore made in said cause in favor of the United States for \$2,095 be set aside, and that judgment be entered in favor of the United States against the defendants for the sum of \$220 and costs.

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PEORIA GRAPE SUGAR CO. v. BABCOCK CO.

(Circuit Court, D. Indiana. May 25, 1895.)

No. 401.

STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM—INDIANA STATUTE.

A memorandum in the form: "2/17. 15 cars mx. glucose, \$1.17½. Our guarantee price. Shipment: Feby., March. L. J. R. Peoria Grape Sugar Co.,"—is insufficient to sustain an action under the Indiana statute of frauds, providing that no contract of sale of goods, over \$50 in value, shall be valid unless some note or memorandum in writing is made and signed by the party to be charged, such memorandum failing to disclose the name of one party to the contract, and being indefinite as to the quantity of glucose, and the price.

This was an action by the Peoria Grape Sugar Company against the Babcock Company to recover the price of certain glucose, sold and delivered. The defendant interposed a counterclaim, to which the plaintiff demurred.

This is an action by the plaintiff against the defendant to recover the purchase price of a quantity of glucose sold and delivered by the plaintiff to the defendant. The defendant has filed a counterclaim in nine paragraphs against the plaintiff, seeking to recover damages for the alleged breach of several contracts for the sale and delivery of large quantities of glucose alleged to have been sold by the plaintiff to the defendant. The first paragraph alleges, in substance, that the plaintiff, by its written contract marked "Exhibit A," agreed to sell and deliver to the defendant 15 cars of glucose at the price of \$1.17½ per 100 pounds, which was to be shipped to and delivered at Evansville during February and March, 1894. That the glucose was to be of the kind and quality described in the contract. That 15 cars would be 750 barrels, amounting in weight to about 450,000 pounds. That during the month of April, 1894, the plaintiff by its verbal agreement, also by its written agreement, a copy of which is filed, marked Exhibits "D" and "E," promised and agreed to extend the time for shipment of the remainder of said glucose on said contract. That thereupon the defendant directed the plaintiff to ship all of the remainder of the glucose, which the plaintiff thereupon promised in writing to do, a copy of which, marked "Exhibit E," is filed. That, in compli-

ance with this promise, the plaintiff did ship a portion of the glucose, to wit, 250 barrels. That subsequently, on August 11, 1894, the plaintiff refused to further comply with its contract, and refused to ship any more glucose, leaving due on said contract 500 barrels, amounting in weight to about 300,000 pounds. That, by reason of the failure to deliver the glucose, the defendant was compelled to go into the market and buy enough to cover its contract, and lost the difference in price between the contract price and the value at the time of the refusal, to wit, \$2,850. That the defendant was ready and willing to receive and pay for said glucose as fast as the same was shipped. That in said contract "mx." means mixing; "\$1.17½" means \$1.17½ per 100 pounds; "Shipment: Feby., March" means shipments to be made during February and March; "2/17" means second month, seventeenth day; "our guarantee price" means that plaintiff guarantees the price to defendant not to exceed the price stated in the contract, and that plaintiff will pay defendant any excess of price it may be compelled to pay in the market in case it is compelled to go into the market to buy by reason of plaintiff's failure to comply with its contract. That said terms and expressions are familiar to the trade, and their meaning well understood.

The exhibits referred to are as follows:

Exhibit A.

"2/17. 15 cars mx. glucose..... \$1.17½  
 "Our guarantee price. Shipment: Feby., March.  
 "L. J. R. Peoria Grape Sugar Co."

Exhibit D.

"Peoria, Ill., Apr. 19th, 1894.

"The Babcock Company, Evansville, Ind.—Gentlemen: Your letter regarding past-due shipments received, and contents noted. We will admit we should have notified you at the expiration of the contract that we should have a right to ship the goods. When your Mr. Babcock was here, the writer was not aware that the option was out, supposing you still had time to take them. The price of corn was advanced so sharply that it will be a dead loss for us to fill the order. At the same time, if you want the goods shipped, we will do so, but must have shipping directions so as to ship them at our convenience. Please instruct us how you want the goods, and oblige.

"Yours, truly,

B. F. R.

"Peoria Grape Sugar Co."

Exhibit E.

"Peoria, Ill., April 23rd, 1894.

"The Babcock Co., Evansville, Ind.—Gentlemen: Your letter of the 21st at hand, and note your instruction to ship you one car daily on your order of February 17th. The same has had our attention, and the goods will go forward as instructed.

"Yours, truly,

Peoria Grape Sugar Co."

The second paragraph does not differ from the first except in counting on a contract marked "Exhibit B." as follows:

"April 5th. Peoria Grape Sugar Co. O. K.  
 "10 cars mxg. glucose..... \$1.25  
 "April & May delivery. Price guaranteed, etc. L. J. R."

The third paragraph does not differ from the first except in counting on a contract marked "Exhibit C," as follows:

"Peoria Grape Sugar Co.

"20 cars mx. glucose..... \$1.50, less frt.  
 "June, July shipment, buyer's option. Usual guarantee price, etc.  
 "Apr. 24th. L. J. Reynolds."

The fourth, fifth, and sixth paragraphs count upon the same instruments set forth as exhibits in the first, second, and third paragraphs. The seventh, eighth, and ninth paragraphs count upon the same exhibits as embodying the contracts the breaches of which give rise to the damages sued for. It is further alleged that the plaintiff subsequently sent by mail to the defendant

three printed memoranda, substantially alike, which are filed as exhibits. Then each paragraph proceeds as follows: "But if it should be held that the memorandum which is filed marked 'Exhibit F' formed a part and parcel of the contract, and that the terms therein stated were a part of the terms of the contract between the parties, yet, in either event, the defendant says that the plaintiff has failed and refused to carry out the terms of its contracts in this, that it has failed and refused to ship 500 barrels of the glucose described in said contract." The exhibits last referred to are not copied, for the reason that they cannot be regarded as the basis of the causes of action in either the seventh, eighth, or ninth paragraphs of the counterclaim. The plaintiff has interposed a demurrer to each paragraph of the counterclaim.

J. E. Williamson, for plaintiff.

J. T. Walker, for defendant.

BAKER, District Judge (after stating the facts). The statute of frauds of this state is as follows:

"No contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 3 Burns' Ind. Rev. St. § 6635 (Rev. St. 1881, § 4910).

The goods agreed to be sold, as disclosed in each paragraph of the counterclaim, largely exceed the price of \$50. The sole contract of sale exhibited in each paragraph of the counterclaim is evidenced by the writings copied in the foregoing statement of the case. The defendant does not count upon a verbal contract of sale, coupled with a delivery to and acceptance by the purchaser of a part of the property, nor upon part payment, nor upon the giving of something of value in earnest to bind the bargain. The right to recover damages for failure to deliver the property mentioned in each paragraph of the counterclaim rests solely upon the written instruments upon which the several causes of counterclaim are bottomed. The right of the defendant to recover damages is grounded upon the validity of the contracts evidenced by the notes or memoranda in writing of the bargain. The note or memorandum in writing of the bargain, when relied upon as the foundation of a right to recover damages for failure to deliver the property, must disclose with substantial accuracy every fact material to constitute a contract of bargain and sale. It is, therefore, essential that such a note or memorandum shall contain within itself a description of the property agreed to be sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and of the party who buys it. It is settled to be indispensable that the written memorandum should show, not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name, or a sufficient description, of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by one does not

bind him, save only to the person to whom the promise was made, and, until that person's name is shown, it is impossible to say that the writing contains a memorandum of the bargain. In *Grafton v. Cummings*, 99 U. S. 100, 107, it appeared that the purchaser of property at auction signed an agreement which did not mention the name of the seller. The court, speaking by Mr. Justice Miller, say:

"The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the agreement or memorandum shall be in writing. In an agreement of sale there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it. \* \* \* The name of the vendor, or some designation of him which could be recognized without parol proof extraneous to the instrument, was an essential part of that instrument to its validity."

In *Sanborn v. Flagler*, 9 Allen, 474, the contract was to deliver to plaintiff certain iron. Bigelow, C. J., said:

"It is urged that the paper does not disclose which of the parties is the purchaser and which is the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection, if well founded. There can be no valid memorandum of a contract which does not show who are the contracting parties."

In the case of *Ridgway v. Ingram*, 50 Ind. 145, the requisites of the note or memorandum in writing referred to in the statute of frauds were considered by the court, and it was there said by Wooden, J., in delivering the opinion of the court, that—

"A memorandum, in order to be sufficient within the statute, must state the contract with such reasonable certainty that its terms may be understood from the writing itself, without recourse to parol proof."

The case of *Lee v. Hills*, 66 Ind. 475, involved a counterclaim founded upon a memorandum in writing. The counterclaim was for the recovery of damages for the failure to deliver certain personal property sold by the plaintiff to the defendant. It was alleged that by the mutual mistake of the parties, the word "sold" was omitted from before the name of the counterclaimant. It was held that the memorandum, the word "sold" being omitted, was not a note or memorandum in writing of the bargain within the meaning of the statute of frauds, and that parol evidence was not admissible to supply the omitted word in the memorandum. The case of *Wilstach v. Heyd*, 122 Ind. 574, 23 N. E. 963, was an action to recover damages for the alleged breach of a contract for the sale of a lot evidenced by a memorandum in writing. The memorandum of sale was as follows:

"\$200.

New Albany, April 23d, 1887.

"Received of J. B. Wilstach two hundred dollars as part purchase money of a lot at \$2,500. Balance twenty-three hundred and sixty dollars.

"Geo. Heyd, Admr. Est. Jacob Heyd."

And there were indorsed on the reverse side these words: "The lot No. 14 Ekin Ave." It was held that the memorandum was in-

sufficient to support an action for damages for its breach, and that the words indorsed on the reverse side were insufficient to help it out. It was said that the words indorsed on the reverse side of the memorandum could not be regarded as a part of it because there was nothing in the memorandum referring to them. And it was further said that, even if these words were read into the memorandum, the description of the lot was insufficient, inasmuch as it would require the aid of parol proof to identify it.

The note or memorandum counted on in each paragraph of the counterclaim is insufficient to sustain an action for its breach. It does not disclose the name of the purchaser, and there is nothing in either of the letters copied in the statement which can aid its insufficiency. The description of the property is clearly insufficient. What shall be held to constitute a car of glucose can only be ascertained by parol proof. And the admission of such proof would most likely result in establishing a contract at variance with the understanding of one or the other of the contracting parties. Until the quantity or amount constituting a car load has been mutually agreed upon, the minds of the parties have not met on one of the most important terms of the bargain. The contract is so indefinite in this particular that it is incapable of enforcement. For the court to hear proof, and adjudge that the parties agreed upon 50 barrels of glucose as a car load, would be to permit a material part of the contract to be proved by parol evidence dehors the contract. And the price to be paid for the glucose is equally uncertain. Whether the parties understood that the price to be paid was \$1.17½ per 100 pounds, as alleged, or whether it was to be \$1.17½ per gallon, is not disclosed by the contract. The understanding of the parties, whatever it was in this regard, rests in parol. Each memorandum discloses the name of the seller, but it fails to disclose the name of the purchaser, the amount of property to be sold and delivered, or the price to be paid therefor. They must be held invalid as contracts for whose breach damages may be recovered. Let the demurrer be sustained.

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CLARK THREAD CO. v. ARMITAGE.

(Circuit Court, S. D. New York. May 22, 1895.)

1. UNFAIR COMPETITION—FRAUD OF PLAINTIFF.

Fraud, such as to disentitle a plaintiff to relief against unfair competition in his business, cannot be predicated of statements which, owing to the brevity required by the limited space of a label, are not minutely accurate; nor of the use on two classes of goods of labels which might be mistaken for each other, the statements on both being true; nor of the use, to a limited extent, of the name of a firm to which the plaintiff believed itself to have succeeded; nor of the use of "trade talk" in advertisements.

2. SAME—CORPORATE NAME—ESTOPPEL.

Defendant was incorporated as the William Clark Thread Company. Plaintiff, the Clark Thread Company, objected to this name; and, at the suggestion of its managing director and treasurer, defendant's name was

changed to the William Clark Company. *Held*, that plaintiff was estopped to object afterwards to the use by defendant of the amended name.

**2. SAME—IMITATION OF LABELS.**

Plaintiff had established, by a long course of successful dealing, a high reputation and extensive market for the thread manufactured and sold by it, which was known as "Clark's Thread," and was put up on spools each bearing a round label, with the name "Clark's" in the upper part of the circle, the words "Spool Cotton" in the lower part, and the letters "O. N. T.," separated by periods, horizontally across the middle. Defendant, immediately after its incorporation, began the manufacture of thread, which it put up on spools with a label in all respects like plaintiff's, except that it bore the letters "N-E-W," separated by hyphens, in place of the letters on plaintiff's labels. *Held*, that defendant's label was calculated to create confusion and misunderstanding, and that plaintiff was entitled to an injunction restraining the defendant from using the word "Clark" or "Clark's" in connection with thread manufactured by the William Clark Company.

**4. SAME—USE OF NAME.**

*Held*, further, that plaintiff's right was not impaired by the fact that another manufacturer, whose goods came little into competition with plaintiff's, had long used the name "Clark's" in connection with thread, with plaintiff's assent.

This was a suit by the Clark Thread Company against Herbert G. Armitage to restrain the use of a label. The cause was heard on the pleadings and proofs.

Rowland Cox and Charles B. Meyer, for complainant.  
C. E. Mitchell and H. D. Donnelly, for defendant.

COXE, District Judge. This action is brought to restrain unfair competition in trade. Both parties are dealers in spool cotton. The complainant is a New Jersey corporation created in 1865 and engaged in the manufacture and sale of "Clark's O. N. T. Spool Cotton." The defendant is the manager of the William Clark Company which is also a New Jersey corporation organized in May, 1891, for the purpose of manufacturing and selling thread. It began the sale of its product in October, 1892, under the name of "Clark's N-E-W-Spool Cotton." It is conceded that the case is to proceed upon the same principles of law as if the William Clark Company were the defendant. The contention on the part of the complainant is that the defendant's cotton is put up and advertised so that purchasers are led to believe that they are buying a new brand of the complainant's cotton. In other words, the allegation is that the public believes it is purchasing a new brand of an old and well-known manufacturer whose reputation is firmly established by 30 years of honest endeavor, and not the untried product of an unknown corporation with no years, no history and no good will behind it. The complainant prays for an injunction restraining the defendant from using the name of "The William Clark Company," or "Clark," or "Clark's N-E-W" in connection with spool cotton. The defenses are first, that the complainant is guilty of fraud and misrepresentation in advertising its goods and is, therefore, entitled to no relief in a court of equity. Second. The William Clark Company was named after its principal incorporator who had a right to give his name to the company. Its use in the trade is,

therefore, proper and lawful. Third. The complainant is estopped from attempting to enjoin the corporate name for the reason that its officers and agents not only acquiesced in the name but even suggested it. Fourth. The name "Clark," in connection with thread, does not belong exclusively to complainant, but for years had been used by persons named Clark to designate their goods. Fifth. The proof fails to establish a case of unfair competition.

It is thought that the defendant has not succeeded in proving the charge of false representation. The code of morals by which the defendant seeks to test the complainant's acts is so strict that, if it were assented to, very few business houses which exploit their goods by advertising—certainly not the defendant himself—could escape condemnation. There are doubtless inaccuracies on some of the complainant's boxes and labels. Information is omitted which might have been supplied and assertions are made which, possibly, may convey erroneous impressions. It must be remembered, however, that the complainant was limited as to space. Epigrammatical expressions were unavoidable. When one's statements are confined to the end of a spool it is necessary to be concise. A box cover is not a favorable place on which to trace a pedigree. It is said that there was *suppressio veri*, if not actual falsehood, in the statement on some of the boxes, "Manufactory established in 1812." If the complainant had been in a position to relate the details of its genealogy it is possible that a more accurate idea might have been conveyed. Such a history, in the actual environment, was out of the question. The statement as it was intended to be understood, and doubtless was understood, is sufficiently accurate. A merchant, occupying a modern building in which his customers are heated by steam, lighted by electricity and hoisted and dropped through many stories in express elevators, might truthfully place upon the granite arch over his door "Established in 1800." No one would understand this statement literally; no one would for a moment believe that the cloud-piercing structure before him was built in 1800, or that the merchant, or any of his assistants, were doing business there or elsewhere nearly a century ago. The idea conveyed would be that somewhere and by some one a business was established in 1800 and that the merchant in question had succeeded to its good will. So, when the complainant placed upon its boxes, "Manufactory established in 1812," a customer, if he attached any importance at all to the statement, would probably conclude that complainant had succeeded in some way to the rights of those who began making thread in 1812, and so it had. He would hardly imagine that complainant was making thread in an antiquated building erected three-quarters of a century ago. If he did entertain this notion he would probably conclude to purchase his thread elsewhere. So, too, it is impossible to predicate fraud of the use of the black and gold label on the three-cord cotton. Complainant uses a black and gold label on its six-cord thread and the label contains the words "Six Cord." On the three-cord cotton, of which a relatively insignificant amount is made, the words "Six Cord" are omitted. The argument is that

the public, having been accustomed to see a similar label on six-cord thread, will suppose that the three-cord cotton is six-cord cotton, although there is no statement to that effect upon the label. This will not do. A party cannot be charged with fraud in making a false statement as to part of his goods when the proof is that the statement is made regarding other goods as to which it is absolutely true.

The complainant is also accused of fraud because years ago, to a very limited extent, it put up and sold cotton on black spools with the name of "J. & J. Clark & Co., Paisley," on the box cover, indicating that it was manufactured by that firm at Paisley, Scotland. Only one box of this thread was found and introduced in evidence, the complainant admitting that it and similar boxes were at one time put up and sold by it. There is testimony to show that in former years thread was sent here by the Paisley firm in an unbleached condition and was bleached and spooled by the complainant. This "Blackwood" thread constituted such an insignificant part of the complainant's business that it is impossible to assume that anything was done *malò animo* regarding it. If the complainant believed that it was the legitimate successor of J. & J. Clark & Co. in this country, and the thread was made, though not completed for the market, at Paisley, it is difficult to see how the complainant is guilty of fraud in this connection. Fraud cannot be presumed. The question is not what was the technical, legal effect of all the transfers and changes in the business of the various firms and corporations, but what the complainant believed, and had a right to believe, regarding them. If its officers asserted only what they honestly believed to be true, with no intent to mislead the public, there is no fraud. So far as the court is able to understand the complicated history of the succession from the old Paisley firm, it is thought that no material statement made by the complainant is unfounded. But even though the complainant took too sanguine a view as to its derivative rights, it cannot be convicted of fraud if it honestly believed that it possessed them. The court understands that the complainant has none of the "Blackwood" thread on hand and discontinued its sale some time prior to the commencement of this action.

Again, the complainant is charged with fraud in saying that its thread is "sold everywhere." No sane man would understand this literally. If "everywhere" when so used is synonymous with "the earth," the complainant can be convicted of falsehood by proof that Clark's thread is unknown in Tasmania or Siam. The statement is on a par with the equally modest suggestion of the defendant that his thread is "the latest and the best." This harmless exaggeration is understood and discounted by all. It is not fraud, but merely "trade talk." No one is deceived. No one is injured.

It is unnecessary to pursue this subject further. All of the alleged frauds can be explained upon a theory compatible with honesty. Some of the most serious accusations relate to representations which were discontinued long before the commencement of this action and had reference to matters so trivial as to preclude absolutely the idea of fraud. One who is honest as to millions is not likely to



develop into a petty thief. If the statements complained of had been made *animo furandi*, it is hardly possible that they would have been confined to a part of the business so infinitesimal. In short, the record fails to show any motive for the alleged false statements. There is no proof that any one ever was defrauded and it is impossible to perceive how any one could be defrauded thereby.

The defendant's company was first incorporated as "The William Clark Thread Company" on the 7th of May, 1891. The complainant objected to this name and an interview took place between the officers of the two companies for the purpose of arranging the difficulty. At the suggestion of the complainant's managing director and treasurer the corporate name was changed by striking out the word "Thread," leaving it as it is to-day, "The William Clark Company." This is sworn to by two witnesses and is denied by the complainant only in the most general way, if at all. Witnesses who were present at the interview in the interests of the complainant were not called to contradict the testimony. The weight of evidence and the presumptions from the complainant's silence are all overwhelmingly to the effect that the complainant consented to the use of the present corporate name. This must be regarded as an established fact. Corporations usually act through agents. The treasurer represented the complainant upon this occasion. The interview was an official one, no resolution of the board of directors was necessary. The complainant, through its treasurer, having induced the William Clark Company to strike out the word "Thread" from its corporate name and adopt its present name, cannot be heard to complain. Harmony was purchased on the part of the defendant's company by adopting the complainant's suggestion. Complainant should not be permitted now to repudiate its own terms of peace and punish the defendant for using a name which was agreed upon as unobjectionable. Had the William Clark Company supposed that its agents could be attacked for using its present name it might have preferred, for the sake of peace, to change it still further, or to retire altogether rather than face an expensive litigation. It had a right to assume that all disagreement regarding its name was settled forever. Having made a treaty of peace the parties must be held to its stipulations.

The complainant has built up a splendid business. For 30 years it has been engaged in making thread in this country. Its thread is universally recognized as an honest and reliable product. It is so firmly established in certain sections that it practically has a monopoly. "Clark's thread" is sought for and used to the exclusion of all other brands. The demand is for the complainant's thread, and, though other thread is used to a limited extent, it is not too much to say that in certain localities the market belongs to the complainant. It has taken capital, industry and years of arduous endeavor to produce this result. If the complainant had not dealt honestly with the public it would not be in this position to-day. Its success is due to the fact that for a generation it has furnished an article in which the people had faith. This good will is the complainant's inheritance and its property. It is as much a part of its assets as its mill or its counting house. No one has a right to destroy it except by fair and

honest competition. No other manufacturer has a right to take away the complainant's customers by inducing them to believe that they are purchasing the complainant's goods.

The defendant corporation began doing business in the autumn of 1892. When this suit was commenced, in January, 1893, it had been selling its product less than four months; it had at that time no past and no good will; it entered the field as a new comer with its fortune to make; its thread was unknown and untried; the public verdict had not been rendered. Undoubtedly the defendant was at liberty to use all legitimate means to gain popularity for this thread, but it is equally true that he was not permitted to trade upon the complainant's reputation and induce people to believe that his thread was a new brand emanating from the Clark Thread Company; concealing the fact that it was an entirely new thread, the product of a corporation which had not been six months in operative existence. The defendant's company was not entitled to warm itself into being in the sunlight of the complainant's reputation. The chief incorporator was William Clark. He was at liberty to avail himself of whatever reputation he had gained as a thread maker while in the employ of the complainant, but it was unlawful for him so to act that the public was deceived as to the true condition of affairs. That a party has a right to use his surname honestly is clearly established, but in the case of a corporation there is no such thing as a surname or a Christian name. Had William Clark been doing business as an individual the presumption of unfair competition would be more difficult to draw. When, however, he gives his name to a corporation, an act of doubtful propriety, but for complainant's consent, and then, failing to use the corporate name, advertises his goods by a name used for 30 years to distinguish the complainant's goods, the motive can hardly be doubted. The defendant's company is an artificial person; its name is "The William Clark Company"; it has no Christian name and no surname; its name is not "Clark," or "Clark's;" it began its existence in May, 1891. It is no answer to say that "Clark" is a part of its name; so are the letters O. N. T. If it were incorporated under the name of "The Clarkson Company" the argument would be equally available. The defendant cannot escape the charge of unfair competition by alleging that he is using the corporate name, for he is not. He is using complainant's trade name and the fact that complainant's trade name happens to be a part of the name of the corporation which he represents does not give him a right to use it. In short, to paraphrase the language of the court in *Croft v. Day*, 7 Beav. 84: "He has a right to carry on the business of a thread manufacturer honestly and fairly; he has a right to the use of his own name; I will not do anything to deprive him of that or any other name calculated to benefit himself in an honest way; but I must prevent him from using it in such a way as to deceive and defraud the public." The complainant has a right to invoke the rule so plainly stated in *Levy v. Walker*, 10 Ch. Div. 447, and say to the defendant: "You must not use a name, whether fictitious or real—you must not use a description, whether

true or not, which is intended to represent, or calculated to represent, to the world that your business is my business, and so, by fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me."

It would be a jejune and idle proceeding to comment upon the numerous authorities to which the attention of the court is called by counsel. In the recent case of Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, the leading cases have been collected and the law applicable to this subject is clearly stated. The facts in that case are very similar to the facts here. There being no proof that the plaintiff had consented to the defendant's corporate name, the court enjoined its use, thus going a step further than the court is required to go in the case at bar. The general principles of law as there enunciated may be considered as furnishing a rule for this case.

The court cannot resist the conclusion that the public may be led to believe that the defendant's thread is the product of the old company; in other words, that it is "Clark's thread" as known in the market for so many years. The principal label adopted by the defendant, which is used on the bottom of spools, on box covers and generally in the business, is calculated to induce purchasers to believe that defendant's thread is either the old thread under a new label, or a new and improved brand of the old thread. Compare this label with the principal label of complainant. The name "Clark's" appears on each printed in the same heavy Gothic type and occupies identically the same position in the upper half of the circle. The same is true of the words "Spool Cotton" in the lower half. Horizontally across the middle of the complainant's label are the letters O. N. T. separated by periods. They are white letters on a dark background. Horizontally across the middle of the defendant's label are the letters N-E-W- separated by hyphens. They are white letters on a dark background. That this would not mislead an expert or a wholesale dealer may as well be conceded, but it is equally true that it is calculated to deceive small buyers. Women who use thread are not apt to be critically observing in such matters. Minute details make small impression upon their minds. They remember the salient features, not the unimportant ones. They are the partisans of Clark or Coats or some other manufacturer, and when they visit the store of the retail dealer they call for their favorite thread. Is it not too plain to admit of serious doubt that a woman who had all her life used the complainant's thread who should ask a salesmap for a spool of "Clark's thread, No. 50," would receive the defendant's No. 50 and pay for it in perfect confidence that she was getting what she wanted? If she had a spool of O. N. T. with her so that she could compare the labels the differences might attract her attention. If she followed the matter up and made inquiries she might learn the whole truth. But it is altogether likely that she would have no means of comparison, and if the difference in the label made any impression she would probably conclude that Clark had put a new brand of thread on the market. That this label is calcu-

lated to create confusion and misunderstanding seems obvious on its face; that it and the other devices resorted to by the defendant have produced confusion is abundantly proved by the testimony. Those who read this record impartially must, it seems to the court, be impressed with the idea that the defendant's company has reaped an unfair advantage by the use of the name "Clark." If the chief incorporator had been named William Thompson instead of William Clark, and the thread had been put upon the market as "Thompson's" instead of "Clark's," is it fair to suppose that it would have made such headway in complainant's territory and among its old customers? William Thompson might have been as accomplished a thread maker as William Clark, but the public, never having heard of Thompson's thread, would look on it as an interloper and handle it with caution. "Clark's thread," on the contrary, needed no introduction, the public knew all about it.

There is no doubt about the rule of law applicable to this branch of the case. The senior counsel for the defendant states the rule as the court understands it to be. After arguing that the William Clark Company is justified in using its corporate name he says:

"This being the case it follows that it can use its own name upon its own goods provided it does not accompany them with simulative indicia calculated and intended to create the impression that goods of its manufacture are the complainant's goods. \* \* \* Of course, I concede that the name, however legitimately worn, cannot be accompanied with simulative indicia, intended to enable the defendant to palm off its goods as the plaintiff's."

Again he says:

"The question here presented to your honor is a pure question of fact. That question is, has this plaintiff shown that the expression 'Clark's Spool Cotton' points so distinctively in the public mind to the plaintiff, as distinguished from all others, that its use necessarily and per se is an invasion of its rights?"

Although the evidence may not enable the court to say that the expression points distinctively to the complainant, it is thought that the evidence does show that the use of the expression in the manner adopted by the defendant is an invasion of the complainant's rights. We are dealing now with the rights of these parties as they existed at the commencement of this action. There was a time when "Clark's thread" had no well-defined secondary meaning. So many Clarks were engaged in the business that the expression in question did not convey any definite impression to the mind. Times have changed since then. Long before the commencement of this suit the business of the complainant had increased enormously. Others had been absorbed or discontinued business, so that when this action was commenced the complainant so dominated and controlled the market that "Clark's thread" was synonymous with complainant's thread in certain localities, and was understood at all times by a majority of people to relate to complainant's thread.

The chief exception is the "Mile-End Cotton." The manufacturers of that brand had as good if not a better right than the complainant to use the expression referred to, but their product is made to a comparatively limited extent and in some localities is almost unknown.

Certainly it is fair to say that the two concerns practically divided the market for "Clark's thread" between them. The business was so arranged and systematized that there was no clashing. For some time prior to 1892 the expression in question meant either the complainant's thread, or the "Mile-End" thread, but generally the complainant's. It seems to be tacitly admitted that if the complainant at the commencement of the action had the sole right to use the expression "Clark's thread," so that it had acquired a secondary meaning in connection with complainant's thread alone, that its use by the defendant should be restrained. The argument is that this right is lost because the complainant did not possess it exclusively; that because the "Mile-End" Clarks have a right to use the expression all other Clarks have an equal right. The court does not so understand the law. The contrary is, it is thought, asserted by the following authorities: *Newman v. Alvord*, 51 N. Y. 189, 195; *William Rogers Manuf'g Co. v. Rogers & Spurr Manuf'g Co.*, 11 Fed. 495; *Croft v. Day*, 7 Beav. 88. It is true that these cases are not precisely similar, on the facts, to the case at bar. No two cases are exactly alike. It is always possible to distinguish. The effort, however, in these and similar cases is to arrive at justice. The broad principle underlying them all is that property shall be protected from unlawful assaults. That where a party has for long years advertised his goods by a certain name so that they are distinguished in the market by that name the court will not permit a newcomer, by assuming that name, to destroy or impair an established business even though others may have acquired the right to use the name legitimately. A., who has a right to a trade name, may prevent C., who has no right, from using it even though B., who has an equal right with A., does not object to the use by C. One who has an interest in the preserve can without the co-operation of his cotenant, punish the common poacher.

It follows that the complainant is entitled to a decree for an injunction restraining the defendant from using the word "Clark," or "Clark's" in connection with the thread manufactured by "The William Clark Company." Of course the court does not intend to intimate that the defendant may not use the corporate name of said company in any way he may desire, provided it is not printed in such a manner as to be a practical violation of the injunction against the use of the word "Clark." The letters N. E. W. are chiefly mischievous in connection with the word "Clark's"; their use at this time need not be restrained. As the complainant has succeeded only in part it should not recover costs.

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HARPER et al. v. RANOUS.

(Circuit Court, S. D. New York. May 7, 1895.)

**1. COPYRIGHT—INFRINGEMENT—DRAMATIZED NOVEL.**

Under the act of March 3, 1891, amending Rev. St. § 4952, so as to give to authors or their assigns the exclusive right to dramatize and translate their copyrighted works, the owner of the copyright of a novel is entitled

to an injunction against the public production of a play or drama which presents characters, plot, incidents, dramatic situations, and dialogues appropriated from the novel.

**2. SAME—NAME OF NOVEL.**

The owner of the copyright of the novel "Trilby" is not entitled to protection against the use of that name in connection with a dramatic composition which does not present any scenes, plot, or dialogue imitated or adapted from the novel; for it is the name in connection with the novel, and not the name alone, which the copyright protects.

This was a suit by John W. Harper and others against William V. Ranous for infringement of the copyright of the novel "Trilby." Complainants moved for a preliminary injunction.

A. J. Dittenhoefer and George L. Rives, for complainants.  
John J. Thomasson, for defendant.

**LACOMBE**, Circuit Judge. The act of March 3, 1891 (26 Stat. 1106), amends section 4952 of the United States Revised Statutes so that it now contains this provision: "Authors or their assigns shall have the exclusive right to dramatize and translate all of their works for which copyright shall have been obtained under the laws of the United States." Complainants' title to the copyright of the novel "Trilby," as set forth in the bill, is not seriously disputed; and the affidavits show quite plainly that defendant's drama or play called "Trilby" presents characters, plot, incidents, dramatic situations, and dialogue appropriated from the novel thus copyrighted. Complainants may take an injunction pendente lite restraining the defendant, his agents and servants, from producing or publicly performing any play or drama presenting the scenes, incidents, plot, or dialogue of the said novel, "Trilby," or any substantial part thereof, or any simulated or colorable imitation or adaptation thereof. The application, however, for an injunction against the mere use of the name "Trilby" as the title of any dramatic composition which does not present such scenes, incidents, plot, or dialogue, or simulated or colorable imitation or adaptation thereof, is denied. It is the name in connection with the novel, not the name alone, which the copyright law protects.

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**OLIVER DITSON CO. v. LITTLETON et al**

(Circuit Court of Appeals, First Circuit. April 25, 1895.)

No. 111.

**COPYRIGHT—MUSICAL COMPOSITIONS—MANUFACTURE IN UNITED STATES.**

The proviso in section 3 of the copyright act of March 3, 1891, that "in the case of a book, photograph, chromo, or lithograph," the two copies required to be delivered to the librarian of congress shall be manufactured in this country, does not include mere musical compositions though published in book form, or made by lithographic process. 62 Fed. 597, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by Alfred H. Littleton and others against the Oliver Ditson Company for infringement of the copyright on three musical compositions, two of which are in the form of sheet music, and one (a cantata) consists of some 90 pages of music bound together in book form, and with a paper cover. Two of these pieces were printed from electrotype plates, and one from stone, by the lithographic process. An injunction was granted by the circuit court, after delivering an opinion, which is reported in 62 Fed. 597. The defendant appeals.

Linus M. Child and Causten Browne, for appellant.

Lauriston L. Scaife, for appellees.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. We are satisfied with the conclusion of the circuit court in this case, and adopt the opinion of the learned judge of that court, except that we do not deem it necessary to investigate the history of the bill which resulted in the copyright statute of March 3, 1891 (26 Stat. 1106), in question, or to determine how far that history is pertinent to the construction of the act. The case deals with copyrighted matters alone, which are only the musical parts, or notations, of complainants' publications. We are not called on to consider a case in which more than the notation is covered by a copyright. That musical compositions, as such, differ, in the view of the copyright law, from books, as such, necessarily follows from the fact that when musical compositions were first made copyrightable the penalty for infringing was made expressly and distinctively other than that for infringing the copyrighted book. Act Feb. 3, 1831 (4 Stat. 437, 438, §§ 6, 7). And it so stands in the present statute. Act March 3, 1891 (26 Stat. 1109, §§ 7, 8). There are other particulars in which the statutes make the same distinction, but in this one the result is unavoidable. What were copyrighted here were clearly musical compositions, and nothing else, and the distinction thus made by these penal provisions cannot be maintained unless the result reached by the circuit court is accepted. The word "lithograph," found in the proviso in section 3 of the statute under consideration, represents only a subdivision of the matters embraced in the word "print," in the same section, which gets its meaning and limitation, for the purposes of this statute, from its immediate association with the words "engraving, cut." This is emphasized by the third section of the act of June 18, 1874 (18 Stat. 78), which expressly limits the word to pictorial illustrations, or works connected with the fine arts. Moreover, the introduction of the proviso by the words "in the case" constitutes a legislative selection from what precedes it, and shows that the qualifying effect of the proviso was intended to be limited to a part only of the things named in the body of the section. These words necessarily make the whole section *in pari materia*. It is true that in some parts of the statutes the words "book," "print," and "musical composition," refer to the intellectual conception as the essential element, and in other parts may refer more particularly to the material form in which it is expressed; but nowhere does either

element exclusively exist, because no intellectual conception is copy-rightable until it has taken material shape. Therefore, there is no reason for holding that the use of the words "book, photograph, chromo, or lithograph," in the proviso, involves a departure from the distinctive idea appertaining to either in other parts of the statutes touching the subject-matter of copyright. If the statutes were of doubtful meaning, the history of the bill, the omission of the words "dramatic composition" from some of the provisions of the statutes, the contemporaneous construction by the departments or officers of the United States, and perhaps other propositions urged upon either side, might have weight; but, in a case so clear as the one at bar, we do not deem it necessary to invoke such aids, or to note the conditions or limitations under which such considerations should weigh in the interpretation of doubtful statutory provisions. The decree of the circuit court is affirmed.

CONSOLIDATED ELECTRIC MANUF'G CO. et al. v. HOLTZER.

(Circuit Court of Appeals, First Circuit. April 16, 1895.)

No. 123.

1. PATENTS—WHAT CONSTITUTES PATENTABLE INVENTION.

The right to improve on prior devices by making solid castings in lieu of constructions of attached parts is so common and universal in the arts that the burden rests upon any one claiming patentability for such an improvement to show especial reasons in support of his claim.

2. SAME—COMMERCIAL SUCCESS.

That the patented article is a commercial success, and rapidly super-sedes others of its general type, are considerations which are to be applied with caution, and only in doubtful cases, turning on questions of utility or invention. *Olin v. Timken*, 15 Sup. Ct. 49, 155 U. S. 141, and *De Loria v. Whitney*, 11 C. C. A. 355, 63 Fed. 611, followed, and *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757, distinguished.

3. SAME—"NEW RESULTS."

On the question of the patentability of an improvement in galvanic batteries, consisting in casting the cover, cup, and lip in one solid piece, instead of using several pieces secured together, no weight is to be attached to the alleged achievement of new results, consisting in the avoidance of the resistance encountered by electricity in passing joints, and in preventing the weakening effect of the corrosive liquid upon the joints themselves, for these results are the same that are achieved in all the arts using corrosive liquids when metallic and other joints are dispensed with.

4. SAME—GALVANIC BATTERIES.

The Holtzer patent (No. 327,878) for an improvement in galvanic batteries held void for want of invention. 60 Fed. 748, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by Charles W. Holtzer against the Consolidated Electric Manufacturing Company and William Rotch and Charles G. Winter, its president and treasurer, respectively, for alleged infringement of letters patent No. 327,878, issued October 6, 1885, to Charles W. Holtzer, for an improvement in galvanic batteries.



The circuit court rendered a decree for complainant. 60 Fed. 748. Defendants appeal.

Anthony Pollok and Philip Mauro, for appellants.  
Frederick P. Fish and W. K. Richardson, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The first claim covers, in an electric battery, a negative electrode, including cup, cover, and lip, cast solid, with an opening in the cover for the positive electrode. The phraseology of this claim is too clear to be limited to any special material as the constituent element of the negative electrode, so that the device of the appellant (defendant below) infringes, notwithstanding its cup is formed of a simple carbon, and not of agglomerate material. The second claim is like the first, except that it limits the inclosure of the battery to a glass jar, and adds the elements of an insulating bushing surrounding the opening in the cover. The only advance alleged to be covered by either claim is in the fact that the cover, cup, and lip are cast solid, instead of being made of several parts soldered together, or otherwise secured to each other. There is no question on the score of utility, and a cup cast solid with a cover and lip was novel in connection with an electric battery. Therefore, the only issue is whether the device in suit contains invention, within the meaning of the statutes touching patents for mechanical devices.

The right to improve on prior devices by making solid castings in lieu of constructions of attached parts is so universal in the arts as to have become a common one, so that the burden rests on any one who sets up this improvement, in any particular instance, as patentable, to show especial reasons to support his claim. Livermore, the complainant's expert, states that he does not know that any one of the features of complainant's device was of "substantial novelty," but that, so far as he knew, a battery containing all these features was new. This covers only the matter of mere novelty; and so much as this may be said of any combination in any of the arts in which, for the first time, two or more parts are cast as one. The complainant relies on the rule applied by this court in *Watson v. Stevens*, 2 C. C. A. 500, 51 Fed. 757, 760, 761, and claims that prior workers in this art had sought to devise means for avoiding the necessity of joints between the negative electrode and the cover or lip, but had never succeeded. We fail to find any evidence of this in the record. He also claims that the Holtzer battery speedily superseded all others of its general type, which claim is sustained by the proofs. But all such considerations are applied with caution to a very limited class of cases, otherwise doubtful, as is made clear in *Watson v. Stevens*, and in the opinions of the supreme court therein cited, and in cases decided by that court since *Watson v. Stevens*, of which the latest is *Olin v. Timken*, 155 U. S. 141, 155, 15 Sup. Ct. 49. We also, in *De Loria v. Whitney*, 11

C. C. A. 355, 63 Fed. 611, 621, referred to the rule in the following words:

"The appellants rely on the fact that the patented machine was the first successful one, and on the fact that it had great commercial success. The decisions touching the effect of these propositions are so numerous and modern that they need not be referred to specifically; but they limit the application of them to doubtful cases, turning on questions of utility or patentable invention."

In the suit at bar there are not facts enough, of the character applied in these cases, to justify this court in giving complainant a monopoly in this particular art of the privilege of replacing jointed parts by solid castings,—a privilege so common and so constantly exercised in all other arts. But it is said a new result has been accomplished. This is a proposition which sometimes throws light on questions of this character, sometimes does not, and occasionally so appeals to the imagination as to be misleading. Every novelty, in some sense, brings a new result; but whether the new result is such, within the meaning of the decisions, is a very different question. These words are very far from furnishing a universal solvent. Sometimes the character of the new result is such as appeals directly to the trained mind, as well as to the ordinary one. But usually the novelty of the result is only one fact to be weighed in the mass with others. In the case at bar it is of an unimportant character, in one aspect urged by the complainant, and, in the other aspect urged by him, is so common and universal as not to be of any weight. The patent, in its specifications, looks only to the results of "fewer parts, and more simple construction," and of producing an electrode "very strong and durable," which may be "handled without fear of separation." These are not new results, but are the ordinary consequences of dispensing with joints by casting solid, well known in all the arts.

The counsel and the expert suggest alleged new results, not spoken of in the specifications, namely, those arising from the fact that every joint in a structure through which electricity is to pass causes a certain amount of resistance, and also from the fact that the corrosive liquid in the battery attacks the joints, and thus increases the resistance, besides weakening the structure.

As to the first, there is no evidence in the record, except the general statement of complainant's expert that the absence of joints secures "greater electrical efficiency and durability." There are no facts given by which the court can determine whether this word "greater" is used in a minimized, comparative sense, or broadly. There is nothing to show that there was in the prior batteries any loss of efficiency on this score which was taken as of any account, or regarded as a mischief to be overcome.

As to the second proposition, the complainant put in no proof, and apparently looked upon it as so incidental that he was content to rest it on two or three questions put to one of appellant's witnesses at the close of his cross-examination. He refers us to no other proof on this topic. This evidence was as follows:

"Q. What is the advantage of the form of battery shown in exhibit defendants' battery over the Burns form, after the batteries have gone into use? Ans. The principal advantage that my experience has discovered consists in the fact that, the connections to the electrode being brought up further from the solution, there is less liability of the connecting wire becoming corroded off. Q. You mean that capillary attraction tends to draw up the liquid in the battery between the carbon and the metallic ring in the Burns form, and so produces corrosion. Is that correct? Ans. No; that is not what I intended. In handling batteries, it is an easy matter to allow a little of the solution to remain on the tops of the batteries, and, if the connection was made even with the surface of the cover, it would tend to corrode the connection; but in this exhibit this could not occur, as the metal connections are all above the surface. Q. Do you know whether or not, when the batteries of this type had gone into use, they tended to become corroded between the metal ring and the carbon? Ans. In my last answer I think I stated that if the metal connection was even with, or below, the top of the battery, there would be such liability."

This proposition is thus left with the same indefiniteness as the other. But, beyond this, the whole topic is disposed of by the fact that these alleged new results are the same as those from time immemorial common to all the arts using corrosive liquids, whenever metallic and other joints have been dispensed with, whether in buckets for transporting the liquids, or in any article used with them, or exposed to them. These facts are so ordinary, common, and immemorial that courts, as well as juries, must take notice of them. In *Potts v. Creager*, 155 U. S. 597, 606, 15 Sup. Ct. 194, the court was considering especially the principle of so-called "double use"; but the language employed by it, by necessity, touches the question we are considering, and affords much practical assistance in the determination of what is a new result, within the purview of the patent law. The court said:

"In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use, particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer."

In the case at bar it cannot be said that there has been a transfer to a "branch of industry remotely allied," of the use of solid in lieu of jointed work, because this substitution has been practiced in every industry, unless it be the particular one at bar; and it cannot be said that the latter is remotely allied to all others, though it may be to some. Whatever has become free and common to the field of practical arts, as a whole, must be free to every part of that field, except under extremely exceptional circumstances. The decree of the circuit court is reversed, and the case remanded to that court, with directions to dismiss the bill, with costs.

## ANDREWS et al. v. THUM et al.

(Circuit Court of Appeals, First Circuit. February 21, 1895.)

No. 89.

## 1. PATENTS—PLEADING AND PROOFS—APPEAL.

A patent which was not set up in the answer, and was first introduced as evidence in the court below upon a motion for rehearing and to reopen the case, which motion was denied, cannot be considered by an appellate court.

## 2. SAME—WHAT CONSTITUTES INVENTION.

To sustain a patent for a new article of manufacture, it is not sufficient that the patentee has produced a better and more merchantable article, but there must be something novel in the means employed in its production. *Knapp v. Morss*, 14 Sup. Ct. 81, 150 U. S. 221, followed.

## 3. SAME—FLY PAPER.

There is no invention in placing two sheets of fly paper together, with their sticky surfaces face to face, although in this form they may be packed without folding, and may be readily separated for use. 53 Fed. 84, reversed.

## 4. SAME.

There is no invention in surrounding a sheet of fly paper covered with a sticky composition with a margin of less adhesive material, for the purpose of preventing the sticky substance from running and spreading; it being already common, in the preparation of medicinal plasters, to spread upon a sheet of leather or paper a medicated composition, adhesive or otherwise, and surround it with a margin of more adhesive material, intended to secure the plaster upon the surface to which it is to be applied. 53 Fed. 84, reversed.

## 5. SAME—FLY PAPER.

The Thum patents (Nos. 278,294 and 305,118), for patents relating to fly paper, held void, the former entirely, and the latter as to its third claim, for want of patentable invention. 53 Fed. 84, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by Otto and William Thum against John A. Andrews, William Y. Wadleigh, B. F. Bullard, and William A. Dole, trading under the name of John A. Andrews & Co., for alleged infringement of two patents relating to fly paper. The circuit court rendered a decree for complainants (53 Fed. 84), and defendants appealed. On June 23, 1894, a motion made by the appellees to dismiss the appeal was denied by this court. 12 C. C. A. 77, 64 Fed. 149. The case is now heard upon the merits.

John M. Perkins, for appellants.

Thomas J. Johnston, for appellees.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

**COLT**, Circuit Judge. Since the decision rendered June 23, 1894, denying the motion to dismiss this appeal, the objections to the validity of the appeal now urged by the appellees are not open, and the case comes before the court at this time for decision on its merits.

The Peck patent (No. 125,326), which is printed in the record, cannot be considered by the court, for the reason that it was not

set up in the answer, and was first introduced as evidence in the court below in support of a motion for rehearing and to reopen the case, which was denied.

This suit was brought for the infringement of letters patent No. 278,294, dated May 22, 1883, and of letters patent No. 305,118, dated September 16, 1884, both issued to Otto Thum. These patents relate to fly paper.

Patent No. 305,118 is for an improved method of applying the adhesive compound to the paper, by means of rollers, and for the improved article produced thereby. The suit is not pressed as to the first and second claims, which relate to the improved method, but only as to the third claim, for the product. This claim reads as follows:

"(3) As a new article of manufacture, the fly paper, with adhesive faces placed together, so as to be packed without folding, and adapted to be separated when ready for use, substantially as described."

We are unable to discover anything patentable in this claim, considered by itself, or apart from the mechanical means set forth in the patent by which the article is produced. There certainly can be no invention in placing two sheets of fly paper together, with their sticky surfaces face to face, although in this form they may be packed without folding, and may be readily separated for use. The invention, if any, in this patent, must reside in the mechanical means by which this was effected, and it is not shown that the defendants have made use of these means.

Patent No. 278,294 is for an improvement in fly paper, and contains a single claim, as follows:

"A sheet of fly paper partially covered with a sticky composition, the latter being surrounded with a band or margin of less, but still slightly, adhesive material."

The specification says:

"My invention relates to an improved method of making and packing sticky fly paper, and its object is to prevent the running and spreading of the adhesive coating under any circumstances, so that large quantities of the paper may be packed and transported without deterioration, and kept on hand. The invention consists in surrounding the adhesive coating with material of such a nature that it will adhere slightly to an adjoining sheet, but will separate readily for use, and when the sheets are in contact will prevent the adhesive coating from spreading."

The only new result which seems to have been accomplished by this method of making fly paper is the production of an article which can be packed in large quantities, and kept on hand without deterioration. It is undoubtedly true that this method produces a very merchantable article, but the question arises whether its adoption called for the exercise of invention, in view of what was old and well known. It is not contended that there was anything new in the adhesive substances themselves, or in the mechanical means by which they are applied; but the simple question is whether there was any invention in coating the body of a sheet of paper with an adhesive composition, and surrounding it with a border of less adhesive material. If the patentee had been the first to

apply two compositions, one of which was more adhesive than the other, or one of which was adhesive and the other not, to a single sheet of paper, and this accomplished a new and useful result, it might, perhaps, be said that it involved invention, in the eye of the patent law. But this can hardly be true if we find that substantially all this was old. In the preparation of medicinal plasters, it was common to spread upon a sheet of leather or paper a medicated composition, either slightly or not at all adhesive, and to surround it with a margin of more adhesive substance, intended to secure the plaster to the surface on which it was to be applied. Thus the use of two substances, the one slightly adhesive, and the other readily adhesive, upon the same sheet of leather or paper, was common long before the date of the patent. To apply this old method in the preparation of fly paper only called for the transposition of these materials. All the patentee did was to reverse the order, and put the less adhesive material on the outside or margin, and the more adhesive in the middle of the sheet. Such a rearrangement required no invention, but would suggest itself to any one skilled in the art. It is not sufficient that the patentee may have produced a better and more merchantable article, but there must have been something novel in the means which were employed in its production. What constitutes patentability, in this class of cases, is clearly expressed by the supreme court in the recent case of *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81. On page 228, 150 U. S., and page 81, 14 Sup. Ct., the court says:

"Tested by these authorities, the validity of the patent in question must be ascertained, not from a consideration of the purposes sought to be accomplished, but of the means pointed out for the attainment thereof; and if such means, adapted to effect the desired results, do not involve invention, they can derive no aid or support from the end which was sought to be secured. All that Hall did was to adapt the application of old devices to a new use, and this involved hardly more than mechanical skill, as was ruled in *Aron v. Railway Co.*, 132 U. S. 85, 10 Sup. Ct. 24, where it was said: 'The same device employed by him [the patentee] existed in earlier patents. All that he did was to adapt them to the special purpose to which he contemplated their application, by making modifications which did not require invention, but only the exercise of ordinary mechanical skill, and his right to a patent must rest upon the novelty of the means he contrived to carry his idea into practical application.'"

For these reasons, patent No. 278,294, and the third claim of patent No. 305,118, must be held to be void, for want of patentable novelty. The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the bill, with costs.

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FAULKNER et al. v. EMPIRE STATE NAIL CO.

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

No. 46.

**PATENTS—EQUITABLE ASSIGNMENT — BONA FIDE PURCHASER OF LEGAL TITLE.**  
One who has purchased an equitable interest in an invention cannot justify the manufacture and sale of the patented article, as against a  
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bona fide purchaser of the legal title to the patent, who found no recorded assignment of it, and who was chargeable with no notice of any outstanding claim thereto, or as against subsequent purchasers from the latter, even if such purchasers had notice. 55 Fed. 819, affirmed.

**Appeal from the Circuit Court of the United States for the Southern District of New York.**

This was a suit by the Empire State Nail Company against Edward H. Faulkner, Edward D. Faulkner, and Francis E. Faulkner for alleged infringement of a patent relating to furniture nails. The circuit court rendered a decree in favor of the complainant. 55 Fed. 819. Defendants appeal.

Walter B. Vincent and George B. Ashley, for appellants.

Alan D. Kenyon, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The suit was brought upon letters patent No. 370,614, granted September 17, 1887, on application filed November 2, 1881, to Thomas F. N. Finch, assignor, for an "improvement in furniture nails." There is no question as to the validity of the patent or its infringement. Defendants contend that the American Solid Leather Button Company, which manufactured the nails they sold, had the right to use the invention by reason of certain transactions between that company and one Latimer B. M. Finch.

The complainant's chain of title is as follows:

(1) Thomas F. N. Finch (the inventor and patentee) to J. W. McCrillis, assignment dated February 12, 1882, recorded May 1, 1882.

(2) J. W. McCrillis to Samuel D. Church, and Latimer B. M. Finch, assignment dated 1884, recorded October 3, 1887.

(3) Samuel D. Church and L. B. M. Finch to Thomas F. N. Finch, assignment dated July 16, 1886, recorded October 3, 1887.

(4) T. F. N. Finch to Finch Manufacturing Company, assignment dated December 21, 1886, recorded October 3, 1887.

(5) Finch Manufacturing Company to Thomas V. Johnson, assignment dated November 1, 1888, recorded November 16, 1888.

(6) Thomas V. Johnson to Empire State Nail Company, assignment dated November 2, 1888, recorded November 26, 1888.

The defendants contended that the American Company acquired an equitable title to the invention described in said letters patent by purchase from the inventor and Latimer Finch; that such purchase was made in the year 1881, before the patent was applied for; and that, if such purchase did not pass title in 1881, the American Company at least obtained title to one-half of the invention, and of the subsequent patent, when, under the assignment of McCrillis, Latimer Finch obtained the same. No assignment to the American Company was recorded. The circuit court held that the American Company did become the owner of an equitable interest in the patent; and without entering into any discussion of the evidence bearing upon that branch of the case, or deciding the questions thereby presented, it may be assumed for the purposes of this appeal that the American Company did, in 1884, or earlier, become the equitable owner either of the whole patent or of an undivided interest therein.

The only question remaining in the case is whether the manufacture and sale of infringing articles can be justified by the assertion of such equitable title against a bona fide purchaser of the legal title, who found no recorded assignment of it, and neither had nor was chargeable with notice of any claim thereto.

In May, 1886, William M. Cavanaugh started with Latimer Finch, in the city of New York, in the business of manufacturing leather nails and buttons. The application for the patent was then pending in the patent office, and he made a contract in writing with Thomas Finch, through Latimer, as his duly-accredited agent, for the purchase of the patent when issued, the equipment and prosecution of the business, and the incorporation of a company to be organized for that purpose. He subsequently organized the Finch Manufacturing Company, to which Thomas Finch, on December 21, 1886, assigned all his right, title, and interest in and to the invention and the letters patent to be obtained therefor. Cavanaugh and one Marcus, who was associated with him in getting up the company, invested some \$4,000 in the venture, and gave to Thomas Finch shares of the stock as consideration for the assignment. Cavanaugh testified that, at the time the patent was purchased and transferred to the Finch Manufacturing Company, he had no knowledge or notice that the title to it was claimed by any one other than Finch. Unless there is found elsewhere in the proof something tending to discredit this statement, it must be held that a legal title, good against any outstanding equitable claim, passed to the Finch Manufacturing Company.

Defendants rely upon a letter received by Cavanaugh on June 4, 1886. It reads as follows:

"Providence, R. I., June 3, 1886.

"Mr. Wm. M. Cavanaugh, No. 161 Franklin St., New York—Dear Sir: Your attention is invited to the inclosed papers, as somewhat indicating the character of the man we understand you have connected yourself in the manufacture of goods infringing our legal rights and patents. We hereby formally notify you that, if you persist in this, we shall not only hold you rigidly accountable in the courts for all violation of our patents, trade-marks, labels, and numbers, but you will probably in the end lose every dollar you put into the enterprise, as has been the case with those who have aided this man's former efforts; the Standard Leather Button Company, of N. Y., and the Empire Mfg. Co., of this city, both being sold out by the sheriff after a brief and discreditable career. Having now been duly warned, it will be your own fault if you follow in the footsteps of so many who have come to grief in this direction.

"Respy., yours,

American Solid Leather Button Company,

"Chas. E. Bailey, Pres."

Precisely what papers were inclosed in this letter is not shown by direct proof, but the evidence warrants the inference that there were none other than these:

First. A copy of a decree of the supreme court of Rhode Island entered July 6, 1885, in the suit of American Solid Leather Button Co. v. Latimer B. M. Finch, which adjudged that:

"Defendant [Finch] was bound by his agreement dated February 1, 1881, in the pleadings mentioned, and the complainant is entitled to insist upon and enforce the same against him, and that said defendant be," etc., "enjoined from disclosing or divulging any information, knowledge, secret combination,



or other thing whatsoever pertaining to or connected with the business of manufacturing the solid leather nails or solid leather buttons in said agreement mentioned, and from making, vending, or using, by himself, his servants or agents, any solid leather nails or buttons in said agreement mentioned, except under the directions and employment of the complainant, and from violating in any manner the terms and provisions of said agreement in the pleadings mentioned."

The record shows that the decree, as originally drawn, contained a further clause enjoining defendant, Finch, from "selling, transferring, assigning, or in any manner disposing of his interest in or control over any invention or patent right which said defendant has or which he may hereafter acquire, relating to solid leather buttons or nails, except to the complainant," which clause was struck out before entry, and became no part of the decree.

Second. One or more circulars, under different dates, stating that Latimer Finch, a former employé of the American Solid Leather Button Company, was making and putting on the market spurious imitations of its standard solid leather nails and buttons.

At the time this letter and inclosure were sent to Cavanaugh, the American Solid Leather Button Company owned another patent for a compressed leather head nail, No. 248,269, issued to Bailey & Talbot, October 18, 1881, and with which the application of Thomas Finch for the patent in suit, which was filed November 2, 1881, had been and still was in interference.

In reply to this notice of June 3, 1886, Cavanaugh sent the following, which was duly received.

"New York, June 4, 1886.

"American Solid Leather Button Co., Providence, R. I.—Gentlemen: I am just in receipt of yours of 3d inst. Replying to same, beg to say I have not the slightest wish to trespass on any rights that you may have, and, that I may not, I should be glad to have you inform me: (1) To what you have a patent? (2) Has your patent ever been litigated, and, if so, was the decision for or against you? Your answer to these two questions will enable me to act in reference to that part of your letter wherein you threaten to sue me for any infringements on your rights. If I am informed what your rights are, I can probably avoid interfering with them.

"Very respectfully,

Wm. M. Cavanaugh."

This letter of Cavanaugh's was not replied to by the American Company.

Other than this correspondence there is no evidence tending to show notice to Cavanaugh, who bought from Thomas Finch for the Finch Manufacturing Company, of any outside claim to the invention and the patent applied for by Thomas Finch.

The claim now made by defendants, viz. that the American Company had some right to or interest in the invention of Thomas Finch, and in the patent therefor, if any should be issued, is one which could have been so plainly and easily stated in a single brief sentence that it is impossible to conceive that men of the most ordinary intelligence could have intended the letter of June 31, 1886, and its inclosures, as notice of such claim. If they did intend them as such notice, they wholly failed to express that intention. Neither the letter nor the decree nor the circulars in any way indicated that the American Company had or claimed to have any interest in the

Finch application, which that company was trying to defeat under the interference with the Bailey & Talbot patent of 1881, which it owned. The Finch Manufacturing Company then became a bona fide owner of the patent in suit, without notice of any prior outstanding equitable interest, and the title it thus obtained is good as against such equity in the hands of subsequent purchasers, even if they had notice. *Rogers v. Lindsey*, 13 How. 441, 446. It is unnecessary, therefore, to discuss the subsequent assignments by which the legal title to the Finch patent passed to complainant.

The decree of the circuit court is affirmed, with costs.

ECLAUBERT v. APPLETON et al. (two cases).

(Circuit Court of Appeals, Second Circuit. April 22, 1895.)

Nos. 74, 75.

1. PATENTS — CONCLUSIVENESS OF PATENT-OFFICE DECISION IN INTERFERENCE PROCEEDINGS.

A decision of the patent office in interference proceedings, upon the question of priority, must be accepted as controlling upon the question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction. *Morgan v. Daniels*, 14 Sup. Ct. 772, 153 U. S. 120, followed.

2. SAME—PRIORITY OF INVENTION—ABANDONED EXPERIMENT.

One who conceives an idea, embodies it in a means by which it can be carried out, and proceeds to use it in the production of the article for which it was designed, must be recognized as the real inventor, as against one who conceived the idea at an earlier period, but, after making experiments, abandoned any attempt to make his idea practically available.

3. SAME — SUIT TO CANCEL PATENT — EFFECT OF ASSIGNMENT OF PLAINTIFF'S PATENT PENDING LITIGATION.

In a suit brought under Rev. St. § 4918, to obtain the cancellation of a patent, an assignment pending the litigation of all complainants' right in the patent cannot be allowed to affect injuriously the defendant's right to affirmative relief under a cross bill; and hence such an assignment will not justify an immediate dismissal of the bill, before the question of priority has been determined.

4. SAME.

Pending a suit to obtain the cancellation of an interfering patent under Rev. St. § 4918, the complainants assigned all their interest in their patent. Defendant had filed a cross bill asking similar relief with respect to complainants' patent, but the question of priority was determined against him. While the cause was pending upon appeal, defendant first learned of complainants' assignment of their patent; and he thereupon moved the appellate court to remand the case with directions to dismiss the bill, but without prejudice to the right of the assignee to apply for leave to file an original bill in the nature of a supplemental bill. The motion was denied, and, the case having been heard upon the merits, defendant's right to affirmative relief was denied by the appellate court. *Held*, that the motion to dismiss was properly denied, but that, after the decision on the merits, it was proper to remand the case, with directions that if the assignee, within such reasonable time as might be designated, should file an original bill in the nature of a supplemental bill, and make proof of its interest, a decree should thereupon be entered in its favor, and also dismissing the cross bill. Distinction between effect of assignments pendente lite by plaintiff and by defendant considered.

5. SAME — ADMISSIBILITY OF EVIDENCE — TESTIMONY IN PATENT-OFFICE PROCEEDINGS.

In a suit to cancel an interfering patent under Rev. St. § 4918, testimony taken in the patent office upon interference proceedings between the same parties, in respect to the same invention, *held* to have been properly excluded, where it was not offered because any of the witnesses were dead or unavoidably absent, but was presented in bulk, and as being admissible as a whole.

6. SAME—OPINION OF THE COMMISSIONER.

The opinion of the commissioner of patents rendered in an interference proceeding is not admissible in a suit under Rev. St. § 4918, to cancel a patent issued to one of the contestants.

7. SAME.

In a suit under Rev. St. § 4918, to cancel a patent which was issued notwithstanding a decision against the patentee in interference proceedings, it is not permissible to introduce in evidence either certain charges filed in the patent office, accusing the examiner who passed the application, and the solicitor who presented it, with fraud or gross negligence, and asking the dismissal of the one and the disbarment of the other, or the commissioner's decision upon such charges.

8. SAME.

Where a patent was issued to a contestant in interference proceedings, notwithstanding the decision of the commissioner against him, and a suit was subsequently brought under Rev. St. § 4918, to cancel the same, *held*, that it was competent to prove by patent-office officials that the patent was issued either fraudulently, or through gross negligence.

9. SAME—EVIDENCE AS TO PRIOR STATE OF THE ART.

In a suit to cancel an interfering patent, oral evidence showing the prior state of the art is not legally objectionable, although such prior state of the art is stated with sufficient clearness in the specifications of the patents in controversy.

10. COSTS ON APPEAL—IRRELEVANT MATTER IN RECORD—TAXATION OF COSTS.

Where a large mass of irrelevant matter is introduced into the case by the complainant, and carried into the record on appeal, the defendant, though unsuccessful, will not be condemned to pay the costs in the appellate court, or the costs of the circuit court which were caused by the irrelevant evidence.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was a suit in equity by Daniel Fuller Appleton and others against Frederic Ecaubert, under Rev. St. § 4918, to procure the cancellation of patent No. 434,539, granted to defendant August 19, 1890, for a method of ornamenting watch-case centers and other like articles. Defendant filed a cross bill to procure the cancellation of the patent upon which complainants based their rights, being No. 435,835, issued September 2, 1890, to Adolph W. Hofmann. The circuit court found that Hofmann was the original inventor, decreed that the Ecaubert patent was void, and dismissed the cross bill. 62 Fed. 742. Ecaubert appeals.

Arthur v. Briesen and Francis Forbes, for appellant.

M. B. Philipp and Melville Church, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On December 31, 1887, Adolph W. Hofmann, assignor to Robbins & Appleton, the complainants, filed in the patent office his application for a patent for an improved

method of ornamenting watch-case centers, and other like articles. The state of this particular art of ornamentation which needed improvement is plainly described in the specification of the interfering patent to the defendant, Frederic Ecaubert, as follows:

"Watch-case centers have been ornamented with regular patterns,—such, for instance, as straight, transverse ribs or diagonal ribs, known as 'rope knurls or ornaments,' and also with diamond shaped projections, known as 'barley-corn knurls and patterns.' These ornaments have been applied to the watch-case center by a circular, ornamented wheel, known as a 'knurl'; and the watch-case center has been mounted upon and revolved by a chuck and mandrel to a lathe, and this has been revolved continuously after the knurling tool is applied in such a manner to the center that the pattern thereon properly meets at the end of a complete revolution. In this operation the ornamentation is applied by a continuous movement, and where the watch-case center, or similar article, is convex the knurling tool has sometimes received a lateral or rocking motion, in order that the surface of the knurl may be pressed properly against the convex edge of the watch-case center. In knurling watch-case centers with leaves, buds, scrolls, commonly called 'vermicelli,' and ornaments similar to engraved work, it is found impracticable to produce highly-finished work by a continuously revolving movement, because the patterns made use of are sufficiently arbitrary and various to prevent their perfect repetition around the periphery of the knurling roll."

Another process was the "spinning process," which was invented and patented by Ecaubert.

"In practicing it a matrix die was used, having a design or pattern upon its inner circumference. Into this matrix the watch-case center was placed, and then, by a small pressure roller revolving upon the inner face of the center, the latter was 'spun' or expanded outward so as to take the impression from the pattern on the inner circumference of the die. The matrix die was made in parts, so that it could be removed after the ornamentation was produced."

The invention consisted, in the language of the Hofmann patent, as follows:

"In presenting the article to be ornamented to a rotary embossing roll, having on its periphery the design ornamentation to be applied, and reversely rotating said article, or, in other words, rotating it first in one direction, and then in the opposite direction; the contact between the roll and article being continuously maintained during the entire operation, so that during each successive pass the roll will deepen the indentations formed by it during the preceding pass."

A reciprocating motion of the lathe spindle imparted a reciprocating or reverse movement to the surface of the watch-case center, or, which would be equivalent, of the knurl, or to both surfaces, as might be most desirable or convenient, and in this reciprocating movement lay the entire invention.

On February 13, 1888, Ecaubert filed in the patent office an application for a patent for the apparatus by which this process was to be used. The two applications were put in interference on January 11, 1889. The matter in issue was "the priority of the invention of the improved method of ornamenting the peripheries of watch-case centers, or other like articles; the same consisting in holding the surface of an embossing die in contact with the surface of the article to be ornamented; imparting a reciprocating or reversing rotary movement to one of said surfaces, and at the same time laterally moving the point of contact of the die with the surface being orna-

mented, as set forth." The decision of the board of examiners in favor of Ecaubert was reversed by the commissioner of patents, and adjudication of priority was made in favor of Hofmann, on August 3, 1890. *Ecaubert v. Hofmann*, 52 O. G. 2107. On July 27, 1889, Ecaubert filed in the patent office an application for a patent for his improved process for ornamenting watch-case centers. On August 19, 1890, letters patent No. 434,539, for this process, were issued; the application having been passed and allowed by the examiner without putting it into interference, and without consultation with the commissioner. On September 2, 1890, as the result of the interference, patent No. 435,335, the subject of this suit, was issued to the complainants, as assignees of Hofmann; and on September 10, 1890, the bill of complaint herein was filed in the circuit court for the Eastern district of New York by Appleton and others, as the owners of the Hofmann patent, against Ecaubert, praying that the Ecaubert patent should be declared void, in accordance with the provisions of section 4918 of the Revised Statutes. Ecaubert filed a cross bill on June 17, 1891, for the cancellation of the Hofmann patent, and subsequently brought a suit in the Southern district of New York against Appleton and others for infringement of his patent, No. 434,539. By stipulation of February 10, 1892, it was agreed that the testimony taken in each suit could be used in the others, subject to all proper objections noted at the time of taking the testimony, and that the three bills should be heard together by the same judge. On July 30, 1892, Appleton and others assigned their patent to the Brooklyn Watch Company. All the testimony, except the complainants' rebuttal testimony in the interference suit, was completed on May 7, 1892. The circuit court found that Hofmann was the original inventor of the invention described in said two letters patent, decreed that No. 434,539 was void, dismissed the cross bill, and dismissed the bill of Ecaubert *v. Appleton* in the Southern district of New York for infringement. This appeal is from the decree of the court for the Eastern district upon the bill and cross bill for interference. The two claims of the Hofmann patent are as follows:

"(1) The improved method, hereinbefore described, of ornamenting the peripheries of watch-case centers, or other like articles; the same consisting in holding a portion of the surface of an embossing die in contact with the surface of the article to be ornamented, said portion being less in width than the entire width of the ornamenting surface of the die, imparting a reciprocating or reversing rotary movement to one of said surfaces, and at the same time laterally moving the point of contact of the die with the surface being ornamented, thereby laterally extending or widening the area of ornamentation, as set forth. (2) The improved method, hereinbefore described, of ornamenting the peripheries of watch-case centers, or the like articles; the same consisting in holding the surface of an embossing die in contact with the surface of the article to be ornamented, imparting a reciprocating or reversing rotary movement to one of said surfaces, and at the same time laterally moving the point of contact of the die with the surface being ornamented, as set forth."

The four claims of the Ecaubert patent are as follows:

"(1) The method herein specified of ornamenting watch-case centers, and similar articles, consisting in pressing against the article to be ornamented a

circular ornamenting roll or knurl, having the designs to be produced upon the periphery thereof, and communicating to the respective parts a rotary, or partially rotary, motion, first in one direction, and then in the other, while the ornamenting knurl is pressed against the article to be ornamented, so that the ornaments are applied by a progressive action to the periphery, substantially as set forth. (2) The method herein specified of ornamenting watch-case centers, and similar articles, consisting in pressing against the article to be ornamented a roll or knurl having upon its periphery the desired ornaments, communicating to the respective parts a rotary, or partially rotary, motion, first in one direction, and then in the other, and moving or rocking the knurling tool laterally to bring the surface of the roll into contact with the surface of the article to be ornamented, substantially as set forth. (3) The method herein specified of applying ornaments to the surface of watch-case centers, and similar rounding articles, consisting in pressing a knurling tool having the counterpart of the design against the said center or similar article, and imparting a partial or complete rotary motion in first one direction, and then the other, to the article, and to the knurl, to bring the knurl into action against the desired portion of the periphery of the article, and also giving to the knurl a movement to vary the position of the axis of the knurl to the axis of the center, or similar article, substantially as specified. (4) The method herein specified of applying ornaments around a watch-case center, back, or other circular article, consisting in pressing against the article to be ornamented a knurling tool having upon its surface the pattern to be impressed, and giving to the parts a circular, or partially circular, movement, first in one direction, and then in the other, and changing the direction of the axis of the knurl to the axis of the article during the operation, to cause the pattern on the knurl to be rolled into the round article, substantially as specified."

It will be perceived that the second claim of each patent is, in terms, for the same invention; the only difference being the immaterial one that in the Hofmann patent the reverse movement is imparted to one of the surfaces of knurl and watch center, and in the Ecaubert patent the rotary motion is communicated to the respective surfaces. These claims state the method customarily used, and accurately express the matter in issue in the interference. The rule upon the subject of the weight to be given in a subsequent suit between the same parties to the decision of the patent office upon the question of priority has been recently stated by the supreme court in *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, as follows:

"Upon principle and authority, therefore, it must be laid down as a rule that where the question decided in the patent office is one between contesting parties, as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction."

It is manifest that Ecaubert has not borne the weight which the adverse decree of the patent office required him to sustain, and, indeed, if the patent office had not spoken, we should have reached the same result, under the established principles applicable to questions of priority. Hofmann made the invention in the latter part of December, 1887. An attempt has been made to show that he caught the idea from Ecaubert, in a conversation with him; but the conversation, if it occurred, will not sustain the inference attempted to be drawn from it. Ecaubert made in 1879 some experiments, admitted to have been abandoned. These trials he renewed in 1885, with a lathe which he made for Alfred Humbert, of Philadelphia,

upon an order received in May, 1885, and with a knurling quadrant, which he says he made to obviate the difficulties which he experienced in 1879, and to use in connection with these experiments, but which he did not send to Humbert, but retained himself, and took to pieces. The lathe was an ordinary lathe, used for knurling by a continuous process, and had no distinctive features about it. We think he did make, with this lathe, before it was sent to the purchaser, attempts to ornament brass rings or brass centers by means of a back and forth motion of the object to be ornamented, but these experiments resulted in nothing but experiment. The idea was never worked out so as to be practically used. No center intended for actual use was ornamented. The idea was not developed, so as to be practically useful, but lay in the theory, imperfectly tested, not a completed invention, and put aside until a knowledge, somehow attained, of Hofmann's development of the same idea, brought it again to activity, and he took measures to prepare an application for a patent. Between 1885 and 1887 he was developing his spinning process, and was actively engaged in bringing it to the notice of manufacturers. He reduced that process to practice, and endeavored to make it an actual and permanent benefit to himself. Ecaubert having thus abandoned any attempt to make his idea practically available and to develop his theory, in fact, Hofmann conceived the idea, embodied it in means by which it could be carried out, proceeded to make watch centers, and thereby first perfected it, and is entitled to be recognized as the real inventor. *Woolen Co. v. Jordan*, 7 Wall. 583; *Whitely v. Swayne*, Id. 687; *Reed v. Cutter*, 1 Story, 590, Fed. Cas. No. 11,645; *Howe v. Underwood*, 1 Fish. Pat. Cas. 166, Fed. Cas. No. 6,775.

It is next contended on the part of Ecaubert that the first, third, and fourth claims of his patent described a different invention from that described in the second claim, and that, therefore, the two patents do not interfere, as to those claims. The first claim of the Ecaubert patent does not, in terms, include in the process the lateral or rocking movement of the knurl, which brings its surface into universal contact with the surface of the watch center. This rocking movement of the knurl is admitted in the Ecaubert specification to have been old at the date of the invention. The great majority of watch-case centers are rounding or convex on their edges, and the Ecaubert specification states that this lateral movement of the knurl is necessary, where the center has a rounded edge. The invention solely consisted, in fact, in the backward and forward motion, and the process of the first claim is that motion, with a lateral movement of the knurl when necessary, and the necessity is almost universal. The attempt to create a distinct and separate invention out of the first claim, and to differentiate it from the actual invention of the second claim, has the fault of adherence to technicality without regard to substance. The application for this patent was filed six months after the interference had been declared, and was made in the hope that a patent which should have the semblance of greater breadth might be able to escape the effect of an adverse decision upon the issue then pending.

The third claim gives to the knurl a movement to vary the position of its axis to the axis of its center, and it is said that this applies to a concave knurl. The fourth claim says that the direction of the axis of the knurl to the axis of a circular article changed during the process of ornamentation to cause the pattern on the knurl to be rolled into the round article. This language in each claim is intended to describe a rolling or lateral movement. The form of the knurl does not prevent the necessity of the rocking motion, which the specification abundantly recognizes.

The fact of the assignment of the Hofmann patent *pendente lite*, and of all rights thereunder to any claims for profits or damages, was not known by the circuit court. The defendant definitely learned of this assignment on November 28, 1894, and thereafter, and before the argument upon the appeal, moved this court to remand the case to the circuit court with directions to dismiss the bill, but without prejudice to the rights of the assignee to apply for leave to file an original bill in the nature of a supplemental bill. This motion was properly denied. A peremptory dismissal of the bill, as will be seen hereafter, was not permissible; and furthermore, while Appleton and others were complainants, Ecaubert was seeking affirmative relief against them by his cross bill, and his right to relief, if any he had, could not be injuriously affected by the complainants' assignment. If the court should decree adversely to the validity of the Hofmann patent, its assignees would be bound by the decree, because, irrespective of the question whether they had become the actual parties, they, being assignees, "were charged with notice of the suit, and bound by its results." Thus, where a plaintiff—who, as owner of a patent, had brought suit for infringement, and had assigned his interest in the patent *pendente lite*—asked the court to dismiss his bill, after an answer praying for affirmative relief, it was held that a possible right in the defendant to have a decree in his favor could not be defeated by such an assignment, and by permission to dismiss the bill. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602.

The argument upon the appeal having been had, and Ecaubert's right to affirmative relief having been decided adversely to him, but the owners of the Hofmann patent being entitled to a decree, if properly before the court, the question recurs as to the effect of an absolute assignment *pendente lite* by the plaintiff of his entire interest in the subject-matter of the suit, his assignee being the only person entitled to relief. The equity rule, apart from statutory or code provisions, is not the same with respect to the effect of assignments *pendente lite* by plaintiff and by defendant. "An assignment by a defendant of his interest in a litigation does not necessarily defeat a suit. The assignee may, at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own name, or he may act in the name of his assignor." *Ex parte Railroad Co.*, 95 U. S. 221. If a sole plaintiff, suing in his own right, assigns his whole interest to another, he is no longer able to prosecute the suit, because he is without interest in the litigation. Story, Eq. Pl. §



348; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802; *Ross v. City of Ft. Wayne*, 11 C. C. A. 288, 63 Fed. 466. But this does not mean that the bill must be dismissed. The effect of the assignment is stated by Judge Story not to be "necessarily a destruction of the suit, like an abatement in law, where a judgment quod cassetur is entered. It is merely an interruption to the suit, suspending its progress until the new parties are brought before the court, and if this is not done at a proper time the court will dismiss the suit." *Hoxie v. Carr*, supra. Section 756 of the New York Code of Civil Procedure provides as follows:

"In case of a transfer of interest or devolution of liability, the action may be continued by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires."

Inasmuch as the practice act, now embodied in section 914 of the Revised Statutes, does not include equity practice in its provision in regard to conformity with code practice, it is proper to direct that the Brooklyn Watch Company should become a complainant, and, when the cause is remanded to the circuit court, to instruct that court that if the assignee of the Hofmann patent files its original bill, in the nature of a supplemental bill, within such reasonable time as may be designated, and proof of its interest is made, and the validity of its title is not successfully attacked, that a decree should be thereupon entered in its favor, in accordance with the principles of the decree heretofore made, and dismissing also the cross bill. No new proofs in regard to priority should be taken.

The defendant took, during the examination of the witnesses, and presented before the circuit court, sundry objections to various items of testimony, and has included in his assignment of errors his exceptions to the ruling of the circuit court which practically overruled the objections, and denied the motions to strike out the testimony objected to. This record is a sample of the expensive practice which now prevails in patent causes, of stuffing the record with prolix cross-examinations and irrelevant testimony. It also became unwieldy by the stipulation that the evidence taken in either of the two suits could be presented in each of said suits. The printed copy of the testimony in the interference proceedings before the patent office was properly objected to upon the grounds of irrelevancy. This suit is an independent one, although between the same parties as in the patent-office proceeding. The testimony of the various witnesses was not offered because they were dead, or unavoidably absent, but the whole volume containing the testimony of the witnesses who had been also examined in this suit was presented, as if it was admissible in bulk. The opinion of the commissioner of patents was also properly objected to as irrelevant. The record of the judgment or decree in the interference proceeding would have been admissible, but the opinion of the commissioner was not a decree, and was not the finding of facts which a court is frequently called upon to make. It was the argument and recital of the considerations which led the commissioner to his conclusions, and a statement of

the effect of the testimony upon his mind, and was not a part of the judgment record. *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509. The owners of the Hofmann patent, after the Ecaubert patent was issued, presented to the commissioner charges against the examiner who passed the application, and against the solicitor for Ecaubert, and asked for the dismissal of the one, and the disbarment of the other. Upon these charges the commissioner made a written decision. The charges and the decision were offered by the complainants, and were properly objected to as irrelevant. These proceedings were *res inter alios actae*, and were of no value in this case.

The oral testimony of two officials in the patent office was taken for the purpose of proving the averment in the bill that the Ecaubert patent was issued either fraudulently, or through the gross negligence of the examiner, and was objected to. The issuance of the Ecaubert patent about two weeks after the decision upon the subject of interference was apparently a singular procedure, and a court would naturally inquire into the reason for the existence of the patent, and why the patent office had changed its mind. The complainants' explanation was founded upon the alleged fraud or misconduct on the part of the examiner, and the testimony of the two witnesses was for the purpose of showing the truth of this theory, and was admissible.

The expert testimony of Robertson, and the accompanying exhibits, which were for use and of use in the infringement case, ought not to have been in this record. His testimony in regard to the state of the watchmaking art was admissible, though unnecessarily cumulative, but the bulk of his testimony was of no importance upon the question which of the two patentees was the prior inventor.

The testimony of Searing and of Hofmann in regard to what may be called, in general, the state of the art, including the spinning process, and the efforts to improve the art, and the cost of old and new methods, was admissible. It was necessary for the court to know the point from which each inventor started, and thus to know in what the invention consisted; and, although this is stated with sufficient clearness in the specification of each patent, there is no legal objection to an oral reproduction of the history.

The remaining objections are to divers questions in the lengthy cross-examination of Ecaubert. The examination was unnecessarily voluminous, and called for too much minutiae; but it was within the line of examination for the purpose of showing errors or inconsistencies in his testimony, and of testing the accuracy of his memory. The questions were too abundant, but we cannot say that they were inadmissible. This irrelevant testimony was unimportant with respect to the result. The relevant testimony alone contained more than enough to show Hofmann's priority, in view of the principles of law in regard to questions of this sort, which have now become elementary. *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 11 Sup. Ct. 846. The relevant testimony proves the correctness of the decision of the circuit court. There was, however, so much irrelevant matter introduced into the case as to make it inequitable that the defendant should pay costs in this court, and he should not

be compelled to pay the costs in the circuit court which were caused by this class of evidence.

The cause is remanded to the circuit court, without costs in this court, with instructions to take further proceedings therein in accordance with the foregoing opinion, and, in the event of a decree in favor of the assignees of the Hofmann patent, to enter such decree, with costs of the entire cause, but without including any costs which may have arisen by reason of immaterial testimony.

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KINZEL v. LUTTRELL BRICK CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 268.

1. PATENTS—INFRINGEMENT—COMBINATION CLAIMS.

To constitute infringement of a combination, the alleged infringing device must include every element of the combination as claimed; and it is immaterial that certain elements which are claimed, and which are omitted from defendants' device, are not of the essence of the real invention. *Water-Meter Co. v. Desper*, 101 U. S. 332, applied.

2. SAME—BRICKKILNS.

The Kinzel patent, No. 471,769, for a brickkiln in which the bricks are both dried and burned by coal fire, without the usual preliminary drying by wood or coke fire, *held* not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This was a bill by John C. Kinzel against the Luttrell Brick Company, M. R. Grace, F. J. Leeland, and E. A. Hamilton for the alleged infringement of letters patent No. 471,769, issued March 29, 1892, to the complainant for an improvement in brickkilns. The circuit court dismissed the bill, on the ground that the patent was invalid because of prior public use authorized and encouraged by the complainant for more than two years previous to filing his application for a patent. Complainant appealed.

This was a bill to restrain the infringement of a patent. The complainant, the patentee, was John C. Kinzel, of Knoxville, Tenn. The patent was granted the 29th of March, 1892, and was for a brickkiln in which the brick are both dried and burned by coal fire, and the usual preliminary drying by wood or coke fire is dispensed with. The patent describes the kiln as follows: The base or floor of the kiln is constructed of dirt suitably banked up above the level of the ground. At the sides of the kiln are two brick walls, seven or eight feet in height. Through these walls are openings into furnace pits. The pits are lined with brick walls, which extend upward to the level of the floor. There is a grate bar in each pit at least one foot below the level of the base of the kiln, and below the grate bars are the ash pits. There are doors closing the openings into the furnace pits through which the furnace may be fed, and openings are also provided to which access may be had to the ash pits. The furnaces extend inwardly from both walls towards the longitudinal center of the kiln, and may be of any desired depth or length. The brick to be burned are built up between the side walls in the usual manner, tunnels or flues being formed transversely in the kiln directly over the furnaces. Two furnaces are arranged opposite each other, so that one tunnel or flue will serve to connect two of the furnaces. In piling the brick in the kiln, the individual bricks are so arranged in relation to each other as to admit the passage of the flame and combustion in the usual way. The brick, hav-

ing been piled within the kiln, are surrounded by casing consisting of a four-inch wall slanting towards the top, in two steps or terraces. The lower part of the casing is made to rest upon the side walls. The ends of the kiln are banked up with dirt, kept in place by means of planks and braces, and provided with a cap also constructed of planks. When the kiln is built according to the foregoing description, it may be sweated or dried out with soft slack coal, which is much less expensive and requires much less attention than either wood or coke. A kiln constructed in accordance with this invention, it is said, may be burned in from 75 to 80 hours, while with other kilns it takes nearly twice that time. The fires may be raked and the clinkers removed during burning without opening the furnace doors, thus preventing cold air from entering and damaging the brick while in the kiln. This is owing to the arrangement of the grate bars, say, one foot below the floor level of the kiln, as herein described; thus giving space for raking the fires without the necessity of opening the doors. The claim of the patentee is as follows: "In the brickkiln, the combination of the bed or base; the short independent side walls, having front openings for the furnace doors and ash pits; parallel pairs of open furnaces extending inwardly from said front openings in the side walls, and opening their entire length directly into the space inclosed by said walls and the body of the kiln; the casing, composed of upwardly sloping terraces, supported upon said side walls; the end walls, composed of dirt, banked up and overlapping the lower edges of the ends of the supported terraces; and an inclosing covering and cap composed of closely-laid plank, completely covering the outer faces of said end walls, and curved over and capping the top of the same, and meeting the faces of the overlapping terraces,—substantially as set forth."

Ingersoll & Peyton, for appellant.

Cooper & Davis, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). The answer below denied infringement. It is conceded by the counsel, as it was by the plaintiff upon the stand, that the defendants do not use the short side walls, the casing of upward-sloping terraces, supported on the side walls or the end walls, composed of dirt, or the closely-laid plank covering, or the plank capping. The claim of the patent includes all these things as necessary elements of the combination stated. It is well settled that, in order to constitute the infringement of a combination, it must appear that the alleged infringing device includes every element of the combination as claimed. *Electric Signal Co. v. Hall Ry., etc., Co.*, 114 U. S. 87, 5 Sup. Ct. 1069; *Voss v. Fisher*, 113 U. S. 213, 5 Sup. Ct. 511; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819; *Water-Meter Co. v. Desper*, 101 U. S. 332; *Dunbar v. Myers*, 94 U. S. 187; *Reedy v. Scott*, 23 Wall. 352; and cases cited.

It is immaterial that the elements claimed in the patent of plaintiff and omitted in the defendants' device are not of the essence of the real invention.

In *Water-Meter Co. v. Desper*, 101 U. S. 332, Mr. Justice Bradley, speaking for the supreme court, said:

"It may be observed, before concluding this opinion, that the courts of this country cannot always indulge the same latitude which is exercised by English judges in determining what parts of a machine are or are not material. Our law requires the patentee to specify particularly what he claims to be new, and, if he claims a combination of certain elements or parts, we cannot

declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim."

The result is that no infringement was made out. Therefore, no injunction should have been issued. The court below reached the same result on another ground, which we do not find it necessary to consider.

The decree of the court below is affirmed.

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OFFICE SPECIALTY MANUF'G CO. v. WINTERNIGHT & CORNYN  
MANUF'G CO.

(Circuit Court, E. D. Pennsylvania. May 14, 1895.)

No. 30.

1. CIRCUIT COURTS—FOLLOWING DECISIONS IN PATENT CASES—COMITY.

Conclusive effect is accorded by each of the federal circuit courts to prior judgments of any of the others in patent cases, where the patent, the question, and the evidence are the same in both suits, not on the ground of comity alone, but with the practical and salutary purpose of avoiding repeated litigation and conflicting decrees upon matters which, having been passed upon by one court of first instance, ought to be referred to a court of appeal for authoritative determination.

2. SAME—PAPER HOLDERS.

The Smith and Shannon patent, No. 217,909, for an improvement in paper holders, *held* not anticipated by the English patent to Stephen Dixon, of November 9, 1864; and also *held* infringed as to claims 1, 2, 3, and 5.

This was a bill by the Office Specialty Manufacturing Company against the Winternight & Cornyn Manufacturing Company for infringement of a patent relating to paper holders.

Church & Church, for complainant.

Hector T. Fenton, for defendant.

DALLAS, Circuit Judge. This suit is for an injunction against and an accounting by the defendants, who, it is alleged, infringe claims 1, 2, 3, and 5 of letters patent No. 217,909, granted to Frederic W. Smith and James S. Shannon upon July 29, 1879, for "improvement in paper holders." This patent has been twice before the circuit court for the Northern district of Illinois. Upon the first occasion, claims 1, 2, and 3 were considered, and upon the second occasion all the claims now in question were involved. In both cases the validity of the patent was upheld. *Shannon v. Printing Co.*, 9 Fed. 205; *Schlicht & Field Co. v. Chicago Sewing-Mach. Co.*, 36 Fed. 585. This court will not examine anew the question which has thus been adjudicated, but will accept the decisions referred to as determinate of the effect of the evidence upon which they were based. *Wanamaker v. Manufacturing Co.*, 3 C. C. A. 672, 53 Fed. 791. If the rule here adverted to were one of "comity" merely, it would, I think, be impossible to justify its derogation from the right of suitors to the veritable judgment of the tribunal to which any particular case is confided for decision. Upon general questions of law, the views

of courts of co-ordinate jurisdiction are always regarded with respectful consideration, but never as controlling. In patent causes, however, conclusive effect is accorded by each of the circuit courts of the United States to a prior judgment of any other of them, wherever the patent, the question, and the evidence are the same in both suits, not on the ground of comity alone, but with the practical and salutary object of avoiding repeated litigation and conflicting decrees in the courts of the several districts upon matters which, having been once passed upon by a court of first instance, ought to be referred to a court of appeal for authoritative determination. *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 559, 53 Fed. 370. Defendant's counsel has directed attention to two decisions, both of later date than either of those made by the circuit court in Illinois, which, he contends, should prevent the latter from having conclusive effect; but it is only necessary to read the opinions in the two cases referred to, in order to perceive the futility of this contention. In *Office Specialty Manuf'g Co. v. Globe Co.*, 65 Fed. 599, the patent was not the same as in this case; and in *Office Specialty Manuf'g Co. v. Cooke & Cobb Co.*, 64 Fed. 133, the application was for a preliminary injunction, and upon the ground that the question of patentable invention was, "to say the least, a doubtful one," an injunction was denied; but the court did not regard the question as open even to the admission of a doubt, except as it was affected by evidence which had not been adduced in the Illinois cases. This new evidence consisted of a certain "English file," which has not been introduced here, and of the "Dixon patent," which, as it also constitutes the only substantial additional evidence in the present case, will now be considered. That patent is an English one to Stephen Dixon (No. 2,780), dated November 9, 1864. In the absence of any expert testimony to explain it, I might, perhaps, properly decline to pass upon this patent. *Waterman v. Shipman*, 5 C. C. A. 371, 55 Fed. 987. I have, however, examined it, with the aid of the ingenious suggestions of counsel, and believe that, if it had been before Judge Blodgett in the cases in the Illinois district, it would not have affected his conclusion. It clearly appears that he was of opinion that the patent then and now in suit covered several material features which are not shown by the Dixon patent; and my own investigation of that patent satisfies me that, in several other essential particulars as well, it falls very short of being an anticipation. But I content myself with applying to it some of the remarks made by Judge Blodgett with relation to certain other earlier patents, viz.: "It also lacks the feature of ready removability of parts so as to admit of close packing for transportation"; and it does not "show a practical duplex paper holder, with a tablet, and arranged with more than one parallel ring, composed of puncturing and transfer wires operating together, as shown by complainant's device."

Upon the question of infringement, I do not deem it necessary to enter upon a comparison of the two devices. When examined side by side, and in the light of the construction given to the claims in

suit by the court in Illinois, and of all the expert testimony in this case, it appears to me to be plain that the defendant's file embodies all the elements of the plaintiff's contrivance, and that the former accomplishes precisely the same objects as the latter, and in substantially the same manner. A decree for the plaintiff upon all the claims involved will be entered.

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WELLS GLASS CO. et al. v. HENDERSON.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1895.)

No. 162.

1. PROCESS PATENTS—WHAT IS PATENTABLE.

A purely mechanical process, involving no chemical or other elemental action which is separable or distinguishable from the function of the mechanical devices used to produce the result, is not patentable. *Locomotive Works v. Medart*, 15 Sup. Ct. 745, followed.

2. SAME—WINDOW SASH.

The Henderson patent, No. 412,751, for a process of manufacturing metallic crossbars and rails for window sashes and analogous structures, held invalid, as covering a purely mechanical process.

3. PRODUCT PATENT—WINDOW SASH.

The Henderson patent, No. 420,510, for improvement in window-sash bars, designed to be made by the process described in patent No. 412,751, must be restricted, in view of the prior state of the art and of the amendments made in the patent office, to the particular forms of construction described, and is not infringed by window-sash bars made in accordance with the Schuhmann patent, No. 415,068.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill by William Henderson against the Wells Glass Company and Herman Schuhmann for alleged infringement of certain patents relating to window sashes and analogous structures. The circuit court sustained the patents, found that they were infringed, and entered a decree for an injunction and an accounting. Defendants appealed.

The appellee, William Henderson, is the grantee of letters patent No. 412,751 and No. 420,510, issued October 15, 1889, and February 4, 1890, respectively,—the first for a "process of manufacturing metallic crossbars and rails for window sashes and analogous structures," and the second for "improvements in window-sash bars," designed to be made by the process described in the first patent. The bill charged the appellants, the Wells Glass Company and Herman Schuhmann, with infringement of both patents, and prayed an injunction and an accounting. The defendants answered, setting up a license, and denying both invention and infringement. General replication. The court below considered that both patents were valid and had been infringed, and decreed an injunction and accounting as prayed.

The specification, drawings and claims of the second patent, which, it may be noted, was first applied for, are as follows:

"Be it known that I, William Henderson, a subject of the queen of Great Britain, residing at Chicago, in the county of Cook and state of Illinois, have invented certain new and useful improvements in window-sash bars, of which the following is a specification. My invention relates to rails or crossbars and fastening for window sashes, and is more especially adapted to that class of sashes which contain many small pieces of glass cut in numerous configurations and designs, such as is seen in stained-glass windows and other

ornamental windows; and the objects of my improvements are to furnish a strong and durable crossbar and fastening, which shall be of little weight, which will not rust or corrode, which can be easily bent into any desired form, and is readily placed in any sash, and removed therefrom conveniently, and also to facilitate the operation of repairing or replacing broken parts without interfering with the other portions. I attain these objects by the peculiar construction of the bar and the removable fastening or cap; and, in order to enable others skilled in the art to which my invention pertains to make and use the same, I will now proceed to describe it, referring to the accompanying drawings, in which Fig. 1 is a front view of my bar and fastening as it appears in a window sash. Fig. 2 is a transverse section of the bar and cap. Fig. 3 is a side elevation of the bar and cap, with the latter removed, showing the notched ends. Fig. 4 is a sectional view taken at the line, x, y, Fig. 1, and shows the manner of securing or locking one bar to another. Figs. 5 and 6 are views of modified forms of the cap. In the drawings, A represents my bar, formed of one piece of material, and preferably made of metal. a is the rib thereof, having its upper part made with a flange, a', as seen in Fig. 2 of the drawings, for securing more firmly the cap or fastening, as will be presently explained. The lower part of this stem or rib is formed with shoulders, b, b, at right angles with the rib, for supporting the glass, and beneath said shoulders I preferably form a hollow, f, of any desired form. It will be readily understood that the hollow portion of the bar can be dispensed with, thus leaving it with a flat surface, or that portion may be solid; but I prefer to form it hollow, as shown, thereby gaining strength without materially increasing the weight of the bar. It is also evident that this form affords a better surface for finishing. At each end of the bar, A, I provide notches, c, c, preferably of an acute-angle form, as shown in Fig. 3. The lower notches are adapted to connect with and fit over the shoulder of the transverse bar, as seen, and will be more readily understood by reference to Fig. 4 of the drawings. By clipping off a portion of the upper notch on the rib, a, the bar is formed as seen at E, which form permits the cap to rest upon the surface of the glass, and hold it securely in place. B is a cap made of one piece of material, and preferably of metal, shaped to form a hollow, b', which may be of any form, but preferably of triangular form, as shown in Fig. 5. It will be observed that at the bottom of the cap, and opposite the apex of the hollow, b', I provide a longitudinal slot, d<sup>2</sup>, which extends the entire length of the securing cap. Into this slot the rib, a, is inserted, and the cap is pressed down over the same until the lips, d, rest upon the surface of the glass. Of course, the cap may be made of any size, and the exterior of any form which may be found to be best adapted to receive a polish or finish. While I prefer to form the cap with a triangular hollow, and have found, from experience, that such a form is more desirable, yet I may use a hollow of the form shown in Fig. 2, or any other shape, without departing from the spirit of my invention. In Fig. 6 I have shown a modified form of a cap which I may sometimes use, and in this modification I form the cap of one piece of material, as before, with the longitudinal slot, d<sup>2</sup>, and lips, d, at right angles with the slot, as shown. The edges of the lips, d, are bent upward within the hollow of the cap, at substantially right angles with the lips, and form the parallel sides, h, h, of the groove or slot. These parallel sides will clasp the rib, a, firmly, and prevent a rocking or lateral movement of the cap on the rib, as will be understood by reference to the drawings. In bending the cap, B, to conform to the curve of the bar, and so that the adjustment of the cap on the rib of the bar can be easily effected, I place the rib, a, within the groove, d<sup>2</sup>, of the cap, and bend both cap and bar at the same time; and, in order to prevent the cap slipping from the rib while thus working the material, I sometimes form the rib with a slight enlargement, a', at the top thereof. This enlargement also assists in retaining the cap in place after the glass is in position, and gives additional strength to the whole bar; but it is not absolutely necessary to hold the cap in place, as this is done by soldering the ends of the cap to its transverse cap, which it overlaps and interlocks, as is seen in Fig. 4 of the drawings. It will be further noticed that each end, g, of the cap is cut at a suitable angle to conform to the side of the cap with which the end meets; thus allowing it to fit snugly against the transverse cap, and to press against



the surface of the glass. In forming the notches on the ends of the bar the cap is placed over the rib, a, and, with a suitable machine, the notches are made. The cap is then removed, and the portion of the upper notch is clipped off to form the ends, as at E. By this operation I am enabled to cut the cap and bar of corresponding length, thus making the adjustment of the cap an easy matter. My object in clipping the upper end of the rib, a, as seen at E, in Fig. 3, is, in joining the parts together the lower portion of the transverse bar will fit in the angular notch, c, and the transverse cap will rest on the glass when it (the glass) is thick; but when thin glass is used the cap will rest on the clipped end, E, of the rib, a. In manufacturing my bar and cap, I may use a die of proper form, and 'draw' the metal through the same, or I may take strips of metal, of suitable dimensions, and form the same as desired, by folding or otherwise. It is also evident that I can make them of various kinds of sheet metal and other material, and that the contour of the cap and of the lower portion of the bar may be made in numerous designs. In use, my bars and caps are easily applied to any window sash, and are especially adapted to be used in doors or windows where sudden shocks or jars occur, as my construction secures the glass very firmly. The application is evident. The bars and caps are cut in suitable lengths, and bent into any desired form. The cap is then removed, and the edge of the glass rests upon the shoulders of the bar. The cap is then placed on the rib, a, and pressed down until the lower portion rests upon the surface of the glass. The ends of the caps may then be soldered to the connecting one, thus making the fastening more secure. It is readily understood that I can form the cap, B, with a groove or channel having parallel sides, or may form it with a core, but I prefer the formations above named. It is also obvious that I may form the rib, a, with a flange on each side of the same at the top, or I may use only one flange, as shown.

"Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is: (1) The crossbar, A, having the shoulders, b, b, and rib, a, at right angles therewith; the hollow projection, f, beneath the shoulders; the ends formed as at c, c, and E; and the vertically adjustable cap, B,—substantially as shown and described, and for the purpose set forth. (2) The combination of the crossbar, A, having the rib, a, and shoulders, b, b, at right angles with the rib; the hollow projection, f; the ends formed at c, c, and E, with the vertically adjustable cap, B, having slot, d<sup>2</sup>, and lips, d, d, at right angles with the rib, when in the slot,—substantially as shown and described. (3) The combination of the crossbar, A, having the rib, a, and shoulders, b, b, at right angles with the rib; the hollow projection, f; the ends formed as at c, c, and E, with the vertically adjustable cap, B, having slot, d<sup>2</sup>, lips, d, at right angles with the slot, and parallel sides, b, b,—substantially as shown and described. (4) In window sash and analogous structures, the crossbar, A, having the notches, c, c, shoulders, b, b, and rib, a, having its ends formed as at E, in combination with the cap, B, having the hollow, b', lips, d, d, slot, d<sup>2</sup>, and both ends cut at an angle, as at g,—substantially as and for the purpose set forth. (5) In window sash and analogous structures, the crossbar, A, having the notches, c, c, shoulders, b, b, and rib, a, having the flange, a', and ends formed as at e, in combination with the cap, B, provided with a triangular hollow, b', and having lips, d, d, slot, d<sup>2</sup>, and angles, g,—substantially as shown and described, and for the purpose set forth."

The claims of patent No. 412,751 are as follows: "(1) The herein-described process of manufacturing crossbars, rails, and fastenings for window sashes, etc., consisting first in passing the strips of metal through a die or dies, giving the bars the desired conformation or shape; then cutting or sawing the formed strips into proper lengths; then notching the ends of the strips; and then passing the notched strips through a device for bending the same into suitable shape or curve ready for use,—substantially as and for the purpose set forth. (2) The herein-described process of manufacturing metallic crossbars, rails, and fastenings for window sashes, consisting first in drawing the strips of metal through a die or dies, making the proper conformation or shape; then placing the strips horizontally against a revolving circular saw, and cutting them to proper lengths; then notching the ends of the formed strips by placing them longitudinally against a series of revolving disks;

then passing the notched strips through a series of rollers, thus bending them to a proper curve ready for use,—substantially as shown and described, and for the purpose set forth. (3) The herein-described process of manufacturing

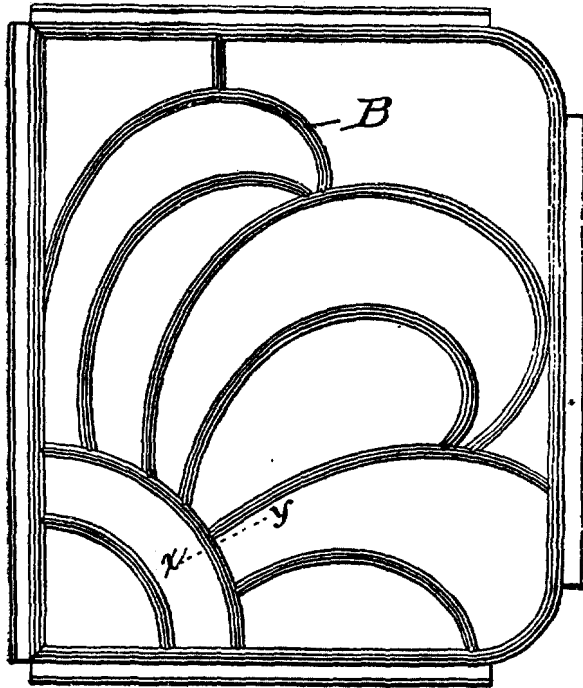


Fig. 1.



Fig. 2.

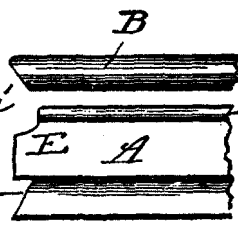


Fig. 3.

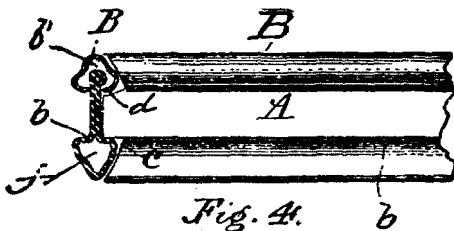
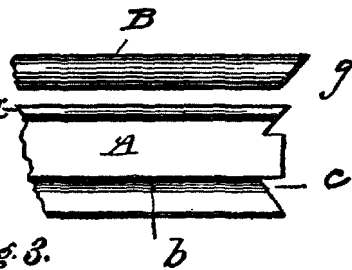


Fig. 4.

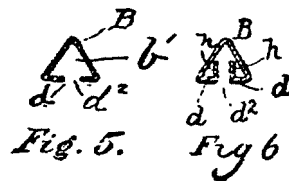
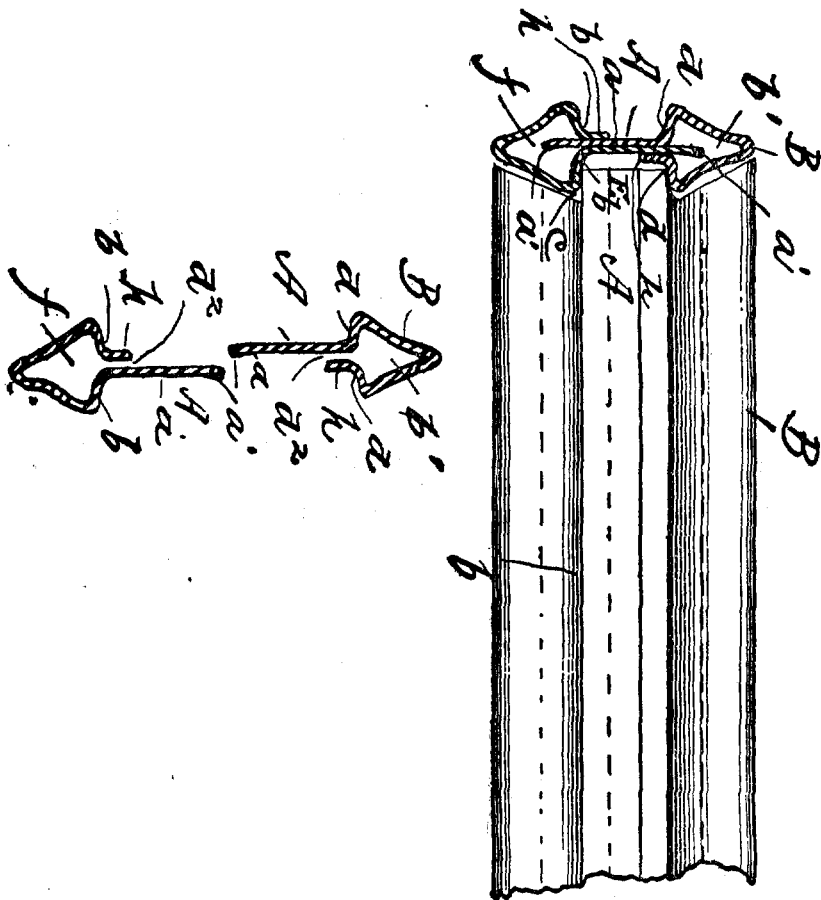


Fig. 5.

Fig. 6.

metallic crossbars, rails, and fastenings for window sashes, consisting first in passing strips of metal through a die or dies, forming a bar and cap of desired conformation; then placing the cap on the rib of the bar, and cutting them into proper lengths; then notching the ends of the strip; and then passing the notched strips through a device for bending the same to a desired curve; then removing the adjustable cap, and clipping the ends of the rib of the bar at a desired angle,—substantially as shown and described, and for the purpose set forth. (4) The herein-described method of manufacturing hollow metallic crossbars, rails, and fastenings for window sashes, consisting first of forming a metallic bar and cap in separate pieces; then adjusting the cap on the rib or web of the bar; then bending, cutting, and notching the same as a whole; then removing the adjustable cap, and cutting the ends of the web or rib of the bar,—substantially as and for the purpose specified."

The appellant Schuhmann applied July 1, 1889, for letters patent on "improvements in metallic window-sash bars," and on the ensuing 12th of November was granted letters No. 415,068, in accordance with which, it is conceded, the alleged infringing devices were made. They are sufficiently illustrated by the following drawings, which are in evidence and are substantially identical with Figs. 2 and 4 of Schuhmann's patent:



Banning & Banning, for appellants.

Charles Shackelford and Offield, Towle & Linthicum, for appellee.

Before WOODS, Circuit Judge, and BUNN and SEAMAN, District Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The process of patent No. 412,751 is purely mechanical. The devices and machinery necessary for its accomplishment, consisting of dies, a "bending or conforming device," a "machine for forming or notching the ends of the bars," and other familiar appliances, are illustrated by drawings, and minutely described in the specification. The application for the patent was rejected, in the first instance, on the ground that "the alleged method is, as presented, the necessary function or operation of the mechanism described"; and, notwithstanding the amendments made to the second, third and fourth claims, we are of opinion that the objection was not obviated, and the patent should not have been granted. In the case of *Appleton Manuf'g Co. v. Star Manuf'g Co.*, 9 C. C. A. 42, 60 Fed. 411, 18 U. S. App. 492, where it was necessary to consider the question of the patentability of mechanical processes, we were unable to deduce from the decided cases a definite rule; but whatever uncertainty there had been, or lack of harmony, in the decisions and dicta of the Supreme Court on the subject, was removed by the recent opinion of that court in *Locomotive Works v. Medart*, 15 Sup. Ct. 745, from which we quote the following:

"The four claims of the patent make no reference to the mechanism exhibited in the drawings, and described in the specification. All claim an improvement in the art of manufacturing, and set forth, in more or less detail, the various steps in that process. That certain processes of manufacture are patentable is as clear as that certain others are not, but nowhere is the distinction between them accurately defined. There is somewhat of the same obscurity in the line of demarkation as in that between mechanical skill and invention, or in that between a new article of manufacture, which is universally held to be patentable, and the function of a machine, which, it is equally clear, is not. It may be said, in general, that processes of manufacture which involve chemical or other similar elemental action are patentable, though mechanism may be necessary in the application or carrying out of such process, while those which consist solely in the operation of a machine are not. Most processes which have been held to be patentable require the aid of mechanism in their practical application, but, where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon his mechanism does not impair his right to a patent for the process, since he would lose the benefit of his real discovery, which might be applied in a dozen different ways, if he were not entitled to such patent. But, if the operation of his device be purely mechanical, no such considerations apply, since the function of the machine is entirely independent of any chemical or other similar action."

This is followed by "a review of some of the principal cases upon the subject of patents for processes," and after quoting from *Corning v. Burden*, 15 How. 252, the statement is added, that, "although the cases are not numerous, this distinction between a process and a function has never been departed from by this court."

It is evident that, in the process for making metallic sash bars

described in Henderson's patent, there is involved no chemical or other elemental action which is separable or distinguishable from the function of the several mechanical devices which are employed to effect the result. The patent is therefore invalid.

It is not necessary to pass upon the question of novelty in the second patent. In view of the prior art, it is clear that, if valid, the patent must be restricted to the particular forms of construction described. Similar forms in bars for uniting glass and other plates in skylights, show cases and windows are shown in earlier patents which are in evidence, and especially in No. 315,958, issued April 14, 1885, to Overman and O'Connor, and No. 370,075, issued September 20, 1887, to Macleod. If the various forms illustrated in those patents were not, like Henderson's device, "especially adapted to that class of sashes which contain many small pieces of glass cut in numerous configurations and designs," it was mainly because of the size of the parts; and once it was perceived to be desirable to use a stronger material than lead in the construction of windows of stained glass, or of clear glass in small pieces, it required no invention to adapt to that purpose the designs of Macleod and others by reducing or otherwise changing their proportions. Henderson himself, before seeking a patent for a bar with rib and shoulders and adjustable cap, had introduced into public use, and was under contract to furnish the Wells Glass Company, a metallic T-shaped bar; and the idea of putting on the rib of that bar a cap, to make the finish the same and to afford support for the glass on both sides, whether it was Henderson's own conception, or was, as Schuhmann testified, his suggestion, was an expedient which was too obvious to be called invention, even if such a cap or counterpart had never before been employed. And in the notching, fitting, and bending of the parts, by means of devices which were in common and familiar use, it is difficult to see anything essentially new, or beyond the powers of ordinary mechanical experience and skill.

In addition to the prior art, the file wrapper shows that, pending the application for this patent, Henderson presented an amendment to his specification, whereby he described, and sought to include, a sash bar substantially identical in form and in details of construction with the bars made by the appellants, and that the amendment was not allowed because it proposed "matter not embraced in the statement of invention or specification or drawing, as originally filed." In response to this, counsel says: "What of it? Certainly no question in this case is affected thereby. That the device of the defendant appellants contains a new and additional invention, supplemental to and built upon the invention of Henderson, does not for a moment take it out from under the Henderson device patent, as an infringement thereof." This argument proceeds upon an erroneous assumption of fact. The proposed amendment did not describe an invention made up of the device first described, and of additional and supplemental matter severable therefrom. It was regarded by the patent office as presenting, and was rejected because it presented, and the claim based

upon it was for, "an entirely distinct and independent invention from that embraced in the application as originally filed." Having acquiesced in that ruling, the patentee cannot be heard to insist that the matter so excluded is nevertheless covered by the patent. It follows that the decree of the circuit court, in so far as it declared patent No. 412,751 to be valid and infringed, and No. 420,510 to have been infringed, is erroneous, and should be reversed, and it is so ordered.

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DE LA VERGNE REFRIGERATING MACH. CO. v. FEATHERSTONE,  
et al.

(Circuit Court, N. D. Illinois. January 21, 1895.)

1. PATENTS—ANTICIPATION—PRIOR STATE OF THE ART.

The Boyle patent, No. 175,020, for an improvement in gas-liquefying pumps used in refrigerating machines, held void for anticipation as to the combination claimed in its first claim, but not as to the removable cages for the valves claimed in its second.

2. SAME—INVENTION.

The introduction of removable cages for the valves of a gas pump of a refrigerating machine, whereby the valves may be replaced with but a few minutes' interruption, and thus the work of refrigeration enabled to go on almost continuously, is a patentable invention, as the presence of such cages performs a proximate office in the function of the machine.

3. SAME—INFRINGEMENT.

Minor differences in the adjustment of parts and in the construction of the mechanism, such as would be naturally suggested to any skilled mechanic with the patented combination clearly in mind, will not save a device from being an infringement.

In Equity. Bill by the De la Vergne Refrigerating Machine Company against John Featherstone and others to enjoin infringement of a patent and for an accounting.

Hubert A. Banning, Banning & Banning, Charles H. Aldrich, and Edmund Wetmore, for complainant.

Bond, Adams, Pickard & Jackson, for defendants.

GROSSCUP, District Judge. The bill in this case is to restrain the infringement of letters patent No. 175,020, issued March 21, 1876, to James Boyle, his heirs or assigns, for "an improvement in gas liquefying pumps." The improvement relates to that class of machinery which is employed for the abstraction of heat for refrigerating and ice-making purposes. The principal defenses are the invalidity of the patent and noninfringement.

Mechanical refrigeration has become an art. Ammonia, destitute of water, by reason of its susceptibility to rapid vaporization from a liquid to a gaseous state, during which heat from surrounding objects is rapidly taken up, is the agent most usually employed. This agent is distributed through the environment to be operated upon by means of pipes and coils, which are connected with a compressor, and the gas, after expanding from a high to a low pressure, during which the heat is taken up, returns for recompression.

When compressed, it is again discharged through the pipes and coils under high pressure, with power of performing its circuit anew, and during each cycle it changes its condition from a gas under high pressure to a liquid, and from a liquid to a gas under low pressure. The gas compressor is a pump, and it is to this part of the refrigerating mechanism that the complainant's improvement relates. The complainant's patent is described in the letters patent as follows:

"A represents the pump cylinder, provided with the heads, B and B<sup>1</sup>, bolted thereon in the usual manner. C is the piston or plunger, provided with the piston rod, D, which passes through the head, B, and through a stuffing box, D, thereon. G is a tube or chamber running the entire length on the outside of the cylinder, and provided with the air inlet, G<sup>1</sup>. This air tube communicates with the interior of the cylinder, A, close to the head, B. Throughout a passage, a, and at the other end, it communicates with one end of an air tube, G<sup>2</sup>, running across the head, B<sup>1</sup>, on the outer side. This air tube, G<sup>2</sup>, is divided centrally by a cross partition, b, and the other end of said tube communicates with the air outlet, G<sup>3</sup>. The various air tubes or chambers are preferably cast with a cylinder and head, as shown in the drawing, but may be arranged in any other suitable manner. Through the air tube or chamber, G<sup>2</sup>, on each side of the partition, b, is screwed a cage, the upper end of which extends up into an aperture in the cylinder head, B<sup>1</sup>, and at the joint are suitable shoulders, x, x, so that when the cage is properly screwed up the joint will be perfectly air-tight. On the upper end of the cage, H, is formed a seat, d, for the inlet valve, I, which has a stem or rod, J, extending downward through guides, h, h, within said cage, and the valve held down to its seat by a spiral spring, l, surrounding the stem between the guides. On the upper end of the cage, H, is formed a seat, d, for the outlet valve, I. The valve stem, J<sup>1</sup>, guides, h<sup>1</sup>, and spring, l<sup>1</sup>, are the same as in the first cage, except that the spring is arranged to hold the valve up to its seat. The lower ends of the cages, H, H<sup>1</sup>, are closed by means of screw caps, L, forming tight joints with the chamber, G<sup>2</sup>."

The patent is a combination patent, and the claims are as follows:

"(1) In combination with the cylinder, A, and its heads, B, B<sup>1</sup>, the solid piston head, C, the tube, G, extending the entire length of the cylinder, the air-tubes, G<sup>1</sup>, G<sup>2</sup>, air inlet, a, cages, H, H<sup>1</sup>, having valves, I, I<sup>1</sup>, and the outlet, G<sup>3</sup>, all constructed substantially as and for the purposes herein set forth."

"(2) In combination with the cylinder, A, and air tube, G<sup>2</sup>, the removable cages, H, H<sup>1</sup>, provided with spring valves and exterior screw threads, and exterior screw caps, L, L, all substantially as and for the purposes herein set forth."

It is not contended that any of these parts are new. The validity of the patent must be maintained, if maintained at all, solely on the score of a new and useful combination of old parts. A review of the state of the art satisfies me that, excepting the removable cages, all the other elements of the combination have been united in previous patents, some of them in other arts, such as the Seguin patent of 1838, and some in the refrigerating art itself, such as the Della, Beffa & West, and the Harrison patents. In the two patents last named the cylinders were double-acting, and provided with outlet valves at each end. But I do not think the adaptation from double-acting to single-acting cylinders is invention. Single-acting cylinders are old, and it is at best but mechanical selection to

choose a cylinder of that character, and adapt to it valves in use in the other.

It is urged with some persistency that in the patents named, and some others, removable cages for the valves were employed. I am not wholly free from doubt on that question. The experts and counsel on the respective sides have disagreed, and no models of these patents have been brought to my attention. The question is one of fact, and is to be decided, so far as this record goes, upon the disclosures of the drawings alone. I have looked into these drawings in vain for any certain indication of removable cages. They have some features from which an inference of that character may be drawn, and there are indications which seem to rebut it. The pertinent inquiry is whether, in the state in which they appear in this record, they would suggest, naturally and reasonably, to the inventor, the feature of removable cages. He is limited in his claims by all the information that these patents have given to the world, but he is not limited by all the doubts or conjectures that they may create. My own judgment is that, in the absence of the suggestion aliunde of removable cages in combination with the other elements of the pump, the patents brought to my attention would not suggest them, and I cannot find that they actually contain them. It therefore follows that in respect of the removability of the cages, the complainant's invention is not anticipated by the patents to which reference has been made.

It is not disputed that the removability of the cages containing the valves is a very advantageous feature of the mechanism. It enables the valves to be replaced with but few minutes' interruption, and thus the work of refrigeration to go on almost continuously. It is, in this respect, a highly useful improvement upon previous refrigerating mechanisms. The introduction of such cages into a combination is not, in my judgment, a mere aggregation. Its presence there performs a proximate office in the function of the machine. It may be admitted that in ordinary mechanism a method of easy access to the parts, whereby repairs may be made quickly and inexpensively, is not itself a part of the function of the machine, but is only accessory and incidental. But the product of this machine is a state of temperature, and any interruption affects not only the quantity, but the quality, of the thing produced. Thus, practically uninterrupted refrigeration for weeks and months is a very different result from refrigeration occasionally interrupted by hours of time. The difference between the two is the difference between success and partial success in the art.

It is not contended that the cages themselves, or their feature of removability, are new, but that their introduction into this sort of a pump and mechanism is new. The question, therefore, remains whether such introduction is invention, or simply mechanical selection. This question is in nearly all patent cases the turning one, and the most difficult to solve. After old elements have been put together, and their usefulness for the new purpose demonstrated, it is easy to say that any mechanic could have brought about the



result. Foresight after the event is the simplest and commonest of endowments. But the fact that constancy of temperature was a pressing need in the art of refrigeration, and had been for a long time, and that no mechanism, prior to this combination, had accomplished that end, is a cogent argument that the result, when accomplished, was the product of thought and conception, rather than mere mechanical selection.

In *Loom Co. v. Higgins*, 105 U. S. 580, Justice Bradley says:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention."

The discovery of the exact point at which the fault of previous machines lay, and of the expedient of counteracting this by relays of valves, required a reasoning beyond mere adaptation, and were thus pre-essentials to the selection of the removable cage feature. I am constrained, therefore, to look upon the introduction of these elements into the combination as patentable invention.

It is sufficient to say that in the respect pointed out the defendants' device infringes upon the complainant's patent. There are some minor differences in the adjustment of the cages and in the construction of the mechanism, but they are differences which to any skilled mechanic, with this combination clearly in mind, would be naturally suggested. A decree may be entered for the complainant, sustaining both claims of the patent, and for an accounting.

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### JOHNSON CO. v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. May 14, 1895.)

#### No. 53.

#### 1. PATENTS—INVENTION AND MECHANICAL SKILL.

For the purpose of meeting a defense that only mechanical skill was required to produce the device of the patent, complainant showed that a device was made by another person, prior to the application, to accomplish the same result, which was different from and much inferior to the device of the patent, and argued therefrom that a mechanic did not and could not learn from the prior art the mode of construction shown in the patent. *Held*, that this was not conclusive, because the scope of mechanical skill is not restricted to the skill of any particular mechanic.

#### 2. SAME—RAILWAY SWITCH.

The Moxham patent, No. 333,474, for a railway switch for street cars, is void as disclosing only mechanical skill. *Johnson Co. v. Pennsylvania Steel Co.*, 62 Fed. 156, applied.

This was a bill by the Johnson Company against the Pennsylvania Steel Company for alleged infringement of a patent for a street-railway switch.

Harding & Harding, for complainant.

Philip T. Dodge and Joshua Pusey (Mark Wilks Collet, of counsel), for defendant.

DALLAS, Circuit Judge. This is a suit brought by the Johnson Company, a corporation of Kentucky, and having works located at Johnstown, Cambria county, Pa., against the Pennsylvania Steel Company, a corporation of Pennsylvania, and having works at Steelton, Pa., for infringement of letters patent No. 333,474, granted to Arthur J. Moxham, December 29, 1885, for railroad switch, and by him assigned to the plaintiff company. The bill is in the usual form, and the answer and amended answer deny infringement, and set up certain prior patents as anticipations of the invention of said patent.

The only claim of the patent is as follows:

"A railway switch for street-car tracks, composed of two rolled side-bearing girder rails, of similar forms, devoid of guards, cut and fitted together at the necessary angle to deflect the car, secured together at their junction and at their divergent ends to the main rails of the track, substantially as and for the purposes set forth."

This claim calls for side-bearing girder rails, but says nothing about a tram. In the specification, as in the claim, however, it is stated that "the object of this invention is to provide a form of switch more particularly for street-car tracks"; and street-car tracks have been commonly constructed of tram rails, and in the specification and drawings a tram is referred to and shown. Therefore, as this case is to be decided upon the question of invention, and as that question is presented most favorably for the plaintiff by relating it to side-bearing girder tram rails, I will so relate and consider it, without pausing to inquire whether the existence of a tram upon the rails to be dealt with, if controlling, could properly be assumed. The evidence, but for one matter which will presently be separately mentioned, would be convincing, to the preclusion of doubt, that the pre-existing switches left nothing to be done which a skilled mechanic would not naturally have done if he had desired to construct a switch, such as is described in the patent, of side-bearing girder rails, whether with or without trams. Patent No. 145,013, issued to Thomas J. Reynolds on November 25, 1873, is a partial exemplar of the prior art; and to that patent alone, though the record includes others of much pertinency, it will suffice to refer. In making the Moxham switch a form of rail is used which differs from that used by Reynolds; the Reynolds switch being made of T rails, and the Moxham of side-bearing rails. Both forms of rail, however, were old, and the only thing which it was necessary to do, or which was done, was to apply the T-rail device to side-bearing rails, and in making this application all that was needed was the removal from the side-bearing rails of such portions thereof as stood in the way, and to fit and unite the parts in an obvious manner. This Moxham did most expediently; yet the intelligence which he exercised was but the discreet judgment of a competent constructor, and not the higher faculty of creation which distinguishes the inventor. The only difficulty I have encountered in arriving at this conclusion has, as I have intimated, arisen from a single piece of evidence which was offered by the complainant in rebuttal; but upon

fully considering that evidence, and giving all possible weight to the presumption in favor of the validity of the patent, I am still unable to sustain it. The particular evidence referred to consists of a switch which was actually made of side-bearing girder rails, and which was used in San Francisco before the patent in suit was applied for. That switch was different from and was inferior to the switch in question; and from these facts it is argued that a mechanic could not—certainly did not—learn from the prior art the mode of construction pointed out by Moxham. This argument merits and has received very careful attention; but, upon mature reflection, I do not think it should prevail. The constructor of the San Francisco device may have had some special object in resorting to the mode of construction which he adopted; or it may be—and this seems to be the more probable explanation—that he was not skillful enough to perform the work in the most desirable manner. The scope of mechanical skill is, however, not restricted to the skill of any particular mechanic. The line to be marked is that which separates mere constructive ability from inventive capacity; and, as the lowest order of invention is something more than mechanical skill, so the highest degree of mechanical skill is something less than invention. All mechanics are not equally skillful, and the question is not whether every mechanic would do the work in one and the best way, but whether any mechanic might, without invention, do the work in the particular manner sought to be exclusively appropriated. This test, when applied to the present case, is conclusive. The testimony of George W. Parsons upon the subject is quite accordant with the weight of the evidence. It is, in substance, that, before the issuance of the patent in suit, nothing beyond mechanical skill was requisite to the construction of the switch in question.

In principle, this case cannot be distinguished from that of *Johnson Co. v. Pennsylvania Steel Co.*, 62 Fed. 156, and the views which I there expressed are equally applicable here.

The bill is dismissed.

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#### THE COLUMBIA.

SHORT et al. v. THE COLUMBIA.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1895.)

No. 172.

#### ADMIRALTY APPEALS—NONJOINDER OF PARTIES—LIMITATION OF LIABILITY.

All persons who file claims for damages in a proceeding for limitation of liability are interested adversely to the owner in respect to a decree which limits his liability; and where such petitioners are not treated, in the proceedings, as adverse to each other, part of them cannot maintain alone an appeal from such decree, in the absence of any proceedings to effect a severance of their interests.

Appeal from the District Court of the United States for the District of Oregon.

This was a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company for limitation of liability in respect to damages occasioned by the wrecking of the barge Columbia. A number of parties filed claims for damages, and the district court entered a decree limiting the liability of the owners to the amount of \$100. From this decree some of the petitioners have appealed.

C. E. S. Wood and Nathan H. Frank, for appellants.

W. W. Cotton, for appellee

Before McKENNA, Circuit Judge, and HANFORD and HAWLEY, District Judges.

HANFORD, District Judge. This cause was commenced in the United States district court for the district of Oregon by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, under and pursuant to sections 4283-4285 of the Revised Statutes of the United States, and admiralty rules 54-57, to obtain a decree limiting the liability of said libelants for the losses occasioned by the wrecking of the barge Columbia. Robert Balfour, Stephen Wilson, Alexander Guthrie, Robert Brodie, Forman R. Bruce, and Walter J. Burns, partners in business under the firm name of Balfour, Guthrie & Co., Malvina Short, as the administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, as administrator of the estate of John August Peterson, deceased, Anna C. Larsen, mother of said Peterson, and William Boyce, in his own behalf, appeared in the district court, made proof of their respective claims for damages, and contested the right of said libelants to the relief prayed. By the decree the total liability was fixed at \$100, that amount being the appraised value of the wrecked vessel; and the same was divided into three equal parts, and awarded as follows: To Malvina Short, Sven Anderson, and Anna C. Larsen, \$33.33, to William Boyce \$33.33, and to the firm of Balfour, Guthrie & Co., \$33.33. An attempt has been made by Balfour, Guthrie & Co., in their firm name, jointly with Malvina Short and Sven Anderson, in their respective characters as administratrix and administrator, to appeal from said decree, and at the instance of said parties a transcript of the record has been filed and the cause docketed in this court. Anna C. Larsen and William Boyce, parties to the decree, did not join the appellants in taking an appeal, nor refuse to join therein, nor waive their right to appeal. They are not treated in the proceedings as adverse parties to the appellants. No request to join in the appeal was made to them, and the court below did not make an order of severance. The petition for allowance of the appeal, notice of appeal, and citation were served upon the libelants, but not served upon Mrs. Larsen or Boyce. The rules promulgated by the supreme court, above referred to, make all persons having claims for damages growing out of a marine casualty proper parties to any proceeding to limit the liability of the owner of the vessel, so that the entire subject-matter may be fully and finally adjudicated

in one proceeding. *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578-607, 3 Sup. Ct. 379, 617. For similar reasons, when an appeal is taken, it is essential to the jurisdiction of the appellate court that each party having a right to be heard upon a review of the case should be brought before the court, or lawfully estopped from continuing the litigation. In every such case all the injured persons have a common interest in the main question as to the right of the owner to limit his liability, and, if judgment passes in his favor as to that question, they all are entitled to share in the distribution of the common fund arising from the sale of the vessel, or the payment into court of the appraised value thereof; and each person who appears and submits a claim for the court to pass upon has a right to appeal from a decision in favor of the owner. If Balfour, Guthrie & Co., and Mrs. Short and Anderson can prosecute this appeal without being joined by Mrs. Larsen and Boyce, then the two last named may each prosecute an appeal separately, or at least their right to do so continued for some time after this case had been docketed in this court. The supreme court has announced and reiterated several times the rule that separate appeals to that court, by several parties asserting interests in common affected by a single decree, cannot be permitted, and has enforced the rule by dismissing appeals when necessary parties were not joined, nor barred of their right to appeal by refusing to join after due notice. *Owings v. Kincannon*, 7 Pet. 402; *Masterson v. Herndon*, 10 Wall. 416; *Hampton v. Rouse*, 13 Wall. 187; *Simpson v. Greeley*, 20 Wall. 152; *Sipperley v. Smith*, 155 U. S. 86, 15 Sup. Ct. 15. These decisions declare a rule of law which governs this court in the exercise of its powers. By the eleventh section of the act creating this court it is expressly provided that all provisions of law regulating the practice and system of review through appeals and writs of error shall regulate the method and system of appeals and writs of error provided for in said act in respect to the circuit court of appeals. 2 Supp. Rev. St. (2d Ed.) 905 (11 C. C. A. xix.). If we ignore the irregularity of the proceedings in the firm name of Balfour, Guthrie & Co. without naming the individuals composing the firm, still the appeal should be dismissed because of the nonjoinder of Mrs. Larsen and Mr. Boyce. No lawful appeal has been taken, and this court is without jurisdiction to pass upon the merits of the cause. Appeal dismissed.

## CRINER v. MATHEWS et al.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1895.)

No. 506.

**APPEAL—ASSIGNMENTS OF ERROR—MOTION FOR NEW TRIAL.**

An order overruling a motion for a new trial is not assignable as error in a federal appellate court.

In Error to the United States Court in the Indian Territory.

This was an action by John B. Criner against Oliver Mathews and Mrs. Mathews to recover possession of a certain farm. There was a verdict and judgment in favor of defendant. Plaintiff moved for a new trial, which motion was overruled. Plaintiff excepted to the overruling of the motion, and brought error to this court.

C. L. Herbert filed brief for plaintiff in error.

H. C. Potterf and Henry Hardy filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**PER CURIAM.** The only error assigned in this case is the overruling of a motion for a new trial. The rule is settled that the overruling of such a motion cannot be made the foundation for an assignment of error in a federal appellate court. The judgment of the United States court in the Indian Territory is affirmed.

## BOARD OF COM'RS OF GRAND COUNTY v. KING.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 452.

**RECORD ON APPEAL.**

After the granting of a writ of mandamus to compel county commissioners to levy a tax for the purpose of paying a judgment against the county, the attorney for plaintiff sent written notice to defendant's attorneys, mentioning certain parts of the record in the original cause wherein the judgment sought to be enforced was rendered as being, in his opinion, necessary for consideration on appeal; and plaintiff's attorneys indorsed thereon that they had received the notice, and statement of parts of the record attached thereto. This matter was not incorporated in the bill of exceptions, nor certified to by the clerk, but was tacked to the record on appeal by counsel, without official sanction. *Held*, that it properly constituted no part of the record, and could not be considered by the appellate court.

In Error to the Circuit Court of the United States for the District of Colorado.

This was a petition by Francis G. King for a writ of mandamus directing George Bunto, Thomas E. Pharo, and John Rowen, as members of the board of county commissioners of Grand county, Colo., to levy a special tax to pay a judgment against the county held by the petitioner. The circuit court granted the writ, and the respondents appealed. On February 18, 1895, the judgment was reversed by this court because the record did not show that the

judgment sought to be enforced was recovered upon any obligation issued under a statute requiring the commissioners to levy a special tax for the payment thereof, and that in the absence of any such legislative direction the court had no power to direct the levy of such a tax. 67 Fed. 202. The petition for the writ of mandamus in fact did not show the nature of the cause of action upon which the judgment was recovered. The plaintiff has now filed a petition for a rehearing.

Sam W. Jones and L. B. France, for plaintiff in error.

Willard Teller, H. M. Orahood, and E. B. Morgan, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. A petition for rehearing has been filed in this case, in which it is said that there was an agreement between counsel that the record in the case in which the judgment was obtained should be made a part of the record in the mandamus proceeding. It is enough to say, in answer to this suggestion, that no such agreement appears in the record before this court. And we repeat what we said in our opinion, that "there is nothing in the record before us, which we can consider, that shows the plaintiff's judgment was rendered on county warrants." Months after the case was tried and disposed of in the lower court, the attorneys for the plaintiff addressed a notice to the defendant's counsel, reading as follows:

"Francis G. King, Plaintiff, vs. The Board of County Commissioners of the County of Grand, Defendant.

"Messrs. Teller, Orahood & Morgan, Attorneys for Plaintiff: Please take notice that the following is the statement of the parts of the record in the original cause between the above-named plaintiff and defendant which appellant thinks necessary for the consideration of the errors assigned on appeal to the United States circuit court of appeals for the Eighth circuit.

"Sam W. Jones and L. B. France, Attorneys for Defendant.

"Received a copy of the above notice, and statement of parts of the record attached thereto, this 24th day of July, A. D. 1894.

"Teller, Orahood & Morgan, Attorneys for Plaintiff."

Following this notice is an abstract of a complaint, and some memoranda of the proceedings in the case in which the complaint was filed. The court did not overlook this irrelevant and useless paper, but it was so obvious that it was no part of the record in the case that no reference was made to it in the opinion. It is not only not in the bill of exceptions, but it is outside of the record certified to by the clerk. It is extraneous and foreign matter tacked onto the record by counsel long after the trial of the cause, and has no official sanction whatever. It is needless to say that new evidence cannot be introduced into the record of a case, for the consideration of the appellate court, long after the case has been tried and judgment rendered therein in the lower court, by giving notice that the "appellant thinks such evidence necessary for the consideration of the case on appeal." The jurisdiction of this court is purely appellate, and is limited to reviewing the action of the lower court upon the pleadings and evidence that were before that court.

Moreover, it is admitted that the petition for mandamus did not show the nature of the cause of action upon which the judgment was rendered, and the court below overruled the demurrer to the petition, thus holding that the existence of the judgment alone entitled the plaintiff to a mandamus. The rehearing is denied.

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## AMERICAN CENT. INS. CO. v. HEISERMAN.

(Circuit Court of Appeals, Eighth Circuit. May 13, 1895.)

No. 542.

## 1. APPEAL—DEMURRER TO EVIDENCE—WAIVER.

The overruling of a demurrer to plaintiff's evidence is waived by defendant by proceeding to introduce his own evidence, and he cannot thereafter assign the same as error.

## 2. SAME—ERROR IN INSTRUCTIONS—FAILURE TO EXCEPT.

Alleged error in giving instructions cannot be considered where either no exceptions were taken, or, if taken, the same do not appear upon the record.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by Mary E. Heiserman against the American Central Insurance Company to recover upon a policy of fire insurance. There was verdict for the plaintiff, and judgment accordingly, and the defendant brings error.

E. F. Ware (Robert W. Neal, on the brief), for plaintiff in error.

J. R. Hallowell and Montgomery Hallowell filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The first assignment is that the circuit court erred in not sustaining the defendant's demurrer to the evidence. This demurrer was interposed at the close of the plaintiff's evidence, and, when overruled by the court, the defendant proceeded to introduce its evidence. This was a waiver of the demurrer. The only other assignment not waived by counsel in the argument of the case is that the court wrongly instructed the jury on the measure of damages. But no exception was taken to the charge at the trial, or, if an exception was taken, that fact does not appear upon the record, and, not appearing of record, has no existence as a predicate for error. The judgment of the circuit court is affirmed.



## UNITED STATES v. WINONA &amp; ST. P. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 564.

## 1. LAND DEPARTMENT OF THE UNITED STATES—JUDICIAL POWER.

The land department of the United States (including in that term the secretary of the interior, the commissioner of the general land office, and their subordinates) is a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and also with power to execute its judgments by conveyances to the parties it decides are entitled to them.

## 2. CERTIFICATION OF TITLE UNDER A RAILROAD LAND GRANT—EFFECT.

A certification of land to the state for the benefit of a railroad company under the acts of March 3, 1857 (11 Stat. 195), of May 12, 1864 (13 Stat. 72), and of March 3, 1865 (13 Stat. 526), by the land department of the United States, has the same legal effect as a patent.

## 3. PATENT TO LAND—LEGAL EFFECT.

A patent or certificate of title to land within its jurisdiction issued by the land department is a judgment of that tribunal and a conveyance of the legal title.

## 4. PATENT TO LANDS WITHOUT THE JURISDICTION OF THE LAND DEPARTMENT—EFFECT.

A patent or certificate of the land department for land over which that tribunal has no power of disposition, and no jurisdiction to determine the claims of applicants for, is absolutely void, and conveys no title. Land the title to which had passed from the government to another before the claim on which the patent was based was initiated, land reserved from sale and disposition by the land department for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which the acts of congress have made no provision, is of this character.

## 5. PATENT TO LAND WITHIN THE JURISDICTION OF THE LAND DEPARTMENT — EFFECT.

A patent or certificate of the land department for land over which that department has the power of disposition, and the jurisdiction to determine the claims of applicants for, is impervious to collateral attack, and conveys the legal title, whether its decision upon the rights of the applicants is right or wrong.

## 6. CANCELLATION OF PATENTS ERRONEOUSLY ISSUED — POWER OF COURT OF EQUITY.

A court of equity may, in a direct proceeding for that purpose, set aside a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department over a matter within its jurisdiction has resulted from fraud, mistake, or erroneous views of the law.

## 7. CERTIFICATION OF LANDS THROUGH MISTAKE OF LAW—EFFECT.

Under the act of March 3, 1857, as amended by the act of March 3, 1865, *supra*, the land department, through a mistake of law, certified to the state of Minnesota, for the benefit of a beneficiary of those acts, lands within the primary limits of its grant, which were subject to homestead entries and pre-emption filings at the time of the definite location of its line of railroad, which had been duly canceled by a proper officer of the land department before the certificates were made. *Held*, that the land department had jurisdiction of the subject-matter of the certificates; and, although its decision was erroneous, the certificates were not absolutely void, but merely voidable, and they conveyed the legal title to the state and its grantees.

## 8. BONA FIDE PURCHASERS.

In a suit in equity brought by the United States under the act of March 3, 1887 (24 Stat. 556), to cancel such certificates, and to restore the title to

the land to the United States, the equities of bona fide purchasers who hold the legal title under the certificates are superior to those of the United States, and constitute a good defense to the suit.

**9. SAME—NECESSARY PARTIES.**

Such purchasers who hold the legal title are indispensable parties to a suit in equity to annul that title.

**10. SAME—CONSIDERATION.**

The complete satisfaction and discharge of an existing indebtedness is a sufficient and valuable consideration for the purchase of land or other property.

**11. LAND GRANTS—EXCEPTIONS FROM LANDS GRANTED IN PLACE.**

Lands within the place limits of the grants to a beneficiary of the acts of March 3, 1857, May 12, 1864, or March 3, 1865, supra, which are sold or otherwise appropriated, or to which pre-emption rights are attached at the time of the definite location of the line of its railroad, are excepted from the grant to that company.

**12. SAME—EXCEPTIONS FROM LANDS GRANTED IN INDEMNITY LIMITS.**

Lands within the indemnity limits of the grant to a beneficiary of the acts of March 3, 1857, May 12, 1864, or March 3, 1865, supra, which were sold or otherwise appropriated, or to which pre-emption rights had attached at the time of their selection and its approval, and those only, are excepted from the lands within the indemnity limits granted to such a beneficiary.

**13. SAME—EXCEPTIONS.**

Accordingly, lands within the place limits of the grant for the Winona Company and within the indemnity limits of the grant to the Sioux City Company under those acts, to which homestead entries and pre-emption filings, that were subsequently canceled by the proper officer of the land department, were attached at the time of the definite location of the line of the railroad of the Winona Company, were excepted from the grant of lands in place to that company, and, after such cancellations were made, were rightfully selected and certified to the Sioux City Company as a part of its indemnity lands.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Robert G. Evans, for the United States.

Thomas Wilson (Lloyd W. Bowers, on the brief), for appellees Winona & St. P. R. Co. and Minnesota Land & Investment Co.

J. A. Tawney and H. M. Lamberton, for appellee Winona & St. P. Land Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In this case, the appellant, the United States, brought a suit in equity in the circuit court against the Winona & St. Peter Railroad Company, a corporation, and more than 35 of its immediate and remote grantees, to set aside the certification from the United States to the state of Minnesota of about 2,380 acres of land, and to annul the conveyances thereof by the state to the railroad company. This suit was brought under the provisions of the act of congress of March 3, 1887 (24 Stat. c. 376, p. 556), to provide for the adjustment of land grants in aid of the construction of railroads. It was grounded on the fact that, at the respective times of the definite location of the railroad of the Winona Company, homestead entries or pre-emption filings had been made upon the lands described in the bill, so that, according

to the decision of the supreme court in *Railway Co. v. Dunmeyer*, 113 U. S. 629, 641, 644, 5 Sup. Ct. 566, these lands were excepted from the grant to the state for the benefit of the railroad company. The existence of the homestead entries and pre-emption filings, when the line of the railroad was definitely fixed, was conceded by the appellees; and their defense was that the certification of the lands to the state, although erroneous, was not void, but conveyed the legal title; that the appellees, other than the railroad company, had become the bona fide purchasers of all but 240 acres of this land, in reliance upon this certificate, before the government made any claim to recover it; that the 240 acres which were still held by the railroad company were rightfully certified to the state for the benefit of the St. Paul & Sioux City Railroad Company, another corporation; and hence that there was no equity in the bill.

In the view we take of this case, the material facts disclosed at the hearing are these: The lands in question were certified to the state under the provisions of the following acts of congress, viz.: The act of March 3, 1857 (11 Stat. c. 99, p. 195), which granted to the territory of Minnesota, for the purpose of aiding in the construction of certain railroads, including that of the Winona Company and that of the St. Paul & Sioux City Railroad Company, every alternate section of land designated by odd numbers for 6 sections in width on each side of each of said roads, and provided that in case it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any sections or parts of sections granted, or that the right of pre-emption had attached to the same, then lands in lieu of those so sold or pre-empted might be selected from alternate sections of the public domain within 15 miles of the lines of said roads; the act of congress approved March 3, 1865 (13 Stat. c. 105, p. 526, §§ 1, 2), which increased the quantity of lands granted by the act of March 3, 1857, to aid in the construction of the railroad of the Winona Company to 10 sections per mile, extended the indemnity limits of the grant to 20 miles, and provided that the lands granted by that act and by the act of March 3, 1857, should "in all cases be indicated by the secretary of the interior"; and the act of May 12, 1864 (13 Stat. 72), which granted to the state of Minnesota, for the purpose of aiding in the construction of the railroad of the St. Paul & Sioux City Railroad Company, 4 additional sections per mile, to be selected within 20 miles of the line of said railroad, upon the same conditions, restrictions, and limitations as were contained in the act of March 3, 1857. The line of the railroad of the Winona Company was definitely fixed from its eastern terminus westerly to the west line of range 31 on July 29, 1858, to the west line of range 37 as early as August 3, 1864, and to the west line of range 38 on February 23, 1867. The line of the railroad of the Sioux City Company was definitely fixed from its eastern terminus to section 31, township 107, range 31, on February 20, 1858; and thence westerly to section 30, township 104, range 39, on August 10, 1865. Both of these railroad companies built their railroads in a time and manner that entitled

them to the benefit of the acts of congress cited, so far as those acts and the timely construction of their railroads conferred upon them any right to these lands; and the railroad of the Winona Company was built past all and across some of these lands before the year 1873. All of these lands were certified to the state before June 7, 1879, and all but 680 acres of them before May 15, 1874. A part of them were certified to the state for the benefit of the Winona Company, and a part were certified to the state for the benefit of the Sioux City Company. Those certified for the benefit of the Winona Company were conveyed to that company by the state prior to 1880. The lands certified to the state for the benefit of the St. Paul & Sioux City Railroad Company were within the place limits of the Winona Company and within the indemnity limits of the Sioux City Company. When the line of the railroad of the Winona Company was definitely fixed opposite to them, they were subject to homestead entries or pre-emption filings, which were subsequently canceled by the proper officer of the land department of the United States. After these entries and filings had been canceled, the Sioux City Company selected these lands as indemnity lands under its grants, and they were thereupon certified to the state for its benefit. There was such a deficiency in the lands in place granted to the Sioux City Company that all the public lands within its indemnity limits were required to fill it. In 1875, before the governor of the state had conveyed these lands to the Sioux City Company, the Winona Company brought suit against it for an injunction, forbidding that company to apply to or to receive from the governor of the state a conveyance of any of these lands, and for a decree that the Winona Company was justly entitled to them, and to a conveyance of them from the state. In 1885 the Winona Company succeeded in obtaining a final decision of the supreme court entitling it to this relief (*St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334); and the governor of the state thereupon conveyed these lands to the Winona Company. On October 31, 1867, D. N. Barney and eight other persons owned the stock of the Winona Company. These persons had, at the request of the company, loaned to it large sums of money, and had constructed 105 miles of its railroad from Winona to Waseca, Minn. In payment of this loan and for the construction of this railroad, the corporation on that day agreed to deliver to these men certain amounts of its stock and bonds, and sold and agreed to convey to them, or to the parties to whom they directed it to convey, as many acres of land as the corporation should receive on account of the construction of that 105 miles of railroad, and to convey in satisfaction of this contract all the lands it should receive within its 20-mile limits, commencing at the eastern terminus of its railroad, and running westerly until the full quantity was conveyed, excepting, however, such portions of said lands as were necessary to the operation of its railroad. At the same time, and as a part of the same transaction, Barney and his associates sold their stock in the Winona Company to parties in

control of the Chicago & Northwestern Railway Company, and the sale of and agreement to convey these lands were part of the consideration for the sale of the stock. Some of the lands covered by this contract were sold to innocent third parties before 1876. In that year, the appellee the Winona & St. Peter Land Company, a corporation, was organized with a capital stock of \$500,000; and, with this stock, it bought the unsold lands covered by the contract of October 31, 1867, and the obligations of the purchasers of the lands sold by Barney and his associates, for the unpaid purchase price thereof. Prior to 1878 the Winona Railroad Company conveyed to the parties designated by Barney and his associates all the lands in controversy, except 240 acres in range 38, which had been certified to the Sioux City Company, and except those which the Winona Company conveyed to the land company on November 20, 1887, in obedience to the decision of the supreme court of the United States in *Railroad Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. 606, and *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654. In 1878 Barney and his associates commenced a suit in the proper court in the state of Minnesota to compel the Winona Railroad Company to convey the lands last mentioned to them, or to the parties they designated, under the contract of October 31, 1867. That suit was removed to the United States circuit court for the district of Minnesota, where a decree was rendered in April, 1881, that the Winona Company should convey these lands under the contract to the complainants in that suit, or to the parties they might designate. In 1886 this decree was affirmed on appeal by the supreme court; and on November 20, 1887, the Winona Company conveyed these lands to the Winona & St. Peter Land Company pursuant to that decree.

According to the uniform decisions of the officers of the land department of the United States, from the passage of the acts of congress under which these lands were certified to these railroad companies until the decision of the supreme court, in 1884, in *Railway Co. v. Dunmeyer*, 113 U. S. 641, 5 Sup. Ct. 566, these lands fell under the grant to the Winona Company, when the pre-emption filings and homestead entries upon them at the time the lines of the railroads were definitely fixed were subsequently canceled by the proper officers of the land department; and, according to these decisions, they were properly certified to the state for the Winona Railroad Company. But that was an erroneous view of the law. *Railway Co. v. Dunmeyer*, *supra*. Neither Barney nor any of his associates, nor the land company nor any of the appellees who purchased from any of them, discovered this error or received notice of any claim of the United States to any of these lands or of any defect in the title to them until about March, 1891, when the United States demanded the reconveyance of them from the railroad company under the act of 1887. In the meantime many tracts of these lands had been sold by Barney and his associates and by the land company, and they were then held under deeds and contracts from them by their immediate and remote grantees, many of whom had paid taxes and made valuable improvements upon the lands. The land company itself had paid taxes upon

them to the amount of \$7,993.33. There never had been any final adjustment of these land grants between the United States and the railroad companies. Upon this state of facts the court below dismissed the bill.

The determination of the questions presented by four of the alleged errors assigned by the appellant will be decisive of this case. These errors are: (1) That the court below erred in holding that the action of the officers of the land department in certifying to the state of Minnesota for the benefit of the Winona Railroad Company the lands within the place limits of its grants on which homestead entries or pre-emption filings, which had subsequently been canceled, existed at the time of the definite location of its line, though erroneous, was not absolutely void, but was merely voidable at the suit in equity of the party who had the better right to the title, and that the certificates those officers issued conveyed the legal title to the state and its grantees. (2) That the circuit court erred in holding that the United States had no equitable right to these lands superior to that of the bona fide purchasers who had acquired this legal title before the United States gave any notice of their mistake or of its claim to recover the lands. (3) That the court below erred in holding that the immediate and remote grantees of the Winona Railroad Company, who were parties to this suit, were bona fide purchasers of the lands bought by them respectively. (4) That the court erred in holding that the lands within the place limits of the grants to the Winona Company, and within the indemnity limits of the grants to the Sioux City Company, upon which homestead entries and pre-emption filings, that were subsequently canceled by the proper officer of the land department, existed at the time of the definite location of the line of the railroad of the Winona Company, were, after these cancellations were made, properly selected and rightfully certified to the Sioux City Company by the officers of the land department.

This is one of five cases argued at the last term in which the questions presented by the first three errors assigned arise. In some of these cases the question is mooted whether or not a pre-emption right attached to any of the public land, within the meaning of the congressional land grants, by the mere filing of a declaratory statement in a case in which the pre-emptor never settled upon the land, or otherwise complied with the law relative to pre-emption rights. This question and the cognate question whether or not the railroad company or its grantees are entitled to question the attachment of the pre-emption right at all, when the declaratory statement was filed on a tract of land at the time the railroad company definitely located its line, it has been unnecessary for us to consider in reaching a satisfactory decision of these cases, and we express no opinion upon them. For the purpose of the determination of these cases, we concede to the United States, but we do not decide, that the existence of a pre-emption filing upon a tract of land at the time of the definite location of the line of a land-grant railroad, excepted the tract from the grant to the railroad company to the same extent as the existence of a homestead entry upon it would have done. Under this concession

it must be admitted that the decision of the officers of the land department, evidenced by their certificates, that the grants to the Winona Railroad Company attached to the lands in controversy, was erroneous. They should have held that these lands were excepted from these grants by the existence of the homestead entries and pre-emption filings upon them when the line of the railroad was definitely located, and that these lands did not fall within the grants to that company when the entries and filings were subsequently canceled. *Railway Co. v. Dunmeyer*, 113 U. S. 641, 5 Sup. Ct. 566; *Burr v. Greeley*, 3 C. C. A. 357, 52 Fed. 926, and 10 U. S. App. 409. But was the decision and judgment of these officers void or only voidable? Counsel for the government insist with great earnestness that the cases just cited conclusively answer this question and preclude further discussion. A careful examination of the opinions, however, has led us to the conclusion that these cases are not decisive of, and that they are hardly persuasive upon, this question. A determination of it was not necessary to the decision of either of the cases, so that whatever was said concerning it was obiter dicta. In *Railway Co. v. Dunmeyer* no certificate or patent had issued to the railroad company, but a patent had issued to an adverse claimant of the land. The action was for the breach of a covenant in a deed made by a grantee of the railroad company, and it was sustained on the ground that the railroad company never had any title, and the patentee had. In *Burr v. Greeley*, a remote grantee under the railroad company, who was in possession of the land, claiming from the United States the rights of a bona fide purchaser under the act of 1887, brought an action against his grantor for breach of covenant, on the ground that the railroad company never had any title, because pre-emption rights had attached to the land at the time of the definite location of the line of the railroad. This court held that the plaintiff could not maintain his action, because he could not retain the benefits given to him as a bona fide purchaser from the railroad company or its grantee, under the act of 1887, and at the same time recover for a breach of the covenant in his deed. In this case patents or patent certificates had been issued to the state for the railroad company, and it is stated in the opinion that these patents were void, and that purchasers under them acquired no title. But it is obvious that the decision must have been the same whether the patents were void or voidable. That question was not material to the decision, and what was said upon it was unnecessary to the determination of the case. Moreover, it is a common practice of legislatures and courts to use the words "void" and "voidable" interchangeably where the distinction between them is not material to the question or case under consideration; and it was in this way that the word "void" was used in *Burr v. Greeley*. The question now before us was neither argued, considered, nor decided in that case, and we enter upon its consideration in this case for the first time.

The question is, were the certificates of the officers of the land department absolutely void, so that they conveyed no title, legal or equitable, and so that they were constantly open to collateral attack?

All the lands certified for the Winona Company were within the place limits of its grants. The grants were in praesenti, and they attached upon the filing of its maps of the definite location of its line opposite to the lands. The certificates were evidence that the officers of the land department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy, and their legal effect was the same as though patents to the state had been issued for the benefit of that company. *Frasher v. O'Connor*, 115 U. S. 102, 116, 5 Sup. Ct. 1141; *Curtner v. U. S.*, 149 U. S. 662, 675, 13 Sup. Ct. 985, 1041. A patent issued by the officers of the land department of the United States, in a case within the scope of their power or jurisdiction, is dual in its effect: It is an adjudication of those officers that the patentee is entitled to the land under the laws of the United States, and it is a conveyance of the title to that land to the patentee. By the act of March 3, 1849 (9 Stat. c. 108, p. 395, § 3; Rev. St. § 441), the secretary of the interior is charged with the supervision of the public business of the United States relating to the public lands; and by the act of March 3, 1857, *supra*, as amended by the act of May 12, 1864, *supra*, the power was conferred and the duty imposed upon him to indicate the lands granted to the Winona Railroad Company by those acts of congress in all cases. By the act of July 4, 1836 (5 Stat. c. 352, § 1; Rev. St. § 453), the commissioner of the general land office is required to "perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land, and the issuing of patents for all [agents] [grants] of land under the authority of the government." The land department of the United States, then, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or pre-emption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws, whether or not the land claimed was subject to pre-emption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. Similar questions must be heard and determined by that department whenever any portion of the public land subject to disposition by that tribunal is sold or otherwise disposed



of in any way. In every case there must, in the nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land, under the acts of congress. A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that, when such a judgment is rendered in a case within the jurisdiction of the land department, it is, like the judgments of other special tribunals, vested with judicial powers, impervious to collateral attack.

As was said in *Moore v. Robbins*, 96 U. S. 530, 533:

"It is a part of their [the officers of the land department's] daily business to decide when a party has, by purchase, by pre-emption, or by any other recognized mode, established a right to receive from the government a title to any part of the public domain. This decision is subject to an appeal to the secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the party, the title of the government passes with this delivery."

These propositions are not seriously questioned by counsel for the government, but his contention is that the land department was without jurisdiction to decide whether these lands fell within the grants to the railroad company, and rightly belonged to it, or were excepted from these grants, and were open to pre-emption, homestead, and purchase by other parties; and he maintains that, since this department was without jurisdiction to decide this question, the certificates to the state which it delivered were issued without authority, and were absolutely void. In support of these views, he has cited many authorities from the decisions of the supreme court, but a careful examination of these decisions has convinced us that they do not rule this case. They are cases in which the power to hear and determine the claims of the parties to the land in controversy, and to convey it to the rightful claimant, was not vested in the land department when it rendered its decision and made its conveyance. They are cases in which the title to the land patented or certified had passed out of the government, and hence was not within the jurisdiction of the officers of the land department when that tribunal decided and attempted to convey it, as in *Polk v. Wendal*, 9 Cranch, 87; *Stoddard v. Chambers*, 2 How. 284, 318; *Easton v. Salisbury*, 21 How. 426, 432; *Reichart v. Felps*, 6 Wall. 160; *Best v. Polk*, 18 Wall. 112, 117, 118; *Sherman v. Buick*, 93 U. S. 209; *Iron Co. v. Cunningham*, 15 Sup. Ct. 103; or cases in which the land was reserved from sale or disposition by the land department until a claim under a Mexican or Spanish grant should be determined, and the power to determine the extent and validity of this claim had been conferred upon tribunals other than the land department, and the final decisions of those tribunals had not been made when the claim of the patentee was initiated, as in *Doolan v. Carr*, 125 U. S. 618, 624, 632, 8 Sup. Ct. 1228; or cases in which the land had been set apart as a portion of a military or other like reservation, and had thus ceased to be a part of the public domain, subject to sale or other disposition by the officers of the land department, as in *U. S. v. Stone*, 2 Wall. 525, 527, and *Wilcox v. Jack-*

son, 13 Pet. 499, 511. In all these cases the land that was the subject-matter of the patents or certificates, and the rights of the claimants to it, were not subject to the jurisdiction of the land department. That department had no jurisdiction to hear and determine these claims, or upon such determination to dispose of the lands. On the other hand, in every case to which our attention has been called in which the power to hear and determine the claims of applicants for lands of the United States, and upon such determination to dispose of those lands, either under the pre-emption or homestead laws, under grants for railroads or other corporations, or by sale, or in any other recognized mode, has been vested in the land department, the supreme court has uniformly held that the patent or certificate issued from the department conveyed the legal title, and was not subject to collateral attack. *Minter v. Crommelin*, 18 How. 87, 89; *U. S. v. Schurz*, 102 U. S. 378, 401; *French v. Fyan*, 93 U. S. 169, 172; *Quinby v. Conlan*, 104 U. S. 420; *Smelting Co. v. Kemp*, 104 U. S. 636, 645-647; *Steel v. Refining Co.*, 106 U. S. 447, 450, 452, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573, 585, 11 Sup. Ct. 380; *Knight v. Association*, 142 U. S. 161, 212, 12 Sup. Ct. 258; *Noble v. Railroad Co.*, 147 U. S. 174, 13 Sup. Ct. 271; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

The distinction between the two classes of cases is well illustrated by *Best v. Polk*, 18 Wall. 112, 117, 118, and *Minter v. Crommelin*, 18 How. 89. In the former case a tract of land was sold by the land department, and patented to a purchaser in 1847. But a Chickasaw chief had perfected his title to this land in 1839, under the provisions of a treaty between the United States and the Chickasaw Indians. The supreme court held the patent void, because the title to the land had passed out of the United States before the claim of the patentee was initiated, and hence the officers of the land department had no jurisdiction over the subject-matter of the patent. But in the latter case the land patented to a pre-emptor had been reserved by act of congress to a Creek warrior, but the act provided that, if the warrior abandoned his reservation, it should be forfeited, and the secretary of the interior might order its sale. The supreme court held that the patent was *prima facie* evidence that the warrior had abandoned his reservation, that the secretary had ordered the sale, and that the legal title had passed to the pre-emptor.

Another striking illustration of this distinction is found in *Doolan v. Carr*, 125 U. S. 618, 630, 8 Sup. Ct. 1228, and *Quinby v. Conlan*, 104 U. S. 420. In the former case, the plaintiff, Carr, brought ejectment in reliance upon a title derived from a patent issued to the Central Pacific Railroad Company in 1874 under the Pacific Railroad acts. Those acts excepted from their grants to the railroad company the lands claimed under Mexican or Spanish grants. By the act of March 3, 1851 (9 Stat. 632), a commission had been created to determine the extent and validity of such claims under Mexican grants. An appeal was allowed by that act from the decision of the commission to the district court of California, and

from the decision of that court to the supreme court of the United States. The land patented to the Central Pacific Railroad Company in that case was within the limits of a claim under a Mexican grant, which was in litigation before some of these tribunals when the grants were made to the Central Pacific Railroad Company, and when the line of its railroad was definitely fixed, and the claim under the grant was finally sustained by the supreme court long after those dates. The jurisdiction to hear and determine the claim to this land under the Mexican grant had been conferred by this act of congress upon tribunals other than the land department; and the court held that the patent to the railroad company issued by that department was absolutely void, and its action in the premises without jurisdiction or authority. But in *Quinby v. Conlan* (an action of ejectment) the patent under which the plaintiff claimed was attacked by an attempt to show that the land was within a reservation under a Mexican grant when the rights of the pre-emptor were initiated. The determination of that question depended upon whether or not the public surveys had been extended over the land, and whether or not other land had been taken by the claimant under the Mexican grant in satisfaction of it. The supreme court held that the patent was a conclusive determination of this question, and could not be collaterally attacked, because "the question whether the land had been so freed from the reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by records of proceedings in the land department," and that department had the jurisdiction to determine those questions.

In *Steel v. Refining Co.*, 106 U. S. 447, 451, 1 Sup. Ct. 389 (an action of ejectment), the plaintiff's title depended upon a patent issued upon a claim for mineral lands within the limits of a town-site; and the defense was that the patent was void because the land was not mineral, and the patentee was not a citizen, and had not declared his intention to become one. The supreme court held that proof of these facts was inadmissible to attack the patent, and declared that the land department "must necessarily consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is unassailable, except by direct proceedings for its annulment or limitation." To the same effect are *Heath v. Wallace*, 138 U. S. 573, 575, 11 Sup. Ct. 380, and *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030.

In *French v. Fyan*, 93 U. S. 169, 172, the supreme court held that parol evidence was inadmissible to show that land patented to the state of Missouri as swamp and overflowed land never was in fact swamp or overflowed land, and that, therefore, the patent was void.

In *Ehrhardt v. Hogaboom*, 115 U. S. 67, 69, 5 Sup. Ct. 1157, that court held that parol evidence was inadmissible to show that land patented to a pre-emptor was swamp or overflowed land, and was

therefore included in the grant to the state of California, and that the patent to the pre-emptor was consequently void. The supreme court held in these cases that the acts of congress devolved upon the land department the duty and conferred upon it the power to determine what lands were of the description granted by the acts of congress, and that its decision on that subject was impregnable to collateral attack.

These authorities, and those above cited which we have not reviewed, perhaps sufficiently illustrate the distinction between the cases in which the land department has acted upon a subject-matter within and one without its jurisdiction. A careful study and analysis of these decisions will show that none of them are inconsistent with the following rules: (1) A patent or certificate of the land department to land, over which that department has no power of disposition and no jurisdiction to determine the claims of applicants for, under the acts of congress, is absolutely void, and conveys no title whatever. Land the title to which had passed from the government to another party before the claim on which the patent is based was initiated, land reserved from sale and disposition for military and other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which the acts of congress have made no provision, is of this character. *Polk v. Wendal*, 9 Cranch, 87, and cases cited under it supra. (2) A patent or certificate of the land department to land over which that department has the power of disposition and the jurisdiction to determine the claims of applicants for, under the acts of congress, is impregnable to collateral attack, whether the decision of the department is right or wrong, and it conveys the legal title to the patentee or to the party named as entitled to that title in the patent or certificate. *Minter v. Crommelin*, 18 How. 87, 89, and cases cited under it supra. (3) A court of equity may, in a direct proceeding for that purpose, set aside such a patent or certificate, or declare the legal title under it to be held in trust for one who has a better right to it, in cases in which the action of the land department has resulted from fraud, mistake, or erroneous views of the law. *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed. 192, 195; *Cunningham v. Ashley*, 14 How. 377; *Barnard's Heirs v. Ashley's Heirs*, 18 How. 43; *Garland v. Wynn*, 20 How. 6; *Lytle v. State*, 22 How. 193; *Lindsey v. Hawes*, 2 Black, 554, 562; *Johnson v. Towsley*, 13 Wall. 72, 85; *Moore v. Robbins*, 96 U. S. 538; *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244; *Mullan v. U. S.*, 118 U. S. 271, 278, 279, 6 Sup. Ct. 1041; *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10.

It is not difficult to determine whether the certificates issued in this case were void or voidable when tested by these rules. Jurisdiction of the subject-matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry,

not whether its conclusion in the course of it is right or wrong. *Foltz v. Railway Co.*, 8 C. C. A. 635, 60 Fed. 316, 318, and cases cited.

When these certificates were issued, the Winona Railroad Company had undoubtedly applied to the land department for conveyances of the lands in controversy to the state for its benefit. These lands were a part of the public lands of the United States, the disposition of which had been intrusted to that department by the acts of congress which established it and defined the powers and duties of its officers. Moreover, the acts of congress under which the Winona Company claimed these lands expressly provided, as we have seen, that the secretary of the interior should indicate the lands granted under them in all cases. The conclusion is irresistible that these acts conferred the power and imposed the duty upon the officers of the land department to hear and determine the ultimate question whether or not the railroad company was entitled to these lands under its grants, and to "indicate" the lands granted by certificates or patents to the state. In no other way could they have discharged the duties these acts imposed upon them. In deciding this question they necessarily considered whether or not the railroad company had so far complied with the acts granting the lands that it had earned them, the character of the lands themselves, and the class to which they belonged, the time of the definite location of the line of the railroad, the homestead entries and pre-emption filings that were then upon the lands, the cancellation of all these entries and filings that had been made, and, finally, the legal effect of all these and all other material facts upon the claim of the railroad company to receive the lands under the acts of congress. It now appears that they were mistaken as to the legal effect of these facts, but the question they decided was one which the acts of congress authorized and required them to decide,—one which they were obliged to decide before they issued the certificates; and, although their decision and their conveyances evidenced by these certificates may be voidable, they are not absolutely void. They are impregnable to collateral attack, and they conveyed the legal title to the lands to the state and its grantees.

The next question is whether or not the United States had any equitable right to these lands superior to that of bona fide purchasers who acquired the legal title to them from the railroad company before the government gave any notice of the mistake of its officers, or of its claim to recover the lands. This is not a debatable question. The equities of the United States appeal to the conscience of the chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. Bona fide purchasers are the especial favorites of courts of equity. In *Boone v. Chiles*, 10 Pet. 177, 209, Mr. Justice Baldwin, in delivering the opinion of the supreme court, said: "A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. *Sugd. Vend.* 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any de-

fect in it or adverse claim to it; and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-34), which a court of equity imparts liberally."

In *U. S. v. Burlington & M. R. R. Co.*, 98 U. S. 334, 342 (a suit in equity, brought by the United States to annul certain patents issued by it to the railroad company, for alleged errors of the land department in the construction of the acts of congress under which the patents were issued), Mr. Justice Field, in delivering the opinion of the supreme court, declared that the government "certainly could not insist upon a cancellation of the patents so as to affect innocent purchasers under the patentees." To the same effect are *U. S. v. California & O. Land Co.*, 148 U. S. 31, 41, 13 Sup. Ct. 458, and *U. S. v. Wenz*, 34 Fed. 154.

The equitable right of the United States to recover these lands is not exceptionally strong in this case. If its land department had decided that the railroad was not entitled to them when it decided to the contrary, the company would have been entitled to an equal number of acres within its indemnity limits in lieu of them, so that the company obtained no more land than it was entitled to, although what it did obtain was undoubtedly somewhat more valuable than the land within its indemnity limits which it should have received. But the right of the government, in order to secure this difference in value, to recover these lands now, when lands in lieu of them can no longer be found within the indemnity limits to fill this grant, when the certificates of its land department have stood unchallenged for from 13 to 18 years, and when purchasers under these certificates have bought, improved, and paid taxes on these lands, is far inferior to the equities of such purchasers, and ought not to prevail against them.

The counsel for the government, however, argues that the purchasers who hold the legal title to these lands were not necessary parties to this suit; that the United States is entitled to a decree canceling the certificates as against the railroad company, under the provisions of the act of 1887, regardless of the rights of the subsequent purchasers; and that the relief given to these purchasers by the act, through applications to the land department, excludes them from all other rights and remedies. But there is nothing in the act of 1887 to support this contention. The rights and remedies these purchasers are pursuing in these suits existed in the absence of the act of 1887. There is nothing in that act that indicates any intention on the part of congress to deprive them of any defenses or rights they then had under the well-established rules of equity jurisprudence. On the other hand, that act grants them additional privileges, and proves that they are especial favorites of congress, as well as of courts of equity. Under the settled rules of practice in equity, the holders of the legal title to these lands were indispensable parties to a suit to annul that title; and the fact that the holders of that title were bona fide purchasers of it for value, without notice of its defects, was a perfect defense to this suit.

The third assignment of error to be considered is that the appeal-  
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lees who hold this title as the direct or remote grantees of the railroad company are not in fact bona fide purchasers. This presents a question of fact which the circuit court has decided against the appellant after a full consideration of the evidence. The finding of that court is presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, it should be permitted to stand. *Warren v. Burt*, 7 C. C. A. 105, 110, 58 Fed. 101, and 12 U. S. App. 591; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. 885; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821.

According to Mr. Pomeroy, "the essential elements which constitute a bona fide purchaser are therefore three: A valuable consideration, the absence of notice, and presence of good faith." 2 Pom. Eq. Jur. § 745.

On October 31, 1867, Barney and his associates were the owners of the stock of the Winona Railroad Company. On that day they sold their stock in the railroad company to the owners of the Chicago & Northwestern Railway Company, and at the same time bought of the Winona Company as many of its lands as should be received by it on account of the 105 miles of its railroad that had then been built. They took the agreement of the Winona Railroad Company to procure the certification of these lands from the United States, and to convey them to the parties to be designated by themselves, and they agreed to take in satisfaction of this contract all the lands that should be received by said company, commencing at its eastern terminus, and proceeding westerly until the full quantity was obtained. They paid the railroad company in full for these lands on that day, by satisfying a debt the company owed them for constructing the 105 miles of railroad, and for money they had loaned to it, and by assigning the stock of the railroad company to those in control of the Chicago & Northwestern Company. Here was a valuable consideration fully paid by Barney and his associates. The satisfaction and discharge of the indebtedness of the railroad company to them was in itself a sufficient and a valuable consideration for this purchase. *Railroad Co. v. National Bank*, 102 U. S. 14, 24. Between 1867 and 1876 the land department of the United States indicated and certified to the state all but 680 acres of these lands, and it certified the remaining 680 acres prior to 1880. The appellee the Winona & St. Peter Land Company was organized in 1876. Barney and his associates or their successors in interest under the contract of October 31, 1867, sold the lands covered by that contract which had not already been sold to purchasers from them to this land company for its capital stock, which aggregated \$500,000. Here again was a sufficient and valuable consideration paid for these lands by the land company; and it is clear that the first essential element of a bona fide purchaser inhered in both the purchase of Barney and his associates in 1867, and in that of the land company in 1876. Did they purchase in the absence of notice of defects in the title? Before 1881 the railroad company had conveyed to the

parties entitled to them, under the contract of October 31, 1867, all the lands in controversy except 240 acres that had been certified to the Sioux City Company, and except the lands conveyed to the land company on November 20, 1887, in obedience to the decree of the court in *Railroad Co. v. Barney*. The decree in that case that these lands should be so conveyed was rendered in the circuit court in April, 1881. It was afterwards affirmed on appeal. But, so far as the question of notice to these purchasers is concerned, there was no change in the status of affairs from 1867 until after the decision of the supreme court in *Railway Co. v. Dunmeyer*, in 1884. When Barney and his associates purchased these lands, in 1867, only 320 acres of them had been certified to the state; and the evidence is plenary that none of these purchasers had any notice of any defects in the title to any of these lands. After 1867 they did not own the stock of the railroad company or control its operation. They paid for the lands in that year. They could not then have had any notice or knowledge that the secretary of the interior would subsequently indicate, and that the company would in 1872 and in subsequent years receive, lands to which it was not entitled under its grants. They and their successor in interest—the land company—were bound under their contract to take the lands received by the railroad company from the United States, and the railroad company was bound by its contract to apply for and to obtain the lands it had earned. But it was not the land company, nor was it Barney and his associates, that applied for and procured the certificates of these lands to the state in the years between 1870 and 1880. It was the railroad company, which had then passed beyond their control. There is no doubt that the railroad company applied for, and the officers of the land department certified, the lands here in question in the utmost good faith. They all believed that the railroad company was entitled to them. But, after all, it was their mistake, and not that of Barney and his associates, or that of the land company, that caused the railroad company to receive, and to vest in the land company, the title to these lands that the railroad company was not entitled to, instead of an equal number of acres within its indemnity limits which it should have received. The evidence in this record that neither the land company nor Barney nor any of his associates had any notice or knowledge of this mistake, or of any claim of the United States to any of these lands, until long after they had paid the full consideration for their respective purchases, is very persuasive. Indeed, the United States itself did not discover it until 1884,—eight years after the land company had fully paid for the lands. Up to that time the officers of the land department had uniformly held that the railroad company had earned and was entitled to these lands under the acts of congress. In *Railroad Co. v. Whitney*, 132 U. S. 357, 366, 10 Sup. Ct. 112, the supreme court said of the action of these officers in a similar case:

"It is true that the decisions of the land department on matters of law are not binding upon this court, in any sense. But on questions similar to the one involved in this case they are entitled to great respect at the hands of any court. In *U. S. v. Moore*, 95 U. S. 760, 763, this court said: 'The con-



struction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. \* \* \* The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' See, also, *Brown v. U. S.*, 113 U. S. 568, 571, 5 Sup. Ct. 648, and cases cited; *U. S. v. Burlington & M. R. R. Co.*, 98 U. S. 334, 341; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 418, 5 Sup. Ct. 208."

It is no wonder that purchasers of this title rested in fancied security on a title sustained by decisions to which the supreme court pays such respect. The testimony of the witnesses and the circumstances surrounding these transactions force us to the conclusion that the second essential element of a bona fide purchase—absence of notice of defects in their title—was not absent from the purchase by Barney and his associates, nor from the purchase by the land company. Nor was the element of good faith lacking. There is no evidence of any fraud or of any conspiracy, or of any attempt on the part of any of the parties connected with this transaction to obtain for the railroad company or for themselves any lands to which they were not justly entitled. The officers of the railroad company supposed that that company had earned and was entitled to the lands it applied for and received; the officers of the land department, to whom the government had intrusted the duty of deciding the question, so held; and Barney and his associates and the land company accepted the title to the lands in good faith, in satisfaction of the executory contract to convey them, for which they had fully paid as early as 1876. They or their grantees or appointees under the contract of 1867 were clothed with the legal title to all these lands years before the United States made any claim to recover them. It goes without saying that those who hold any of these lands under deeds, contracts, or designations made by Barney and his associates or the land company are as fully protected as they are, and we think the character of bona fide purchasers ought not to be denied to any of them.

A single question remains for consideration. Were the lands within the place limits of the grants to the Winona Company, and within the indemnity limits of the grants to the Sioux City Company, upon which homestead entries and pre-emption filings, that were subsequently canceled by the proper officers of the land department, existed at the time of the definite location of the line of the railroad of the Winona Company, rightfully certified to the state for the Sioux City Company by the officers of the land department?

Section 1 of the act of March 3, 1857, grants to the territory of Minnesota, for the purpose of aiding in the construction of the railroads of these two companies:

"Every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preemption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the governor of said territory or future state to select, subject to the approval of

the secretary of the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preemption have attached, as aforesaid: \* \* \* provided, that the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads or branches: \* \* \* and provided further, that any and all lands heretofore reserved to the United States, by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through said reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States."

Section 2 of that act provides:

"That the sections and parts of sections of land which by such grant shall remain to the United States, within six miles on each side of said roads and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price." 11 Stat. p. 195, c. 99.

Section 7 of the act of May 12, 1864, grants to the state of Minnesota, for the purpose of aiding the construction of the railroad of the Sioux City Company, 4 additional alternate sections of land per mile, to be located within 20 miles of the line of its road, and to be selected upon the same conditions, restrictions, and limitations as are contained in the act of March 3, 1857. Section 1 contains the same proviso that we have just quoted from section 1 of the act of 1857, relating to the reservation from the operation of the act of lands theretofore reserved by the United States to aid in any object of internal improvement or for any other purpose; and section 2 of that act contains the same provision as section 2 of the act of 1857, increasing the price of the land remaining within the place limits of the grant to double the minimum price. 13 Stat. 72.

It is contended that the proviso in section 1 of the act of March 3, 1857, and in section 1 of the act of May 12, 1864, which treats of lands reserved for internal improvement and for other purposes, expressly reserved the lands within the place limits of the Winona Railroad Company, subject to homestead entries and pre-emption filings, not only from the grant to that company, but from the entire operation of these acts. The argument is (1) that these lands were excepted from the grant to that company by the earlier provisions of section 1 of the act of 1857, and that they were thereby reserved to the United States within the meaning of this proviso, for homesteads and pre-emptions; and (2) that by section 2 of the act of 1857 their price was increased to double the minimum price, and thereby they were reserved to the United States for sale. The argument is specious, but we think it is unsound. The proviso which closes section 1 has no reference whatever to lands "sold and to which preemption rights have attached." Those lands had been excepted from the granted lands, and their treatment had been concluded in the earlier part of the section. They were treated as the property of the purchasers and of the pre-emptors, and not as the property of the United States, and they were excepted from the

granted lands because in equity they were no longer its property. The proviso treated, not of these lands, but of lands reserved to the United States by acts of congress for its works of internal improvement, for its military purposes, for sale, or for any other like purpose. This is made clear by the latter clause of the proviso, which grants the necessary right of way over these lands to the respective railroad companies, subject to the approval of the president. It was not over lands sold or to which pre-emption rights had attached that congress intended to grant this right of way, but over lands of the United States upon which other parties had no claims as purchasers or pre-emptors. The same considerations lead irresistibly to the conclusion that the provisions in section 2, increasing the price of the sections remaining to the United States within the place limits of the grant, have no application to the odd sections subject to homestead entries and pre-emption filings. This section provides that the price of the lands it refers to shall be double the minimum price, and that none of them shall be subject to private entry until they have been offered for sale at the increased price. Congress certainly did not intend to increase the price of lands sold or claimed by pre-emptors, or to prevent their entry until they were offered for sale at double the minimum price. They were not legislating concerning these lands. They were dealing with sole reference to the even-numbered sections within the place limits of the grant, the sections which the United States had reserved to itself for sale; and this section has no reference to any other lands. For the same reasons the provisions of sections 1 and 2 of the act of 1864 have no application to the lands in controversy. *U. S. v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358, 367, 370, 371, 12 Sup. Ct. 13.

The question recurs, were these lands excepted from selection as indemnity lands by the Sioux City Company by that portion of section 1 of the act of 1857 preceding the proviso we have considered? There is a wide difference in legal effect between the grant of lands in place and the grant of the right to select and receive lands in lieu of those in place which are sold or otherwise appropriated at the time the line of the railroad is fixed. Until the line of the railroad is definitely fixed, the former is in the nature of a float; but, the instant the railroad company files with the secretary of the interior its map of the definite location of its line, the lands within the primary or place limits are thereby identified and segregated from the public domain, and the grant of those lands takes effect as of the day of the date of the act of congress which bestows it. *Smith v. Railroad Co.*, 7 C. C. A. 397, 406, 58 Fed. 513; *Railroad Co. v. Baldwin*, 103 U. S. 426; *Grinnell v. Railroad Co.*, Id. 739; *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389; *Land Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. 362. Moreover, since the lands within the place limits are identified by the definite location of the line, no lands within those limits that are not then subject to the grant become or ever can become a part of it. Lands sold

or appropriated and lands to which pre-emption rights have at that time attached are excluded from these granted lands as completely as though they were excepted in a deed. *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566; *Burr v. Greeley*, 3 C. C. A. 357, 52 Fed. 926, and 10 U. S. App. 409.

But these rules have no application to the right to select lands without the place limits in lieu of those excepted from the grant of lands within them. The act of 1857 provides that if it shall appear that any of the lands within the primary limits have been sold by the United States or otherwise appropriated, or that pre-emption rights have attached to any of them when the line of the railroad is definitely fixed, any agent appointed by the governor of the state may select, from the lands of the United States, subject to the approval of the secretary of the interior, an equal quantity of lands within the indemnity limits of the grant. Ordinarily, it will not "appear" at the time the line of the road is definitely fixed how many acres of land or what lands are excepted from the grant of lands in place by sales, appropriations, or the rights of pre-emptors. When the grant is extensive, and especially when, at the time of the definite location of the line, the region through which it extends is a well-settled agricultural country, crossed by conflicting land grants, many years may be required to ascertain what and how many lands are thus excepted from the primary grant. When this has been discovered, time will be required to make the selections. The history of the grants under consideration furnishes a striking illustration of these facts. During all this time the grant of the indemnity lands is in the nature of a float. The right to select these lieu lands cannot be exercised until the deficiency of the lands granted appears. The selection may then be made from any of the lands of the United States within the indemnity limits of the grant, and, when such a selection is made and approved, the grant for the first time attaches to any specific lands within those limits. *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 421, 5 Sup. Ct. 208; *Barney v. Railroad Co.*, 117 U. S. 228, 232, 6 Sup. Ct. 654; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 408, 6 Sup. Ct. 790; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 511, 10 Sup. Ct. 341; *U. S. v. Missouri, K. & T. Ry. Co.*, 141 U. S. 358, 371, 12 Sup. Ct. 13.

The grant of lands for the Sioux City Company then attached to specific lands within its place limits when the line of its railroad was definitely located opposite to them, but the grant of indemnity lands first attached to specific lands when they were selected and their selection was approved by the secretary of the interior. Accordingly, the lands subject to the grant within the place limits were those that were public lands when the line of the road was definitely fixed,—the lands that were not then sold, otherwise appropriated, or subject to pre-emption rights; and the lands subject to the grant within the indemnity limits were those that were public lands when they were selected and their selection was approved,—the lands that at that time were not sold, otherwise appropriated, or subject to pre-emption rights. *Ryan v. Railroad Co.*, 99 U. S. 382; *Railroad Co. v. Herring*, 110 U. S. 27, 38, 39, 3 Sup. Ct. 485; *St. Paul & S. C. R. Co. v.*

Winona & St. P. R. Co., 112 U. S. 720, 730, 731, 5 Sup. Ct. 334; Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co., 117 U. S. 406, 6 Sup. Ct. 790; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 513, 10 Sup. Ct. 341. In Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 5 Sup. Ct. 208, lands which were within the indemnity limits of a grant to the state of Kansas for the Atchison, Topeka & Santa Fé Railroad Company, under the act of March 3, 1863 (12 Stat. 772), were subsequently, and before they were selected by the Atchison Company, granted as lands in place to the predecessor of the Kansas Pacific Railroad Company by the act of July 2, 1864 (13 Stat. 356). The supreme court held that these lands were thereby withdrawn from the public lands subject to selection by the Atchison Company; that, as they were not lands of the United States at the time it attempted to make its selection, it was immaterial that they had been such when the act was passed which made the grant. On the other hand, in Ryan v. Railroad Co. 99 U. S. 382, 388, a tract of land in the indemnity limits of the grant to the California & Oregon Railroad Company under the act of July 25, 1866 (14 Stat. 239), was, at the date of the act and at the time of the definite location of the line of the railroad, subject to a claim for a Mexican grant sub judice. If this tract had been within the place limits of the grant to the railroad company, it would certainly have been excepted from it. On March 3, 1873, the claim for the Mexican grant was finally rejected. On March 30, 1874, the successor in interest of the California & Oregon Railroad Company selected this tract as a part of its indemnity lands and obtained a patent for it. The supreme court held that the tract became a part of the public lands of the United States when the claim under the Mexican grant was finally rejected; that it was therefore public land when the selection was made; that it was immaterial that it had been subject to the Mexican grant when the act was passed; and that it was lawfully selected and rightfully patented. The same effect must be given to the selection and certification of these indemnity lands to the Sioux City Company. It was immaterial that there were homestead entries and pre-emption filings upon them when the act of 1857 was passed, or when the line of the railroad was definitely fixed. When these homestead entries and pre-emption filings had been duly canceled, the lands became a part of the public domain of the United States, subject to selection by and certification to that company under its grants, and the lands were rightly certified to the state for the benefit of that company.

Finally, it is insisted that inasmuch as in a case between the Winona Company and the Sioux City Company (St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 5 Sup. Ct. 334), in which the questions we have been considering were not presented, a decree was made and executed which transferred these lands to the Winona Company, when the Sioux City Company should have been permitted to retain them, the Winona Company cannot in this action avail itself of the fact that they were properly certified to the Sioux City Company. The conclusive answer to this contention is that this suit is based on the act of 1887. That act authorizes suits to cancel

patents, certificates, or other evidences of title to lands "erroneously certified or patented," and "to restore the title thereof to the United States." 24 Stat. 556. These lands were not erroneously certified or patented. The United States is not entitled to a restoration of the title, and it cannot maintain a suit in equity to review the decision of a question of title between private parties which is *res adjudicata* between them, and in which it has no interest.

The decree below must be affirmed, without costs to either party in this court; and it is so ordered.

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UNITED STATES v. WINONA & ST. P. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 566.

1. PUBLIC LANDS—RAILROAD GRANTS — EXCEPTED TRACTS — BONA FIDE PURCHASERS—NOTICE.

Actual possession of land by one claiming under a pre-emption filing at the time when a land grant railroad was so located as to include such land within its place limits is notice to all persons purchasing under the grant while such occupancy continues that the land was excepted from the grant, and hence they cannot successfully claim, by way of defense to a suit brought by the United States to annul the grant, that they were bona fide purchasers.

2. SAME—ESTOPPEL AGAINST THE UNITED STATES.

Long-continued delay by the United States in bringing a suit to cancel an erroneous certification of lands to a state in aid of a railroad, by which delay the railroad company and its grantees were prevented from acquiring indemnity lands in place of those erroneously certified, raises no equitable estoppel against the United States, both because there was no intended deception on the part of the government or its officers, and because the United States is not bound, in respect to the enforcement of rights or the protection of interests which are vested in it in its sovereign capacity, by any laches or negligence of its officers.

3. SAME.

Where a suit is brought in the name of the United States pursuant to an act of congress expressly directing the same for the purpose of canceling an erroneous certification of lands to a state to aid in the construction of a railway, the fact that, previous to the bringing of the suit, a pre-emptioner, whose claim had been canceled, petitioned the land department for the reinstatement of his rights, is not sufficient to raise a presumption that the suit was brought for his benefit alone; but, on the contrary, the government must be considered to have such a direct interest in the suit as will prevent the operation of any laches or estoppel on account of the negligence of its officers; for, if the pre-emptioner's claim should be ultimately sustained, the government would be entitled to receive from him the minimum price of the land, and, if not sustained, it would have the land itself.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Robert G. Evans, for the United States.

Thomas Wilson (Lloyd W. Bowers, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**SANBORN, Circuit Judge.** This is an appeal from a decree dismissing a bill brought by the United States under the act of March 3, 1887 (24 Stat. 556), to restore to the United States the title to 160 acres of land, which at the commencement of this suit was held by the appellee the Winona & St. Peter Land Company. That corporation had acquired its title through a certification of the land to the state to aid in the construction of the railroad of the Winona & St. Peter Railroad Company, the purchase of the land from that company by Barney and his associates, the purchase of the land from Barney and his associates by the land company, and through conveyances of the land by the state to the railroad company and by the railroad company to the land company, in the same way in which it acquired the land it held under the certificates for the benefit of the Winona Railroad Company in No. 564 (U. S. v. Winona & St. P. R. Co., 67 Fed. 948). The method by which that title was acquired by the land company and the rules and principles which measure the rights of the parties to it are stated with some care in the opinion in that case, and will not be here repeated. The two cases were argued and submitted together, and, with the exceptions to which we shall refer, the material facts in the two cases are the same.

The record in this case discloses one decisive fact which did not appear in that case. We held in that case that the United States could not maintain its suit to restore the title to the land held by this land company under the certificates to the state for the Winona Railroad Company, because both Barney and his associates and the land company were bona fide purchasers of the title to that land without notice of any defects therein. In this case they had full notice of the defects in the title to the 160 acres in question here before they bought or paid for the land. The grant was made March 3, 1857 (11 Stat. 195). On June 30, 1857, one Marshall took possession of the land, and commenced to occupy and cultivate it for the purpose of acquiring the title to it under the pre-emption laws. On July 3, 1857, he made a pre-emption filing upon it in the proper land office, which has never been canceled. He held the possession of this land until 1878, when a judgment was rendered against him in an action of ejectment, which was brought by the land company in 1877 in the district court of Dodge county, Minn. In the meantime he had built a house and stables upon the land, and had cultivated and dwelt upon it at least a portion of the time. After the judgment of the district court had been rendered, in 1878, he surrendered the possession of the land to this land company, in obedience to that judgment. On November 15, 1887, he filed in the office of the commissioner of the general land office an application for a reinstatement of his pre-emption rights, which has not been passed upon by the land department because that tribunal holds that it has no jurisdiction to consider it. This land is within the place limits of the grant for the Winona Company under the act of March 3, 1857 (11 Stat. 195). After the pre-emption filing was made, and while Marshall was in possession of this land, claiming

it as a pre-emptor, the line of the definite location of the Winona Company was fixed, this land was certified to the state to aid in the construction of that railroad, Barney and his associates bought it of the railroad company, the land company bought it of Barney and his associates, and the legal title was finally, on April 21, 1876, vested in the land company by means of conveyances from the state to the railroad company and from the railroad company to the land company.

The possession of this land by Marshall, claiming under his pre-emption filing, was notice to Barney and his associates and to the land company of his claims to the land as a pre-emptor, and of the fatal defect in their title to which these claims so clearly pointed. *Lea v. Copper Co.*, 21 How. 493, 498; *Noyes v. Hall*, 97 U. S. 34, 37, 38; *Siebert v. Rosser*, 24 Minn. 155, 161; 16 Am. & Eng. Enc. Law, tit. "Notice," subtit. "Possession," p. 800, and authorities there cited. The purchase of the land company, therefore, lacks the essential element of absence of notice of defects in its title, and it cannot in this case sustain the defense that it is a bona fide purchaser. Nor can the United States be deprived of the relief sought in this suit by the statute of limitations, or by its laches, or on the ground of an estoppel in pais. No equitable estoppel against the government arises here from the fact that, if the United States had promptly set aside the certification of this land to the state in 1862, immediately after it was made, the railroad company and its grantees might have acquired indemnity lands in place of this tract, while no such lands can now be found or obtained. Mr. Justice Field, in delivering the opinion of the supreme court in *Henshaw v. Bissell*, 18 Wall. 255, 271, declared that "there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud," to warrant the application of the doctrine of equitable estoppel. There was no intended deception in the conduct or certification of the government or of any of its officers in this case. They acted in the utmost good faith, and their delay was the result of their honest belief that the land had been properly certified. The negligence of the officers of the government, however gross, could not raise an estoppel against it. Negligence is but another name for laches. Public policy demands that public interests shall not be prejudiced or jeopardized by the carelessness of governmental officials. It has been long and conclusively settled that the United States is not bound by any statute of limitations, nor barred by any laches or negligence of its officers, in a suit to enforce the rights or to protect the interests vested in it as a sovereign government. *Lindsey v. Miller*, 6 Pet. 666; *U. S. v. Knight*, 14 Pet. 301, 315; *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486; *Fink v. O'Neil*, 106 U. S. 272, 281, 1 Sup. Ct. 325; *U. S. v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 125, 6 Sup. Ct. 1006; *U. S. v. Beebe*, 127 U. S. 338, 344, 8 Sup. Ct. 1083.

It may be conceded that if Marshall, the pre-emptor, had brought a suit in 1891, when this suit was commenced, to obtain a decree to



the effect that the title of the land company was held by it in trust for him, the statute of limitations of Minnesota and his own laches would have defeated him. *Railroad Co. v. Sage*, 4 U. S. App. 160, 1 C. C. A. 256, and 49 Fed. 315. Nor is it denied that "when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone." *U. S. v. Beebe*, 127 U. S. 338, 347, 8 Sup. Ct. 1083; *Curtner v. U. S.*, 149 U. S. 662, 674, 13 Sup. Ct. 985, 1041. But the United States sustains no such relation to this suit. The act of congress of March 3, 1887 (24 Stat. 556), made it the duty of the secretary of the interior to adjust the land grant of the Winona Company, and to demand the reconveyance to the United States by that company of any lands erroneously certified to the state for the benefit of the company. This tract of land was erroneously certified for the benefit of the Winona Company, and the secretary demanded its reconveyance. The act of congress required the attorney general, in case the railroad company should fail to reconvey the land within 90 days after the demand of the secretary, to bring this suit or a like proceeding to cancel the certification to the state, and to restore the title of the land to the United States. The railroad company failed to reconvey for 90 days after demand, and the attorney general exhibited this bill as the act of congress directed him to do. The only evidence tending to show that this suit was instigated by Marshall, or that it is prosecuted for his benefit, is the fact that he filed a petition with the commissioner of the general land office in November, 1887, for a reinstatement of his pre-emption rights. It cannot be presumed that this petition was the only or the proximate cause of the institution of a suit which congress had directed to be brought in any event. It was the duty of the secretary of the interior and the attorney general to investigate this case, and to prosecute this suit, regardless of the application of Marshall. That the faithful discharge of the duties of government may result in the protection or restoration of the rights of individuals does not deprive those duties of their public character or privileges. Moreover, the United States is not without interest in this suit. If Marshall's claims as a pre-emptor are ultimately sustained, the government will receive from him at least the minimum price of the land (section 2259, Rev. St.); and, if they are not sustained, they will have the land itself.

Our conclusion is that the United States has a pecuniary interest in the result of this suit; that it is brought and is prosecuted by the direction of congress to protect the public interests, and to discharge the duties imposed upon the United States as a sovereign government; and that the government is entitled to the benefit of its exemption from the statute of limitations and from laches in

this case. The decree below must be reversed, and the cause remanded, with directions to enter a decree for the relief prayed in the bill; and it is so ordered.

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## UNITED STATES v. ST. PAUL &amp; S. C. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 565.

**PUBLIC LANDS—RAILWAY GRANTS — ERRONEOUS CERTIFICATION — BONA FIDE PURCHASERS.**

A bona fide purchaser of lands erroneously certified to a state under a railroad grant has a good defense against a suit brought by the United States under the act of March 3, 1887 (24 Stat. 556), to cancel the certification and restore the title to the government. *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, followed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Robert G. Evans, for the United States.

Thomas Wilson (Lloyd W. Bowers, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**SANBORN, Circuit Judge.** This is an appeal from a decree dismissing a bill brought by the appellant, the United States, under the act of March 3, 1887 (24 Stat. 556), to restore to the United States the title to 80 acres of land which at the commencement of the suit was held by the appellee Alfred J. Mohler. The land in controversy is within the place limits of the grant by the act of March 3, 1857 (11 Stat. 195), to the territory and state of Minnesota to aid in the construction of the railroad of the appellee the St. Paul & Sioux City Railroad Company. At the time of the definite location of the line of the railroad opposite this land, in 1858, pre-emption rights had attached to it. Notwithstanding that fact, the secretary of the interior, on August 26, 1864, certified it to the state of Minnesota as a part of the lands granted by the act of March 3, 1857, to aid in the construction of the railroad of the St. Paul & Sioux City Railroad Company. On January 4, 1868, the state conveyed it to the railroad company. By five mesne conveyances the title of the railroad company to this land was transmitted to the appellee Mohler. His immediate grantor conveyed it to him on May 19, 1891, by a warranty deed with full covenants. He then paid \$2,900 for it in money and property, and had no notice of any defects in his title until the subpoena was served upon him in this suit, long after he had purchased and completed his payment for the land.

The decree below must be affirmed, with costs, because the appellee Mohler was at the time of the commencement of this action the holder of the legal title to this land, and he was a bona fide purchaser of it for value, without notice of any defects in his title. The reasons for this conclusion are stated at length in *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948.

## UNITED STATES v. UNION PAC. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 495

## PUBLIC LANDS—RAILWAY GRANTS—BONA FIDE PURCHASERS.

A bona fide purchaser of the title of a land-grant railroad company to lands patented to it by mistake, and which were excepted from the grant by reason or prior pre-emption claims, that were subsequently canceled, has superior equities, constituting a good defense to a suit brought by the United States under the act of March 3, 1887, to set aside the patent and restore the title to the government. *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, followed. 61 Fed. 143, affirmed.

## Appeal from the Circuit Court of the United States for the District of Kansas.

This is an appeal from a decree which dismissed a bill exhibited by the appellant, the United States, under the act of March 3, 1887 (24 Stat. 556), to set aside a patent of 160 acres of land issued on September 10, 1874, to the Kansas Pacific Railroad Company, under the act of July 1, 1862 (12 Stat. c. 120, §§ 3, 9, pp. 489, 492, 494), and the acts amendatory thereof, and to restore to the United States the title under that patent, which at the commencement of this suit was held by the appellee William Hoard. The original grant was made to the Leavenworth, Pawnee & Western Railroad Company of Kansas. The name of that company was subsequently changed to the Union Pacific Railway Company, Eastern Division; then to the Kansas Pacific Railroad Company; and that company was afterwards consolidated with the appellee the Union Pacific Railway Company, which has succeeded to all the rights this railroad company acquired under any of its names. In all particulars essential to the determination of this case the terms of this grant were the same as those of the grant considered in the case of *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, 11 Stat. 195. But the act of July 1, 1862, authorized the president of the United States to issue a patent for the lands within the grant opposite the constructed road whenever 40 consecutive miles of it had been completed. On May 8, 1867, the railroad company filed its map of the definite location of its line of railroad opposite the land here in controversy. This land was part of an odd section within the place limits of the grant. At the time of the definite location of the line of the road opposite this land a declaratory statement had been filed upon it under the pre-emption laws. This filing was canceled by the proper officer of the land office on October 3, 1871. On September 29, 1871, one J. G. Mohler made a homestead entry upon said tract of land, which was canceled on September 9, 1873. On July 28, 1885, Mohler applied to the proper officer of the land office for the reinstatement of his homestead entry. His application was rejected, and he made application to purchase the land under section 2 of the act of June 15, 1880, but this application was rejected. On March 11, 1873, the Kansas Pacific Railroad Company conveyed this land by warranty deed to one Powers. On September 3, 1875, Powers conveyed by like deed to one Berg. On April 22, 1881, Berg, by like deed, conveyed to one Whitman. On July 28, 1883, Whitman conveyed by like deed to one Quinn. On September 1, 1885, Quinn conveyed the land to the appellee William Hoard. The patent to the Kansas Pacific Railroad Company and the deeds which conveyed the title under that patent to Quinn were duly recorded in the office of the county where the land is situated, and an abstract of title, which disclosed this complete chain of title, was furnished to Hoard before he purchased. There was a one-story house, a barn, and a stable upon the land, and 110 acres of it were under cultivation when Hoard made the purchase. He bought the land of Quinn, who was then in possession of it, in 1885, and paid him \$5,000 for it. He has since lived upon and cultivated it as a farm. He had no notice of any defects in the title or of any claim of any one but Quinn to any interest in the land until after he had purchased and paid for it.

W. C. Perry, U. S. Atty.

T. F. Garver (T. L. Bond, on the brief), for appellee William Hoard.  
N. H. Loomis (A. L. Williams and R. W. Blair, on the brief), for appellee Union Pac. Ry. Co.

Fred M. Dudley, for appellee Northern Pac. R. Co., filed brief by leave of court.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principles announced in *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, are decisive of this case. Conceding, but not deciding, that by the previous filing of the declaratory statement pre-emption rights had attached to this land at the time when the line of the railroad opposite to it was definitely fixed, this land was excepted from the grant to the railroad company. But the land was within the jurisdiction, and its disposition within the power, of the land department of the United States. The patent issued by that department to the railroad company was not void, but conveyed the legal title. The appellee William Hoard was a bona fide purchaser for value of that title, without notice of any defects in it; and his equitable rights as such purchaser are superior to the equitable claims of the United States to have the title restored to it, and constitute a complete defense to this suit.

The decree below must be affirmed, without costs to either party in this court; and it is so ordered.

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UNION PAC. RY. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 307.

1. ESTOPPEL AGAINST THE UNITED STATES.

A suit in which the United States has no interest, and in which it is under no obligation either to the public or to the party for whose benefit the suit is brought, can be sustained no better in the name of the United States than in the name of the real party in interest; and an estoppel which would operate against the rights of such party will bar recovery, notwithstanding that the United States is the formal complainant. *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, followed.

2. SAME—PUBLIC LANDS—SUIT TO CANCEL RAILROAD GRANTS.

Certain lands were excepted out of a railroad grant because a pre-emption claim had attached thereto at the time of a definite location of the road. Subsequently, the pre-emptor relinquished his claim, and the land was sold by the railroad company, and the title conveyed by it was at length obtained by one W. for his wife, and they took possession under their deed. They, however, concealed from the railroad company and from the United States that they had bought the railroad title; and afterwards W. made a homestead entry upon the land, which entry, after a contest before the land department with the railroad company, was canceled, and a patent was issued to the railroad company. W. having died, his wife caused the deed conveying the railroad title to her to be recorded, thus showing a perfect chain of title from the United States

through the railroad company to herself. She then procured an abstract of this title, and, upon the faith of it, procured from an investment company a loan secured by a mortgage of the land. Afterwards, with the purpose of discharging the land in part at least from the lien of the mortgage, she petitioned the United States, through the land office, to bring a suit to cancel the patent to the railroad company on the ground that she and her children, as heirs of W., were entitled to the land under her husband's homestead entry, and this suit was accordingly brought. *Held*, that she was estopped to set up this claim as against the mortgage, and that the United States had no interest to protect or governmental duty to perform, and hence that the suit instituted in its name was for her benefit alone, for which reason the estoppel operated as a bar to the suit, notwithstanding that the United States was the complainant.

### Appeal from the Circuit Court of the United States for the District of Kansas.

This is an appeal from a decree in favor of the United States which annulled a patent of 160 acres of land to the appellant the Union Pacific Railway Company, upon the title evidenced by which a mortgage for \$2,200, which was held by the appellant William Dalrymple, rested. The case was heard below upon the bill exhibited by the United States and the answers of the railway company. When a suit in equity is heard on the bill and the answers, the material allegations of the answers must be taken to be true, and the averments of the bill that are denied by the answers to be false. *Leeds v. Insurance Co.*, 2 Wheat. 380, 384; *U. S. v. Trans-Missouri Freight Ass'n*, 7 C. C. A. 15, 82, 58 Fed. 58. Under this rule the material facts in this case are these: By the act of July 1, 1862 (12 Stat. c. 120, §§ 3, 9, pp. 489, 492, 494), and the various acts amendatory thereof, the United States granted to the Leavenworth, Pawnee & Western Railway Company of Kansas, a corporation, certain of the public lands, to aid in the construction of a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, to a place of connection with the Pacific Railroad of Missouri on the one hundredth meridian west of Greenwich, described in that act. The original grant, so far as it is material to this case, was in these words: "That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said road, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed." The act of July 2, 1864, also provided that whenever 40 consecutive miles of any portion of said railroad and telegraph line was completed, as required by the act, patents should be issued conveying the right and title to said lands to the company on each side of the road as far as the same was completed. By the act of July 2, 1864 (13 Stat. c. 216, § 4, pp. 356, 358), section 3 of the act of July 1, 1862, was amended by striking out the word "five" wherever it occurs, and inserting in lieu of it the word "ten," and by striking out the word "ten" wherever it occurs, and inserting in place of it the word "twenty."

The name of the Leavenworth, Pawnee & Western Railroad Company of Kansas was subsequently changed to the Union Pacific Railway Company, Eastern Division, then to the Kansas Pacific Railroad Company, and the company was finally consolidated with the Union Pacific Railway Company, the appellant, which has succeeded to all the rights this railway company acquired under any of its names. The railroad company earned its grant by the timely and fit construction of its railroad and telegraph line. The 160 acres of land in controversy here was a part of an odd section within the place limits of the grant to this company by the acts we have mentioned. On May 6, 1867, the railroad company filed its map of the definite location of the line of its railroad opposite to this land. On April 14, 1866, one James S. Grier, who was a minor 20 years of age, filed his declaratory statement upon this land

in the proper land office, by which he alleged that he had settled thereon under the pre-emption laws. On August 12, 1868, he relinquished his pre-emption claim to this land. On September 10, 1868, the railroad company sold and conveyed this tract of land by a warranty deed to one James Waddle. On February 10, 1871, Almer Weller bought the land of Waddle, and the latter conveyed it by warranty deed either to him or to his wife, Hannah E. Weller. Thereupon Weller and his wife took possession of the land under this deed, and have ever since retained it. They concealed from the railroad company and from the United States the fact that they had bought the title Waddle received from the railroad company; and on October 9, 1871, Weller made a homestead entry upon the land, which was on October 22, 1875, after a contest and trial before the land department of the United States of the claims of Weller and the railroad company, canceled by the commissioner of the general land office. On December 31, 1877, the United States issued a patent of this land to the railroad company. At some time prior to September, 1886, Weller died intestate, and left his wife, Hannah E. Weller, and five children, his sole surviving heirs; and Hannah E. Weller recorded in the county in which this land was situated the deed of February 10, 1871, from Waddle, which then ran to her, so that there appeared of record a perfect chain of title from the United States through the railroad company and Waddle to herself. She was still in possession of the land, and she then procured an abstract of this title, and, for the purpose of procuring a loan upon the security of her title to the land, furnished it to the Lombard Investment Company, a corporation, which, in reliance upon the abstract, the record title, and her possession, and without notice of any defect in this title, loaned to Hannah E. Weller, at her request, \$2,200 upon the security of her mortgage upon this land. This mortgage was dated September 1, 1886. It contained full covenants of warranty of the title, and secured the payment of a promissory note of \$2,200 made by Hannah E. Weller, and payable to the Lombard Investment Company. On September 25, 1886, the appellant William Dalrymple purchased and paid a valuable consideration for this note and mortgage in good faith, without notice of any defects in the title disclosed by the abstract. According to the answers of the railroad company and Dalrymple, which stand admitted in this case, Hannah E. Weller knew all these facts; but she did not disclose to the United States the fact that she or her husband had procured the title of Waddle under the patent to the railroad company. But for the purpose of discharging the land in part at least from the lien of the mortgage, and of preventing the appellant Dalrymple from collecting the amount owing to him on this mortgage debt, she petitioned the United States, through the general land office, to bring this suit to cancel the patent to the railroad company on the ground that she and the other heirs of Weller held the possession of, and were entitled to the title to, the land under the homestead entry made by her husband in 1871 only, and she thereby induced the United States to bring and prosecute this suit. The United States has no interest in the suit, and the real parties to the controversy are Hannah E. Weller and William Dalrymple, the holder of her mortgage.

Henry P. Lowenstein (A. L. Williams, John C. Gage, Watson J. Ferry, Charles E. Small, and N. H. Loomis, on the brief), for appellants.

W. C. Perry, U. S. Atty.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The principles announced in *U. S. v. Winona & St. P. R. Co.* (No. 564) 67 Fed. 948, are decisive of this case. The terms of the grant under the act of July 1, 1862 (12 Stat. c. 120, §§ 3, 9, pp. 489, 492, 494), differ in no particular, essential to the decision of this case, from those considered in that case. 11 Stat. 195.

Conceding, but not deciding, that the filing of the declaratory statement of Grier was sufficient evidence that pre-emption rights had attached to the land in controversy here, when the line of the railroad was definitely fixed opposite to it, it follows from the views expressed in that case (1) that this land was excepted from the grant to the railroad company; but (2) that the land was within the jurisdiction, and its disposition within the power, of the land department of the United States, and the patent to the railroad company issued by that department was not void, but it conveyed the legal title to the railroad company and its grantees; (3) that the appellant Dalrymple was a bona fide purchaser of a mortgage for \$2,200, which is a lien upon all that legal title that Hannah E. Weller acquired through the deed from the immediate grantor of the railroad company; and (4) that the equitable rights of a bona fide purchaser are superior in a case of this character to the equitable claims of the United States to have the title restored to it, and constitute a complete defense to this suit.

There is another fatal objection to the maintenance of this suit. It is that this is a suit in which the United States has no interest to protect, and no governmental duty to perform, and that it is prosecuted in its name at the instigation and in the interest of a private individual, to obtain relief that she is estopped from recovering in her own name by every principle of law and of equity. It was instituted and is prosecuted at the instigation and on the petition of a mortgagor to annul a title upon which she obtained a loan of \$2,200 upon the faith of her representation that she had a perfect title to the land. The patent was issued in 1877. It is claimed in this suit that Almer Weller, the husband of Hannah E. Weller, the mortgagor here, was entitled to the legal title to this land under his homestead entry. Either Almer or Hannah had this legal title under the patent through the deed from Waddle from the time the patent was issued, and during all this time they were in possession. If Almer had the title, of what could he complain? If Hannah, his wife, had it, she undoubtedly had it with his consent. If not, he could have maintained a suit in equity at any time during his life, and his heirs could have maintained one at any time since his death, for a decree that Hannah held this legal title in trust for him or for them. *Bogan v. Mortgage Co.*, 11 C. C. A. 128, 63 Fed. 192, and cases cited. Almer Weller made no complaint regarding this title from 1877 until he died. None of his heirs except Hannah have ever complained of it since. Hannah, who, according to the records of the county in which the land is situated, has held this legal title since 1877, never complained because she held it until after she had borrowed the \$2,200, and then, not for the purpose of strengthening her own title, but to weaken the security of the loan she had procured, and to defeat its collection. To obtain this loan, she caused a deed to herself of the title under the patent to the railroad company to be recorded, and she presented to the mortgagee an abstract which disclosed a perfect title in her under the patent to the railroad company. She was then in possession of the land; and if the claim she now makes, that she was not entitled to this land, but that it belonged of right not to her alone, but to her and her children, the

heirs of Almer Weller, under his homestead claim, is well founded, she knew that fact, and concealed it from the mortgagee in 1886, when she induced it to loan its money on the faith of the perfect title her abstract and possession disclosed. She cannot be heard to assert that fact now to defeat this mortgage in the hands of a bona fide purchaser.

In *Paxson v. Brown*, 10 C. C. A. 135, 143, 61 Fed. 874, this court declared:

"No principle is more salutary, none rests on more solid foundations, than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is salutary, because it represses fraud and falsehood. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him. *Cairncross v. Lorimer*, 3 Macq. 828; *Dickerson v. Colgrove*, 100 U. S. 578, 582; *Kirk v. Hamilton*, 102 U. S. 68, 75; *Evans v. Snyder*, 64 Mo. 516; *Pence v. Arbuckle*, 22 Minn. 417; *Crook v. Corporation of Seaford*, L. R. 10 Eq. 678; *Faxton v. Faxon*, 28 Mich. 159."

Upon this principle, the mortgagor, Hannah E. Weller, was estopped to maintain a suit to defeat or weaken the lien of this mortgage, and we think in this case the government is in the same position.

It is not denied that, if the United States was prosecuting this suit to enforce the rights or to protect the interests vested in it as a sovereign government, it might not be affected by the equitable estoppel which bars this mortgagor. *U. S. v. Winona & St. P. R. Co.* (No. 566) 67 Fed. 948, and cases cited. But that is not the position of the United States in this case. The government has no interest in this suit. If this decree is affirmed, the United States will become a mere conduit to pass the legal title to this land from Hannah E. Weller to Hannah E. Weller and the children of her husband. The government can receive no purchase price for the land, nor can it retain the land itself. Moreover, the uncontradicted averments of the answers are that this suit was instigated by this mortgagor for the sole purpose of defeating the collection of her mortgage debt; that she induced the government to institute it by filing a petition which did not disclose the essential fact that either she or her husband held the legal title under the patent she asked the government to set aside; and that the only real parties in interest in this suit are this mortgagor and William Dalrymple, the assignee of this mortgage. Private parties cannot be permitted under such circumstances to use the name of the United States to shield themselves from the just consequences of their own acts, or to deprive bona fide purchasers of their defenses in equity. A suit in which the United States has no interest, and in which it is under no obligation to the public or to the party for whose use the suit is brought and prosecuted, can be sustained no better in the name of the United States than in the name of the real party in interest. Individuals cannot in that way avail themselves of the privileges and exemptions which are bestowed upon the government, not for the benefit of private parties, but for the protection of the interests of the public,



and to enable the United States to discharge its duties and obligations as a sovereign government. *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 285, 8 Sup. Ct. 850; *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1083; *Curtner v. U. S.*, 149 U. S. 662, 13 Sup. Ct. 985, 1041.

The decree below must be reversed, and the case remanded, with directions to dismiss the bill; and it is so ordered.

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**ULMAN v. IAEGER et al.**

(Circuit Court, D. West Virginia. May 17, 1895.)

**1. EQUITY PLEADING—DEMURRER—EXHIBITS.**

Upon demurrer to a bill, the exhibits filed with the bill are to be read as part of it, and the statements found in them must be accepted as true against the demurrants.

**2. EQUITY JURISDICTION—BILL TO CANCEL TAX DEEDS—MULTIPLICITY OF SUITS.**

A bill by a landowner to cancel numerous tax deeds, held by different persons under a sale made by the commissioner of school lands, in West Virginia, in one proceeding to forfeit the lands for taxes, may be maintained as a bill to remove cloud from title, and on the ground of avoiding a multiplicity of suits, where all the parties claim under a common source of title.

**3. SAME—TAX SALES—SCHOOL LANDS.**

Where lands are forfeited for nonpayment of taxes in West Virginia, and are sold by the commissioner of school lands, the title acquired by virtue of the tax deeds is the same title as that of the original owner, and he is to be regarded as the common source of title, notwithstanding that the same has passed through the state to the purchasers at the tax sale.

**4. LACHES—DEMURRER TO BILL.**

The question of laches cannot be considered upon demurrer to the bill where the bill alleges that complainant was ignorant of the matters constituting the foundation of his right, and that, as soon as he discovered them, he took the necessary steps to assert his right.

**5. EQUITY PLEADING—MULTIFARIOUSNESS—JOINDER OF PARTIES.**

In a bill and cross bill for partition between tenants in common of a tract of land, it is proper to join as defendants numerous purchasers at a tax sale of part of the land, for the purpose of canceling their deeds, on the ground that the tax proceedings were invalid; and such bills are not rendered multifarious by such joinder.

**6. SAME—DISCRETION OF COURT.**

Whether or not a bill is multifarious is a question which rests largely in the discretion of the court, and a decision overruling an objection based on that ground will not be reviewed on appeal.

Okey Johnson and Couch, Flournoy & Price, for A. J. Ulman.

Jas. H. Ferguson and P. W. Strother, for W. G. W. Iaeger.

John S. Wise, W. E. Chilton, and E. Spencer Miller, for trustees.

Brown, Jackson & Knight, A. C. Snyder, T. S. Heintze, and D. E. Johnston, for Bramwell and others.

Payne & Green, for Dwight Devine.

Watts & Ashby, for David E. Johnston and Stealeys.

Before GOFF, Circuit Judge, and JACKSON, District Judge.

**JACKSON**, District Judge. Alfred J. Ulman filed his bill in the circuit court of McDowell county, W. Va., against W. R. Iaeger, W. G. W. Iaeger, and others, claiming that he was a cotenant of W. R.

Iaeger in a tract of 150,000 acres of land lying in said county, having acquired title to one undivided half interest. The bill alleges that certain proceedings were instituted by the commissioner of school lands in McDowell county to forfeit the land for the nonpayment of taxes, which finally resulted in the sale of over 7,000 acres of the same to sundry third parties, which sales were confirmed by the court, and deeds were made by the commissioner to the various purchasers in pursuance of the order of the court confirming the sale. The primary object of the bill is to annul and vacate the deeds made by the commissioner, and thereby to remove the cloud upon the title of the owners to the land sold. The further object of the bill is a partition of the land between the tenants in common. There are other grounds of relief sought which at this time we do not think require attention. After the filing of the original bill, the case was, by proper proceedings, removed into this court, for further proceedings to be had therein.

It appears from the bill that Ulman conveyed to Kent, Neal, and Totten one undivided fifth part of his one-fourth of the land in controversy first acquired by him, and that on the 8th day of February, 1888, W. R. Iaeger conveyed the equity of redemption in three-fourths to his father, W. G. W. Iaeger; and it further appears that on the 24th day of April, 1888, W. G. W. Iaeger conveyed the land to Henry Parmalee, trustee, to secure \$6,000 to C. B. Wilkins, and that on the 26th day of March, 1889, he conveyed the same land to John P. Jenny, trustee, to secure \$60,000 to Charles C. Hanes. The bill prays for an account between the plaintiff and defendant W. G. W. Iaeger as to the amounts advanced for taxes, and other moneys advanced for the protection of the land, and calls for a discovery as to the amounts due on each of said trust deeds, and asks that said trust deeds be set aside as clouds upon the plaintiff's title, claiming that they were "shams." To this bill W. G. W. Iaeger filed his answer, denying many of the allegations of the bill, and admitting others, which are unnecessary to be considered at this time. After the filing of the answer, the plaintiff filed an amended bill, making Elias Adler a party, alleging that W. G. W. Iaeger had conveyed one-fourth of his interest in the land to Adler, which was in fact a conveyance for the benefit of Ulman, who, it is alleged, had furnished the purchase money, by which transaction Ulman claims he acquired that interest which Adler and wife conveyed to him on the 30th day of July, 1889, making Ulman's interest one-half of the land. The amended bill also makes a number of the purchasers at the tax sale parties defendant who were not before made parties. On the 2d day of June, 1890, after the issues were made up between Ulman and Iaeger, the defendant W. G. W. Iaeger filed his cross bill, which filing was before that of the first amended bill, against the parties brought into the case by the cross bill. It further appears that Ulman, in his original and amended original bills, seeks relief against the Iaegers and all the defendants who set up any title to the land in controversy, and calls for a partition of the lands between him and W. G. W. Iaeger. This is the scope of the original bills, while the cross bill of Iaeger seeks af-

firmative relief from Ulman, setting up the issues made in his answer to the original bill of Ulman, and bringing to the attention of the court sundry new parties, who, it is alleged, were necessary parties to this proceeding, all of whom were purchasers of a portion of this tract of land at the commissioner's sale, thus rendering it necessary to pass upon the validity of their deeds, claiming that they were clouds upon the title of the rightful owner of the land sold by the commissioner. Other matters are presented for the consideration of the court in both the original and cross bills, which we do not think necessary to consider upon the demurrer; but they are all more or less directly connected with the title to this land, and grew out of the same original controversy between Ulman and Jaeger, on the one hand, and the defendants, on the other. In fact, all the parties to this suit claim portions of the original tract of land now in controversy, and derive their titles from the same common source. Upon this state of facts, as they appear in the original and cross bills, the several defendants have filed their demurrers, and invoke the judgment of the court upon the questions of law raised by them, which are substantially the same.

The first ground assigned is that both Ulman and Jaeger have plain adequate remedies at law, and that all the purchasers at the tax sale hold adversely to them, which requires an action at law to dispossess them. This ground of demurrer is not an unusual one in cases of the character we have under consideration. In passing upon the questions raised by the demurrers, the exhibits filed with the bill are to be read as part of it, and the statements found in them must be accepted as true against the demurrants. In this connection it seems to us that some of the questions raised by the demurrers should be considered upon the merits, rather than upon demurrer to the bill. We will dispose of the question as to the remedy of the plaintiff in this action hereafter, as we wish to first notice the question of misjoinder of parties.

It is urged that all of the defendants who were purchasers at the tax sale have been improperly impleaded in this action because there exists no privity of interest between them and Ulman and Jaeger, and, as a consequence, no such privity between the parties as would entitle Ulman or Jaeger, or both of them, to maintain this action. This is the most serious question raised by the demurrers. To enable us to discuss this position, we have reviewed briefly the history of this case. From that history it is apparent that the title to the land in controversy was either in Ulman or Jaeger, or in both, as tenants in common, and that in this proceeding they must be recognized as the source, and the only one, from which all of the defendants who are impleaded in this action derived their title, if any they have, to any of the land in controversy. It is true that the purchasers at the commissioner's sale claim that they are holding under the state; but it cannot be denied that the state only got the title of Ulmer and Jaeger, if any she acquired, and, when she sold it, she only sold and conveyed the title of Ulman and Jaeger as purchased at the sale. *De Forrest v. Thompson*, 40 Fed. 375, and reported as *Wakeman v. Thomp-*

son in 32 W. Va. Append. 1. We hold this position to be sound, and, as a consequence, there is a privity of estate between the plaintiffs in the original and cross bills and all of the defendants who were purchasers at the tax sale, and it must follow that as to them there was no misjoinder of parties to the action. But we do not rest this conclusion alone upon this position, for the reason that if, in the disposition of the case, it should turn out that the proceedings taken by the school commissioner on behalf of the state were irregular, and either void or voidable, the land would be, by such legal action, restored to the former owners in whose name or names it was sold. This result would establish a legal relation between the plaintiff and defendants, and, as a consequence of such relation, a privity of interest that justified the plaintiff impleading the defendants in this action. One decree could be entered in the case vacating all the deeds made under the proceedings had in the McDowell court, for the plain reason that, if the action of that court was irregular, and did not comply with the terms of the statute under which the proceedings were had, then the defendants acquired no title to the land as against the plaintiffs. We have before held that, where the claims of the defendants are derived from the same source, a suit in equity is the proper proceeding in which to litigate their rights, upon the familiar ground that by suing in equity you can bring all the defendants before the court in one action, and thereby avoid a multiplicity of suits.

There is no occasion, as is contended, for different and several actions to recover the possession of the land in controversy until the cloud which now hangs over the title of complainant is removed. In this case it is alleged that there is a common wrong against the rightful owners of this land, insisted upon by all of the defendants who were purchasers of the land at the tax sale. That common wrong involves the title of all of the numerous purchasers of the lands in controversy. As an incipient step in the litigation, it becomes necessary to vacate and annul the deeds of these various purchasers, founded, as it is alleged, upon proceedings that were not only irregular in not complying with the statute, but were absolutely void, by reason of the fact of an alleged interest in them of the judge of the court who presided at the time they were had. It is doubtful if the last allegation just referred to would be properly cognizable on the law side of the court, under the peculiar circumstances of this case. Be that as it may, it is a very grave charge, and we think more properly belongs to a court of equity, and should be heard in that forum. If we hold that actions of law should be brought for the recovery of the lands sold at the tax sale, it would involve the bringing of suits against each one of the defendants; or, if they were all impleaded in one action of ejectment, each one could demand a separate trial, which would occasion unusual delay, and greatly increase the cost of litigation. The purpose and object of this suit in impleading so many in one action is to prevent oppressive and vexatious litigation, which is not only unnecessary, but is often unavailing, as it might prove to be in this case.

Upon the demurrers the rights to all the parties to the tax sale would depend upon the same questions of law. In this connection it is insisted that there is no privity of interest, by contract or otherwise, between the demurrants and Ulman and Iaegers, except that which the law implies, which, under the circumstances of this case, we hold creates such a privity of interest as justifies this action. We therefore conclude that, if there is a remedy at law, this is one of those cases in which there is also a coexistent remedy in equity, and that the action may be maintained in either forum, but that a more adequate remedy would be found in equity—First, because it is the proper forum in which to raise the question of a cloud upon the title, and to obtain relief by a decree of the court removing the same; and, second, because the object is to vacate and annul deeds that might be used in the chain of title in an action of law.

It is claimed that the questions raised by the bills have been passed upon by the circuit court of McDowell county in proceedings therein had between the state of West Virginia and Ulman and Iaeger. It does not so appear from the bill. On the contrary, it clearly appears that the legal title to the lands in question never arose between the state and Ulman and Iaeger. The action taken and had in the state court was not of a judicial character in which the strength of title was at issue and tried between the state and Ulman and Iaeger. The proceeding was purely a statutory one, of a remedial character, upon which the court undertook to administer relief by which the state could secure taxes due it against lands conceded by the proceedings to have formerly been owned by Ulman and Iaeger. The whole proceeding was purely administrative, and did not involve the validity of the title of Ulman and Iaeger. For this reason we cannot sustain this position.

In the discussion of the questions raised by the demurrer, the defendants claimed that the plaintiff had waited too long before bringing his suit, and that the doctrine of laches applied. No such cause is assigned in any of the demurrers filed that have come under our notice. Treating it, however, as a cause assigned, it seems to us that, under the allegations of the bills, it is a question that more properly arises upon the final hearing of the case on its merits, and for this reason we are not inclined at this time to enter into a serious discussion of it, which may receive a careful consideration both of the facts and the law as applicable to them. The bills allege that both Ulman and Iaeger were ignorant of their rights, and they particularly specify and charge that they were ignorant of the failure of both the sheriff of McDowell county and the clerk of the county court of the county to perform the duties required of them by the statute in regard to the tract of land in question. And the bill further charges that, as soon as they became aware of their legal rights, they took the necessary steps to assert them. Upon the pleadings as they now stand, we must accept these statements as true, leaving the question of laches to be finally determined upon the proofs and the law applicable to the evidence.

We have thus far considered what we regard as the more, if not

the most, important questions raised by the demurrer. A purely technical question remains to be disposed of, and one which in no way involves the real merits of the controversy; and that is that the bill and amended bills, as well as the cross bill, are multifarious, which simply means that the bills are made up of many different parts, affecting different interests. It is a general principle in equity that two or more distinct subjects cannot be embraced in the same suit, and that the joining together improperly in one bill of complaint distinct and independent matters of litigation falls within this rule. In this case all the parties to the suit are interested, in one form or another, in the same subject-matter of controversy, but it is claimed the interests of the defendants are so conflicting that the grouping of them together becomes a vice that a court of equity will not tolerate. It is manifest that, if the purchasers at the tax sale can defeat the plaintiff in this action, then all questions of dispute are settled by a simple decree dismissing the bills; but, if they cannot affect a recovery, then a decree annulling and canceling these deeds under which they claim title settles the primary and chief litigation in this cause, and leaves the minor matters to be disposed of which in no way concerns them.

It is strongly urged that one of the objects of the original bill is to secure a partition of the lands between the tenants in which the defendants who purchased the lands at the tax sale have no interest. This is true, but that question is one that cannot properly arise until the court can determine what land the complainant holds as against the defendant tax purchasers. If the purchasers at the tax sale can defeat the plaintiff in this action, then there may be no need of partition; but, if the deeds of the purchasers should be declared to be inoperative and void, then it is a matter of no moment to them whether the lands in controversy belong to one or both of the plaintiffs in this action. Before partition could be made, it would be necessary to ascertain how and by whom the lands are held; and, inasmuch as the defendant purchasers at the tax sale are claiming the land (against both Ulman and Iaeger) sought to be partitioned, it would seem best to determine the rights of all parties claiming either the legal or equitable title to this land in one comprehensive suit, instead of numerous actions, as all the matters in dispute relate to the same subject-matter of controversy, which have a common origin, and are not so separate and independent as to make this bill objectionable for misjoinder of parties, and therefore multifarious. It cannot be said that the causes of action in the case under consideration have no connection or common origin. It is to be remembered that whether or not a bill is multifarious is a question that rests largely in the discretion of the court, and that a decision overruling a technical objection of this character would not be reviewed upon an appeal. This position is well supported by authority, for which is cited 1 Beach, Eq. Prac. § 115, and the numerous cases cited in note 7. In that note it is said "that in no case has the supreme court of the United States reversed a decree on account of multifariousness in the bill."

Can we say that, upon the consideration of the entire bill, the

vice of misjoinder is so apparent and manifest that we should sustain the demurrers filed to the bill? We think not. We are therefore of the opinion that the demurrers should be overruled, and it is so ordered.

GOFF, J., *concura*.

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WELDON et al. v. TOLLMAN.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 525.

1. MORTGAGE DEBT—UNAUTHORIZED PAYMENT.

One N. executed a deed of trust to D., to secure the payment of a note payable to the wife of D. in five years. The deed of trust empowered the trustee to hold the property in trust for the holder of the note, and, in case of default, upon application of the holder of the note, to foreclose and sell, providing also that, if the note was paid, the deed should be void, and the property should be reconveyed to N. or her assigns. D.'s wife, the holder of the note, sold and transferred it with the deed of trust to one J. Subsequently the land passed by mesne conveyances, subject to the deed of trust, to one W. W., before the maturity of the note, paid the amount thereof to D., the trustee, and received from him and placed on record a quitclaim deed of the property covered by the deed of trust to N., for a nominal consideration. The quitclaim deed made no reference to the powers contained in the deed of trust, and did not recite the payment of the note; nor was the note surrendered. *Held*, that the payment made to D. did not extinguish the note.

2. DEED OF TRUST—SATISFACTION—UNAUTHORIZED ACT OF TRUSTEE.

*Held*, further, that the quitclaim deed executed by the trustee did not relieve the premises of the lien of the trust deed.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was a bill filed by J. B. Tollman, the appellee, against John W. Weldon, the Colonial & United States Mortgage Company, Limited, and Atlee Hart, the appellants, and against certain other defendants, who have not appealed, to foreclose a deed of trust in the nature of a mortgage on certain lands situated in the county of Dakota, state of Nebraska. The deed of trust was executed on April 1, 1885, by Margalissa Nordyke and her husband, who then owned the land in controversy. It conveyed said land to J. M. Dunn, as trustee, to secure the payment of a note for \$2,300, which was on that day executed by the Nordykes in favor of P. M. Dunn, who was the wife of J. M. Dunn, the trustee, and was made payable on April 1, 1890. It also secured the payment of 10 semiannual interest notes in the sum of \$80.50 each. Afterwards, in December, 1885, the Nordykes sold and conveyed the premises to Joseph H. Hill, the latter assuming the aforesaid incumbrance. In July, 1886, Hill sold and conveyed the land to Charles H. and Harry D. Clark; and in December, 1886, the Clarks sold and conveyed the premises to John W. Weldon, one of the appellants. On April 8, 1887, Weldon borrowed certain money from the appellant the Colonial & United States Mortgage Company, Limited, and, to secure its repayment, executed a mortgage in its favor on the lands in controversy. Subsequently, Weldon sold and conveyed the land to the appellant Atlee Hart, subject to the last-mentioned mortgage in favor of the mortgage company. Before the mortgage in favor of the mortgage company was filed for record, to wit, on April 7, 1887, Weldon paid to J. M. Dunn, the trustee in the above-mentioned deed of trust, at Le Mars, Iowa, the amount of the principal note secured by said deed of trust; and Dunn, the trustee, executed a quitclaim deed in the following form, which was filed for record on April 8, 1887, in the recorder's office for Dakota county, Neb.:

"Know all men by these presents, that J. M. Dunn, of the county of Plymouth and state of Iowa, for and in consideration of one dollar, and for other

good and valuable considerations, the receipt whereof is hereby confessed, do hereby remise, convey, release, and quitclaim unto Margalissa Nordyke and husband, of the county of Dakota and state of Nebraska, all the right, title, interest, claim, or demand whatsoever I may have acquired in, through, or by a certain mortgage deed bearing date the first day of April, A. D. 1885, and recorded in the recorder's office of Dakota county, in the state of Nebraska, in Book F of Mortgages (page 483), to the premises herein described, as follows, to wit: \* \* \* Witness my hand and seal, this seventh day of April, A. D. 1887.

J. M. Dunn, Trustee. [Seal.]

Shortly after the deed of trust and notes first above mentioned were executed, Mrs. P. M. Dunn, the wife of the trustee, sold and transferred the notes, together with the deed of trust, to John Jeffries & Sons, of Boston, Mass. They, in turn, sold and delivered the notes and deed of trust to the appellant John B. Tollman, of Boston, Mass., by whom they were held and owned when J. M. Dunn assumed to execute the quitclaim deed aforesaid. That deed was executed without the knowledge or consent of Tollman, who until March, 1890, remained ignorant of its execution and of the fact that the amount of the principal note secured by the deed of trust had been paid to Dunn, the trustee. Dunn appropriated the money by him received to his own use.

The circuit court entered a decree of foreclosure and sale, as prayed for in the complaint, whereupon the defendants prosecuted an appeal to this court.

Francis McNulty, for appellants.

William W. Robertson, John B. Barnes, and M. Dayton Tyler filed brief for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The sole questions at issue are: First, whether, on the state of facts aforesaid, the payment made by the appellant John H. Weldon to J. M. Dunn, the trustee in the deed of trust, operated to extinguish the note thereby secured; and, second, whether the deed of release or quitclaim which was executed by the trustee operated to relieve the premises conveyed of the lien of the deed of trust thereon, so far as the appellants the Colonial & United States Mortgage Company and Atlee Hart are concerned, it being conceded that the former became a mortgagee and the latter a purchaser of the property in the belief that Dunn, the trustee, had the requisite authority to release the lien of the deed of trust, and that the quitclaim deed was adequate for that purpose, and operated to discharge the incumbrance.

The first of these questions admits of but one answer. The payment in question was made in advance of the maturity of the note to a person who was neither the payee nor indorsee of the note, and who was not at the time in the possession of the paper or of the deed of trust securing the same. The fact that the person to whom the payment was made was named as trustee in a deed executed by the maker of the note to secure the payment thereof, and that he was given power, under certain circumstances, at the request of the holder of the note, to sell the property conveyed for the purpose of paying the debt, did not give him even a colorable authority to collect the note in advance of maturity, there having been in the meantime no default which would authorize the holder of the paper to call upon the trustee to execute the trust. One



who makes a payment under such circumstances to a person who is in fact unauthorized to receive payment, and is not even in possession of the note intended to be paid, does so at his own risk. A payment of that nature does not operate to extinguish the obligation on account of which the payment is made, unless the act is subsequently ratified by the owner and holder of the obligation. Daniel, Neg. Inst. §§ 1230, 1233, and cases there cited. See, also, Rand. Com. Paper, §§ 1444, 1470; Lumber Co. v. Littlejohn, 31 Neb. 606, 48 N. W. 476; Best v. Crall, 23 Kan. 482; Keohane v. Smith, 97 Ill. 156.

The second question, we think, is no more difficult of solution. The authority which Dunn, the trustee, could lawfully exercise with respect to the property conveyed, was explicitly described in the deed of trust, and that instrument had been duly recorded in the county and state where the lands were situated. The power so conferred on the trustee was as follows:

"To have and to hold [the property conveyed], \* \* \* including all rights of dower and homestead of said parties of the first part in or to said premises, unto said party of the second part and his successor in trust forever, in trust for the holder of said notes, so that in case of default in the payment of said principal or any installment of said interest or any part of either, or in case of failure to perform any of the covenants or agreements of said parties of the first part herein contained, or if said parties of the first part shall at any time allow the taxes on said premises or any part thereof to become delinquent, or shall suffer said premises or any part thereof to be sold for any tax or assessment whatsoever, or shall do or suffer to be done upon said premises anything that may in any wise tend to diminish the value thereof, then, in such case, it shall be lawful for said party of the second part, his successor in trust or any person appointed to execute said trust, on application of the holder of said notes, to immediately declare all sums of money secured hereby due and payable, and to at once proceed to foreclose this trust deed, and sell said premises to satisfy said debt, interest, and costs, and all taxes and assessments that may be due or that may have been paid by the holder of said notes upon said premises. \* \* \* Provided, however, \* \* \* that if said parties of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to said P. M. Dunn or her assigns the aforesaid principal sum of money, with such interest thereon, at the times and in the manner specified in said notes, and also all sums paid out by the holder of said notes, or by said party of the second part, for taxes and insurance, \* \* \* and shall fully perform all covenants and agreements herein contained, then these presents \* \* \* shall be absolutely null and void, and a reconveyance of said premises shall be made to the said Margalissa Nordyke, her heirs or assigns, at her expense."

It is noticeable that the quitclaim deed executed by the trustee on April 7, 1887, some three years before the maturity of the mortgage debt, did not profess to have been made in execution of any of the powers thus conferred upon the trustee by the instrument creating the trust. It only recited a consideration of "one dollar and other good and valuable considerations," and did not recite that the mortgage indebtedness, for the payment of which the trust was created, had been paid, or that the beneficiary in the trust had directed a reconveyance of the property to the mortgagor. Moreover, it was not signed by the then owner and holder of the notes secured by the deed of trust, nor by any one who professed to be the owner of said notes. The release showed upon its face that in executing the same the trustee had acted on his own responsi-

bility, or, at least, it failed to show by any proper recitals therein contained that he had not so acted. For these reasons, we are relieved of the necessity of deciding what might be the effect of the release, so far as respects subsequent mortgagees and purchasers, if the release had contained proper recitals showing that it had been executed by the trustee in the exercise of powers conferred upon him by the deed of trust. It contains no such recitals, and the only question that we are called upon to decide is whether the mortgage company and Hart were entitled to presume that the deed of trust had been lawfully released by direction of the holder of the notes, and to act upon that presumption without inquiry. This question must be answered in the negative. We fail to see that there were any circumstances in the case which would fairly warrant them in assuming, without inquiry, that in executing the release the trustee had acted by direction of his cestui que trust, to wit, the holder of the notes. They were affected with knowledge of the extent of the trustee's powers, and of the fact that the deed of trust had been given to secure a negotiable instrument, because the deed of trust was a matter of record. They were likewise bound to know, as a matter of law, that a trustee has no authority to deal with the trust estate or to bind the beneficiaries, except such as is expressly conferred upon him by the instrument creating the trust, or is necessarily incident thereto. *Owen v. Reed*, 27 Ark. 122, 126; *Livermore v. Maxwell* (Iowa) 55 N. W. 37, 39; *Perry, Trusts*, § 831; *Pom. Eq. Jur.* § 1062. Besides, as we have already remarked, the act done by the trustee in the present instance was not only beyond the scope of his powers; but in executing the deed of release he did not even pretend or represent that he was acting by direction of the holder of the note, or that the same had been paid. Under these circumstances, it must be held that it was the duty of the appellants to ascertain whether the note had in fact been paid, or whether the holder thereof had given his consent to the release of the deed of trust in advance of the maturity of the note thereby secured. *Lakenan v. Robards*, 9 Mo. App. 179; *Lee v. Clark*, 89 Mo. 553, 558, 1 S. W. 142; *Hagerman v. Sutton*, 91 Mo. 519, 533, 4 S. W. 73; *Stiger v. Bent*, 111 Ill. 328, 337; *Insurance Co. v. Eldredge*, 102 U. S. 545; *Keohane v. Smith*, 97 Ill. 156. Substantially the same conclusion was reached in *Livermore v. Maxwell*, supra, by the supreme court of Iowa. It was held in that case, which presented a state of facts similar to the case at bar, that the trustee did not have authority to receive payment of the note secured by the deed of trust, or to release the incumbrance. The release was upheld in that instance, in favor of a subsequent mortgagee, solely because the record showed that the payee of the note had joined with the trustee in executing the deed of release, and because the mortgagee had no notice or reason to suppose that the payee had parted with the note. So, in the case of *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. 814, on which much reliance seems to be placed by the appellants, the facts were that the payee of a note secured by a deed of trust had joined with the trustee therein in releasing the incumbrance; and it was held that

such a release being of record would protect a subsequent mortgagee who was ignorant of the fact that the payee of the note had sold and transferred the same before he joined in the release. In the case at bar, as we have before stated, P. M. Dunn, the payee of the note, was not a party to the deed of release. This circumstance in itself is sufficient to distinguish the case at bar from the two cases last cited in so far as they are supposed to support the appellants' contention.

It results from the foregoing views that the decree of the circuit court was right, and it is hereby affirmed.

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ORR & LINDSLEY SHOE CO. et al. v. NEEDLES et al.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1895.)

No. 549.

1. SALE—DELIVERY—CHANGE OF POSSESSION.

In an action against a marshal for a wrongful levy of an attachment upon goods alleged to have been sold and delivered by the attachment debtor to the plaintiffs, there was evidence tending to prove that prior to the levy the debtor had executed a bill of sale to the plaintiffs of the goods in question, which formed part of the stock in his store; that the goods were inventoried, and placed on shelves by themselves in the store, in charge of an agent of plaintiffs; and that, when the marshal visited the store to make his levy, the debtor informed him of the sale, and pointed out the goods to him. *Held*, that it was error to refuse to instruct the jury that, although the goods were not so marked that the marshal could have distinguished them by inspection, yet if the marshal had notice of the sale, and could have found out which were the plaintiffs' goods, it was his duty not to levy on them, and if, after notice, he refused to separate them, and did levy on them, he was liable; and that such error was aggravated by instructions that, even if the goods were sold to the plaintiffs, no title passed, unless they were so separated or marked that they could have been distinguished by inspection.

2. SAME—LEVY UNDER ATTACHMENT.

*Held*, further, that if the marshal was not notified of the sale, and the goods were not so separated as to be distinguishable from the rest of the stock, the marshal would not be liable.

3. SAME—DECLARATIONS OF VENDOR.

*Held*, further, that declarations or acts of the vendor of the goods, after the sale, could not affect the validity of such sale, in the absence of evidence of a fraudulent conspiracy between the vendor and vendee, or that such declarations or acts were authorized by the vendee.

In Error to the United States Court in the Indian Territory.

N. B. Maxey, George E. Nelson, Isaac H. Orr, Harvey L. Christie, and John L. Bruce filed brief for plaintiffs in error.

W. T. Hutchings, C. L. Potter, and Mr. Potter filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit which was brought by the plaintiffs in error, the Orr & Lindsley Shoe Company and Baer, Seasongood & Co., against Thomas B. Needles, the United

States marshal for the Indian Territory, and Philip Lewin, for a wrongful levy alleged to have been made by the defendant Needles, under a writ of attachment, on certain goods and chattels which are said to have been the property of the plaintiffs in error. The evidence in behalf of the plaintiffs tended to show that in November, 1889, W. Scott Cook, who was at the time a merchant doing business in the Indian Territory, was indebted to the plaintiffs in the sum of about \$1,868; that for the purpose of paying said claim, on November 30, 1889, he executed a bill of sale in favor of the plaintiffs, conveying to them a quantity of boots and shoes, and men's and boys' clothing estimated to be of the value of about \$1,900; that the goods in question formed a part of the vendor's stock of goods, then situated in his store at a place called "Fred," in the Chickasaw Nation; that the negotiations leading up to the sale were conducted in behalf of the plaintiffs by their traveling salesman John C. Martin; that the goods were selected by Martin, and inventoried, and that they were thereafter separated from the residue of the vendor's stock, and were placed on shelves by themselves in the vendor's store, and were left in charge of the vendor's brother, David F. Cook, who was empowered to sell the same at retail, and to account to the plaintiffs for the proceeds; that on or about December 16, 1889, the defendant Needles wrongfully seized the goods in question under a writ of attachment issued against W. Scott Cook in favor of certain attaching creditors; that prior to said levy the said W. Scott Cook advised the deputy marshal who was about to make the levy that a portion of the goods in his store had been sold and delivered to the plaintiffs. There was further testimony which tended to show that before the levy was made the vendor, Cook, pointed out to the deputy marshal the goods that had been sold by him to the plaintiffs, and their precise location in the store, but that notwithstanding such notice the marshal levied upon the entire stock of goods found in the storeroom, including the plaintiffs' goods, and took charge thereof, and remained in sole charge of the storeroom and the goods therein contained for some days, and until the store and the goods were totally destroyed by fire. The defendants, on their part, offered testimony which tended to show that no bill of sale, such as is above described, had ever been executed by Cook in favor of the plaintiffs, or that, if such bill of sale had been executed, the goods intended to be thereby transferred had not been separated from the residue of the vendor's stock, but were intermingled therewith, and with other goods of a like character and quality, so that, even if the bill of sale was in fact made, the agreement was wholly executory, and did not operate to pass title to any goods, as between the vendor and the vendees, much less to transfer title, as between the vendees and an attaching creditor of their vendor. The defendant Needles also offered testimony tending to show that when the levy was made no notice of the alleged sale was in fact given to him, or to his deputy; that no notice of the alleged sale was given prior to the fire, and that there were no marks of any kind on any of the goods; and that no portion of the goods were so separated from the rest as to indicate that they did not belong to the

defendant in the attachment, and were not a part of the general stock. The testimony being as above indicated, the plaintiffs, at the conclusion of the evidence, moved the court, among other things, to instruct the jury as follows:

"The court instructs you that, although you may believe from the evidence that the goods purchased by plaintiffs were not so marked or designated that the marshal could have distinguished them by inspection or examination, yet if you believe that the marshal had notice of the sale to plaintiffs of the goods sued for, and could have found out which were plaintiffs' goods, after such notice, then it was the duty of the marshal to have separated plaintiffs' goods from the remainder of the stock, and not levied on them; and if you find from the evidence that he had such notice, and refused to separate plaintiffs' goods, but levied on them, your verdict should be for the plaintiffs."

This request was refused, and the plaintiffs duly excepted. Thereafter, of its own motion, the court charged the jury as follows:

"But, in order for the sale between these people to have been complete, there must have been a change of possession; that is, there must have been a delivery, either actual or what we call 'constructive.' In order for a legal delivery to have been made in this case, it was the duty of Scott Cook and Martin, the agent of these plaintiffs, to separate or segregate from the whole stock of goods, the amount of goods actually purchased by the plaintiffs for the satisfaction of their debt. And if, therefore, you find that the plaintiffs in this case purchased these goods,—that is, that this man, Scott Cook, agreed with them that they should have so much of these goods to pay their debts,—yet if you find from the evidence in this case that these goods were not separated from the general stock of goods, or so distinguished or marked that the marshal, by inspection and examination, could have told the plaintiffs' goods from the general goods of the said Scott Cook, in that case plaintiffs could not recover, and you will find for the defendants."

The same direction, in substance, was repeated in the following instructions, which were likewise given by the court of its own motion:

"If you believe from the evidence in the case that there was a sale of a part of the goods, but that part was not separated from the balance of the stock, and so designated and marked that the marshal, when he went to make his levy, could determine by inspection and examination which were the goods of Scott Cook, and which were the goods of the plaintiffs in this case, in that case you will find for the defendant. So, in this case, to recapitulate briefly, the issues sharply defined are these: Plaintiffs are entitled to recover if a part of those goods were actually purchased by them in satisfaction of their debts, and those goods were so separated and designated and marked as to distinguish them from the balance of the stock. Defendants are entitled to recover if there was no designation and marks so that the goods could be distinguished."

We are of the opinion that the instruction first above quoted was applicable to the state of facts which the plaintiffs' testimony tended to establish, and that it should have been given as requested. We are also of the opinion that the instructions above quoted which were given by the court of its own motion were well calculated to mislead the jury, especially in view of the fact that the court declined to give the aforesaid instruction which was asked by the plaintiffs, or any other instruction of equivalent import. The law is well settled that when an officer, having a writ of execution or attachment to execute, is advised before the levy is made that certain goods of a third person have been mixed with property belonging to the defendant in the execution or attachment,

which he proposes to seize, it is the officer's duty to make reasonable efforts to ascertain and separate the same from the property of the debtor on which the levy is to be made. Unless such reasonable efforts are made to ascertain what portion of the general mass in fact belongs to third persons, and unless reasonable efforts are also made to separate the same, an officer cannot escape liability for a seizure of property which does not in fact belong to the defendant named in the writ. This is clearly the rule, except in those cases where the goods or chattels of one person have been intentionally mixed with the goods or property of another for some fraudulent or unlawful purpose. *Wilson v. Lane*, 33 N. H. 466; *Smith v. Sanborn*, 6 Gray, 134, 136; *Treat v. Barber*, 7 Conn. 274, 280; *Weil v. Silverstone*, 6 Bush, 698. In the present case there was not only evidence tending to show that a portion of the stock of merchandise contained in the storeroom had been sold and delivered to the plaintiffs, and separated from the residue of the stock, but there was evidence which also tended to show that notice of the sale was given to the officer, and that the goods sold were pointed out to him, so that he could have readily distinguished the same, if he had seen fit to do so. Under these circumstances, we think that the court erred in refusing to give the instruction asked by the plaintiffs which has been heretofore quoted.

The error committed in refusing the aforesaid instruction was aggravated by the several instructions given by the court of its own motion. It will be observed that these instructions declared, in substance, that, even though certain goods were sold by Scott Cook to the plaintiffs, yet that the sale was incomplete, and that no title passed, unless they were "separated from the general stock of goods, or so distinguished or marked that the marshal, by inspection or examination, could have told the plaintiffs' goods from the general goods of Scott Cook." As the court did not attempt to define what it meant by the phrase, "separated from the general stock of goods," or "separated from the balance of the stock," these instructions were probably understood to mean that the sale was incomplete, and that no title passed to the plaintiffs, unless there was such a visible separation, segregation, or marking of the goods sold that the marshal could tell, without extrinsic aid, by merely looking through the stock, that a portion of the goods were not the property of the defendant in the attachment, but were the goods of a third person. The jury very likely inferred that although everything had been done that the plaintiffs' witnesses described, in the way of selecting and inventorying the goods, and placing them on separate shelves, yet, inasmuch as a stranger coming into the store would not be able to tell without inquiry, simply by looking at the stock, which were the plaintiffs' goods, the sale was therefore incomplete, and that no title vested in the plaintiffs, as against an attaching creditor. It admits of no doubt, we think, that if the goods had been selected, inventoried, and placed by themselves in a particular part of the store, in charge of the plaintiffs' agent, David F. Cook, as the evidence tended to show had been done, then the sale was fully executed, and the title to the goods became vested in the plaintiffs,

even though they remained in the vendor's store, and even though a stranger entering the storeroom might not be able, by a casual examination of the stock, and without inquiry, to identify the plaintiffs' goods as being their property. By the acts aforesaid the parties to the contract had clearly manifested their intention that the goods should become the property of the vendees, and the law always gives effect to such an intention when it is thus disclosed. *Cattle Co. v. Mann*, 130 U. S. 69, 77, 9 Sup. Ct. 458. See, also, the numerous cases cited on this point in 21 Am. & Eng. Enc. Law, p. 476. Moreover, upon the assumption that a sale and delivery of the goods had been consummated in the manner described by the plaintiffs' witnesses, the marshal had no right to disregard the notice of the sale, and to make a levy upon the entire stock, upon the theory that the sale was incomplete because the goods were not separated or marked in such a way that he could identify the same by a mere inspection of the stock. The instructions now under consideration were therefore erroneous and misleading.

Inasmuch as the case must be remanded for a new trial, it may be well to add that in our opinion the marshal cannot be held liable for the alleged trespass if it is true, as the testimony in his behalf tended to show, that he did not have any verbal notice of the alleged sale prior to the levy, and if it be also true that at the time of the seizure of the goods now in question they had not been separated, set apart, or marked in such manner as to distinguish them in any respect from the residue of the stock, or to warn the officer that they belonged to a third party, and were not the property of the defendants named in the writ of attachment. On a retrial of the case the defendants will be entitled to have this issue submitted to the jury, under appropriate instructions, but it should be submitted in connection with instructions which fairly present the issue raised by the plaintiffs' evidence, as heretofore indicated.

The record before us contains numerous other assignments of error, which we need not notice in detail. None of the exceptions taken to the admission and rejection of evidence can be noticed, as the plaintiffs have failed to quote in the assignment of errors the full substance of the evidence admitted and rejected, as rule 11 of this court requires. 11 C. C. A. cii. They have also failed to point out the pages of the record where the objectionable testimony can be found. Under these circumstances, we are under no obligation to consider the alleged errors last alluded to, and in the present instance we shall decline to do so.

One of the most important errors assigned, other than those heretofore mentioned and considered, consists in the refusal of the court to give the following instruction, which was asked by the plaintiffs:

"The court further instructs the jury that if you shall believe from the evidence that there was an actual and completed contract of sale and delivery of the property for the value of which this suit is brought, by said Cook to these plaintiffs, and the said property was invoiced, and set aside from the rest of the stock, and placed in charge of a person as the agent or bailee of these plaintiffs, then, although the property remained in the same storehouse where it was at the time of the sale, and said storehouse remained in the possession of said Cook, then the validity of the sale could not be destroyed

by the levy of the attachments thereon, and could not be destroyed by any declarations made by said Cook, or acts done by him, unless shown to have been authorized by plaintiffs, or that they knew of them, or in some manner ratified them."

The concluding paragraph of this instruction undoubtedly stated a correct rule of law, which the plaintiffs were entitled to have declared, inasmuch as certain declarations and acts of Scott Cook subsequent to the sale were given in evidence by the defendants which tended to impeach the bill of sale under which the plaintiffs derived title. It is undeniable that declarations made to third persons by a vendor of property after the sale and delivery thereof has been consummated are not admissible against his vendee, to impair the latter's title, unless there is independent evidence tending to show that the vendor and vendee have entered into a fraudulent conspiracy of some sort, so that the statements of one are admissible against the other, or unless the vendor's statements were authorized or subsequently ratified by the vendee. The rule of evidence in question is well established and elementary. *Manufacturing Co. v. Creary*, 116 U. S. 161, 6 Sup. Ct. 369. In the present case the declarations in question appear to have been admitted by the trial court for the purpose of impeaching the vendor, Scott Cook, who was called as a witness by the plaintiffs. But even if the declarations of Cook were admissible on that ground, and if a proper foundation was laid for admitting them, for the purpose of impeaching him, still we think that the court might very properly have instructed the jury that the statements made by Cook to third parties after the alleged sale and delivery of the goods were not binding on the plaintiffs, and were not admissible for the purpose of defeating their title.

In conclusion, it will not be out of place to say that the record shows that the controversy between the parties lies within a narrow compass, and that the trial should be carefully confined to the issues disclosed by the record. The plaintiffs rely for a recovery solely on the ground that certain goods were sold and delivered to them on November 30, 1889, for the sum of \$1,868.24, then due to them from the vendor. They contend that the goods sold were selected, inventoried, and set apart by themselves in the vendor's store, and that the marshal had notice of these facts prior to the levy, but refused to recognize the transaction as a valid or consummated sale. The plaintiffs do not claim title to the goods in controversy under or by virtue of any conveyance or mortgage executed prior to November 30, 1889; and whether such prior mortgage or conveyance, if one was executed, was valid or otherwise, is an immaterial issue, so far as the case at bar is concerned. The defendants, on the other hand, evidently rely for a defense upon the ground that, although a bill of sale may have been executed at the time alleged, yet that there was no selection of the goods intended to be sold, or separation of the same from the residue of the stock. They contend that they remained mixed with other goods of the debtor, of like kind and quality; and that the marshal made the levy in utter ignorance of the plaintiffs' rights under the alleged



bill of sale. Whether the one or the other of these contentions is well founded in fact, is the question that should be submitted to the jury on a retrial of the case, and all extraneous issues should be excluded, as far as possible. We are led to make these observations because a number of instructions appear to have been asked which, in our judgment, were unnecessary, and, if given, would merely have diverted attention from the most important issue in the case. For the reasons already indicated the judgment is reversed, and the case remanded for a new trial.

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PRESTON v. HUNTER et al.

(Circuit Court of Appeals, Ninth Circuit. April 29, 1895.)

No. 189.

1. MINES AND MINING—NOTICE OF LOCATION.

A notice of location of a placer mining claim, which contains the name of the locators, the date of location, and a sufficient description, all as required by Rev. St. § 2324, is not invalidated by the fact that the date is preceded by the words "dated on the ground," and such words are to be regarded as mere surplusage.

2. SAME—DECLARATORY STATEMENT—MONTANA LAWS.

Failure to file in the recorder's office a sufficient declaratory statement within the 20 days allowed therefor by the Montana statute (Comp. St. Mont. § 1477), does not render the location void when no other rights have intervened before a proper record is made, and the rights of the locators will attach at least from the date of perfecting the record.

Appeal from the Circuit Court of the United States for the District of Montana.

This was a suit by Duncan Hunter and others against Edward L. Preston to determine an adverse claim to certain mining ground. The case was commenced in a state court, and was afterwards removed to the federal court by the defendant. The circuit court entered a decree dismissing the suit on the ground that neither of the parties was entitled to recover. Defendant appeals.

Albert Allen, for appellant.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity, in the nature of a bill to quiet title, to determine which of the parties has the better right to certain mining ground, situate in an unorganized mining district, formerly in the county of Missoula, now in Flathead county, state of Montana, and whether either of said parties is entitled to a patent thereto. The suit was commenced in the state court by appellees in support of their adverse claim, as the alleged owners of the Butte placer mining claim, to an application for a patent by appellant to the Pine Tree placer mining claim. It was afterwards removed to the United States circuit court for the district of Montana; was there tried before the court, without a jury, and a decree rendered dismissing the suit upon the ground that neither of the parties was entitled to recover. The court found as a fact "that the

alleged location of the Butte placer mining claim mentioned and described in plaintiffs' complaint was never marked upon the ground, so that its boundaries thereof could be readily traced"; and as a conclusion of law held that the alleged location of said claim "was not made in accordance with the laws of the United States and of the state of Montana." This conclusion is admitted to be correct. The court further found as a conclusion of law:

"Second. That the alleged location of the Pine Tree placer mining claim mentioned and described in the answer in this action is, and at all times has been, invalid, and void, for the reason that the declaratory statement thereof in the recorder's office did not contain the date of the location, and that, therefore, the defendant is not the owner of, or entitled to the right of possession of, the premises in controversy, or any part thereof, and is not entitled to recover in this action."

Is this conclusion erroneous? This is the only question presented by this appeal. It must be determined by an examination of the findings of fact relative to the location, etc., of the Pine Tree claim, which are as follows:

"First. That heretofore, to wit, on the 9th day of September, 1892, D. McLeod, Henry Lunn, John Langman, Jay H. Adams, A. M. Scott, H. Preston, D. W. Henley, and John Wetzel, each being then and now a citizen of the United States, entered upon the premises hereinafter described, and located the same as a placer mining claim, and then and there marked the location upon the ground, so that the boundaries thereof could be readily traced, said claim being then situated in the county of Missoula, state of Montana, and now being in the county of Flathead, in said state; and at the time of making the said location, and as a part of the act of said location, the said locators posted on said claim a notice, of which the following is a copy, to wit: 'Notice is hereby given that the undersigned, having complied with the requirements of chapter vi., title thirty-two, of the Revised Statutes of the United States, and the local customs and laws and regulations, have located one hundred and sixty acres of placer mining ground \* \* \* particularly described as follows: [Here follows a description of the ground by metes and bounds.] Said claim to be known as the "Pine Tree Placer Mining Claim," comprising 160 acres. Said claim is situated on the south side of the Kootenai river, about half a mile below Callahan creek. Dated on the ground, Missoula county, Montana, this 9th day of September, 1892,'—signed by all the locators, 'per D. M. McLeod,' with two witnesses.

"Second. That thereafter, and within twenty days, the said locators filed for record in the office of the county recorder of Missoula county, in which the said claim was situated, a declaratory statement, and the acknowledgment thereof as filed and recorded was in the words and figures following, to wit: [Here follows the notice as above quoted with the acknowledgment of a notary public of "the execution of the within instrument" in the usual form of acknowledgments.]

"Third. That thereafter, on the 23d day of May, 1893, and while the said original notice still remained posted on said claim, and entirely legible, and the location still marked upon the ground so that the boundaries thereof could be readily traced, the claim being then situated in the county of Flathead in said state, and the said locators being still the owners of said claim, the said locators filed for record in the office of the county recorder of Flathead county a declaratory statement, under oath, in writing, of the location of said claim, which declaratory statement under oath so filed was in the words and figures as follows."

Then follows the notice of the location and the acknowledgment of the notary public, and the following affidavit and oath:

"State of Washington, County of Spokane—ss.: D. M. McLeod, being duly sworn, says that he is one of the locators and claimants of the foregoing described placer mining claim, known as and called the 'Pine Tree Placer

Mining Claim'; that he and his colocators therein, whose names are subscribed to said foregoing notice, were at the time of the making said location, and now are, citizens of the United States; that the said location is made in good faith, and that the matters set forth in the foregoing notice by him subscribed are true; that a copy of the foregoing notice was posted on said claim on the 9th day of September, 1892. Affiant further says that on the 9th day of September, 1892, he went before Samuel W. Childs, a notary public of Missoula county, Montana, for the purpose of making oath to and verifying said location notice, and did make oath thereto in substance as in this affidavit above stated; but that said notary, by some mistake, instead of writing the proper affidavit, wrote an acknowledgment as shown on this paper. [Signed] D. M. McLeod." "Subscribed and sworn to before me this 16th day of May, 1893. C. S. Voorhees, Notary Public for Washington, residing at Spokane. [Seal]"

The other findings of fact, 4, 5, and 6, relative to the Pine Tree claim are to the effect that the land in controversy is mineral land; that the locators complied with the law as to the amount of work upon the claim; that appellant, by regular conveyances, has become the owner of all the right, title, and interest acquired therein by the locators, and that since said conveyances to him he has complied with the act of congress entitled "An act to amend section 2324 of the Revised Statutes of the United States relating to mining claims, approved November 3, 1893."

The only question discussed by appellant was as to the sufficiency of the notice of location. The notice, as recorded, was in substantial compliance with the provisions of section 2324, Rev. St. U. S., which requires that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." This is too clear for any extended discussion. The words "dated on the ground" were unnecessary, but they neither added to nor took away from the notice any essential requisite thereof, and constitute a mere surplusage of words. The object of a notice is to impart information to the public. No person of ordinary understanding could possibly be misled as to the date of the location specified in the notice. The statute of Montana in relation to filing declaratory statements reads as follows:

"Any person or persons \* \* \* who shall hereafter discover or locate any placer deposit of gold or other deposit of minerals shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing on oath, made before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." Comp. St. Mont. § 1477.

In *O'Donnell v. Glenn*, 8 Mont. 248, 253, 19 Pac. 302, the notice of location was properly dated, but the oath attached thereto did not state the date of the location, or make any reference therein to the date contained in the notice, and it was held that by reason of the fact that the declaratory statement failed to show the date of location under oath it was inadmissible in evidence. The court, after stating that the notice of location was properly admitted so far as the description of the ground was concerned, to which reference was made in the oath, said:

"But the oath does not contain the date of location. This is an essential element of description under the statutes of the United States. It is given in the body of the location notice, but is not sworn to. The laws of the United States do not require the location notice to be sworn to at all, and there is no question as to its sufficiency, so far as that is concerned. But the laws of the territory (Comp. St. § 1477) require the declaratory statement to be made on oath, describing the claim as required by the laws of the United States."

This decision was affirmed in *O'Donnell v. Glenn*, 9 Mont. 452, 23 Pac. 1018. In *Metcalf v. Prescott*, 10 Mont. 284, 293, 25 Pac. 1037, the court held "that the statute intends that the oath shall be part of the record." See, also, *Mattingly v. Lewisohn* (Mont.) 35 Pac. 111. Under these decisions the declaratory statement, which was filed within 20 days after the location of the Pine Tree claim, was not in compliance with the provisions of the statute of Montana, as construed by the supreme court of that state. No oath was attached to the notice; simply an acknowledgment of the execution of the notice. If the case rested here, we would be compelled to decide the question whether the statute of Montana, which imposes an additional burden upon the locators of mining claims to that required by section 2324 of the Revised Statutes of the United States, is not inconsistent with the organic act creating the territory of Montana, which prohibits the legislature from passing any laws "interfering with the primary disposal of the soil." Rev. St. U. S. § 1851. This constitutional authority upon the part of the legislature was questioned in *Wenner v. McNulty*, 7 Mont. 30, 36, 14 Pac. 643; declared to be constitutional in *O'Donnell v. Glenn*, supra; again doubted in *Metcalf v. Prescott*, supra, but the court refused to disturb the rule announced in the *Glenn* Case. But, from the views we entertain of this case, it is unnecessary to decide that question. Conceding, for the purposes of this opinion, that the record made within the 20 days after the location of the claim was wholly insufficient, yet the question remains as to the sufficiency of the record made as set forth in the third finding of the court. That record was not made within 20 days after the location, as required by the statute, but it does not appear that any other intervening rights were acquired to the ground by any other parties prior to the filing of the declaratory statement on the 23d of May, 1893. Appellant, therefore, had the right to complete and perfect the imperfect declaratory statement theretofore recorded, and his rights would attach to the mining claim at least as of the date of the perfected record. Appellees, by failing to appear herein, have certainly waived their rights to object to said declaratory statement upon that ground. The court in *Metcalf v. Prescott*, supra, said:

"It is conceded by respondents, in their brief, that they claim no rights by virtue of the fact that their adversary claim \* \* \* was not recorded within twenty days after discovery. That disposes of that point."

See, also, *McGinnis v. Egbert*, 8 Colo. 41, 5 Pac. 652.

The mere failure to record the declaratory statement within the statutory time does not render the location of the claim invalid where there are no intervening rights before the record is properly made, if there has been a full compliance of the law in all other respects. *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702; *Van Zandt v. Mining*

Co., 2 McCrary, 159, 8 Fed. 725; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111; Craig v. Thompson, 10 Colo. 517, 16 Pac. 24; Omar v. Soper, 11 Colo. 380, 18 Pac. 443; McEvoy v. Hyman, 25 Fed. 596. In *Belk v. Meagher*, 104 U. S. 279, 283, it was held that a failure to do the requisite amount of annual development work on a claim under section 2324 of the Revised Statutes of the United States simply renders the claim subject to relocation by third parties, after the lapse of the year, and not before, and that such right of relocation is itself lost, and the original owner is restored to all of his rights, if he enters without force, and resumes work, before a relocation is perfected by any third party. *Oscamp v. Mining Co.*, 7 C. C. A. 233, 58 Fed. 293; *Wade*, Min. Claims, § 30, p. 56.

The oath constituting a part of the declaratory statement filed for record on the 23d of May, 1893, substantially complies with the statute of Montana. The date of location was given in the notice, and the oath of affiant, attached thereto, expressly states "that the matters set forth in the foregoing notice by him subscribed are true," and "that a copy of the foregoing notice was posted on said claim on the 9th day of September, 1892." We are therefore of opinion that the court erred in finding as a conclusion of law from the facts stated that the location of the Pine Tree mining claim was invalid and void.

It is proper to state that, after this opinion was prepared and agreed upon, leave was granted to appellees to file a brief, and that this brief presents no new points requiring further discussion. The judgment and decree of the circuit court, in so far as it adjudges that appellant is not entitled to recover herein, is reversed, and the cause remanded for further proceedings in conformity with this opinion.

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ENTERPRISE SAV. ASS'N v. ZUMSTEIN, Postmaster.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 275.

1. POWERS OF CONGRESS—POSTOFFICE—LOTTERIES.

It is within the power of congress to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters or the payment of money orders to a person or corporation which, upon evidence satisfactory to the head of the department, is found to be engaged in conducting a lottery.

2. COURTS—JURISDICTION—INJUNCTION AGAINST EXECUTIVE DEPARTMENT.

The courts have no jurisdiction to enjoin the execution of an order of the postmaster general, made pursuant to Rev. St. §§ 3929, 4041, and Act Cong. Sept. 19, 1890, finding that a certain corporation and its officers are engaged in conducting a lottery, and forbidding postmasters to deliver registered letters or pay money orders to them, since the making of such order involves an exercise of discretion reposed in the postmaster general. *Commerford v. Thompson*, 1 Fed. 417, and *Bank v. Merchant*, 18 Fed. 841, distinguished.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The complainant is a corporation organized under the laws of the state of West Virginia, and brings this bill against John Zumstein, as postmaster of the city of Cincinnati. The bill complains that the defendant, in his official capacity as postmaster of the city of Cincinnati, having control of the collection, distribution, receipt, and delivery of the mails of registered letters, and of the payment of postal orders, has arbitrarily, illegally, and without right, undertaken to interfere with, stop, and prevent the employment and the use of the registry department and the postal money order department of the postoffice of the city of Cincinnati in the carrying on of the complainant's business; that "the said defendant, the postmaster of the city of Cincinnati, bases his action, in such interference and denial to your complainant of the postal facilities of the postoffice of the city of Cincinnati, upon an alleged order received by him from the postmaster general of the United States, of date March 31, 1894, and which said order the postmaster makes as his excuse for so interfering with the employment by your complainant of the facilities of the postoffice at Cincinnati," and which said order so now in possession of the said defendant is as follows:

**"Postoffice Department.**

**"Washington, D. C., March 31, 1894.**

**"Order No. 100.**

"It having been made to appear to the satisfaction of the postmaster general that the Enterprise Savings Association (S. A. Stevens, pres.; J. O. Groene, vice pres.; W. R. Sypher, treas.; C. K. Ebann, sec'y; J. S. Munsell, gen'l manager), at 610 Neave Building, Cincinnati, O., are engaged in conducting a lottery or similar enterprise for the distribution of money or personal property by lot or chance through the mails, in violation of the provisions of section 3894, Rev. Stat. of the United States, as amended: Now, therefore, by authority vested in the postmaster general by sec. 3929 and 4041, Rev. Stat. of the United States, and by act approved Sept. 19, 1890, I do forbid the payment by the postmaster at Cincinnati, Ohio, of any postal order drawn to the order of said company and its officers aforesaid; and the said postmaster is hereby directed to inform the remitter of said postal money order that payment thereof has been forbidden, and that the sum of said money order will be returned upon presentation of a duplicate money order applied for and obtained under the regulations of the department. And upon the same evidence the postmaster at Cincinnati, O., aforesaid, is hereby instructed to return all registered letters which shall arrive at his office, directed to the said company and its officers aforesaid, to the postmasters at the offices at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside of such letters.

"[Signed]

W. S. Bissell, Postmaster General.

**"To Postmaster, Cincinnati, O."**

The bill then alleges that it is not conducting a lottery, or any like enterprise; and, to show the character of its business, it makes an exhibit of its charter, by-laws, and its form of application for bonds or certificates, and the terms of its certificates, together with its advertising circulars. Its method or plan is thus summarized in the bill:

"The certificates of the Enterprise Savings Association are sold only in blocks of three, whereby each purchaser is compelled to buy a multiple, there being no denomination as to the face value of such contract, in the way of a guaranty, except the amount of money deposited by the purchaser, with interest at six per cent. per annum, for the average time, and the repayment of such said sum the company guaranties to the purchaser of such certificates. In addition to the said principal sum, with interest so as aforesaid guarantied, the purchasers of said certificates are likewise entitled to, and your complainant agrees to pay, their proportionate share of the surplus earnings of the said association for the length of time their contracts have been in force, only. The certificates of the association are nonforfeitable, after they have reached the age of three years. The guarantied value of said certificates so reaching the age of three years being the amount deposited by the certificate holder, with six per cent. interest per annum for the average time as aforesaid. The paid-up value of such said certificates that have reached the age

of three years as aforesaid being dependent upon the profits of the company that shall have accrued at the time of such maturity, save that there is guaranteed to such certificate holder, upon such certificate, the amount of money he has so paid into the association during that time, with interest at six per cent. for the average time as aforesaid, and his proportionate share during the life or term of his contract, of the profits of the said association during that time, which said profits consist of the sums paid by certificate holders that have, during said term of time, lapsed or become forfeited, together with fines and interest from investments. The paid-up value of the certificates so issued by the complainant must be redeemed, and the complainant agrees to redeem the same not later than one hundred and twenty (120) months from the date of the original contract certificate. By the terms of the contract certificate issued by the complainant association, all certificates so issued are paid up in full in five years and five months from the date thereof, the amount so paid at that time upon each certificate by each certificate holder, at the rate of monthly payment described in said contract certificate, being \$100; and thereupon the complainant association issues to said certificate holder a paid-up certificate in lieu of his original contract or certificate, by the terms of which the holder is not required and does not make further monthly payment, or any payment in fact, but which said certificate your complainant association redeems, and agrees to redeem not later than one hundred and twenty months from the date of the original contract certificate. The purchaser of such certificates, therefore, upon the date of the month of the issuance of such certificate to him, pays to the association the sum of \$5; each month thereafter he pays to the association \$1.50, save upon the last or sixty-fifth month he pays the sum of fifty cents; thus making the sum of \$100 required to be paid by each certificate holder, then entitling him to receive a paid-up certificate as aforesaid. In addition to the said sum that the purchaser of such certificate is entitled to receive, and which the association agrees to pay him, with interest as aforesaid, the said certificate holder is entitled to receive, and the association agrees to pay him, his proportionate share of the profits, as aforesaid, derived by the association from the sources heretofore set out and described. The amount of such profits is uncertain, dependent upon lapses, fines, and interest, as aforesaid; but this is aside and beyond and in addition to the said sum of money so in the aggregate paid in by the said certificate holder, with interest at six per cent. upon such payments for the average time. But the said contracts of the association evidenced by the said certificates mature at a definite time, are for a fixed sum, —the said sum being the total payments of the certificate holder, together with the interest as aforesaid.

"A maturity table is prepared and employed by the said complainant association, which begins (the certificates being numbered as aforesaid) with the lowest numbered certificate then in force (that is to say, which has not lapsed under the contract), beginning with the number 1, and succeeded by its multiple by 3, provided such multiple has not been forfeited as aforesaid. If, however, any such multiple should have lapsed or become forfeited, the association pays the next highest number to such forfeited or lapsed multiple in force, that is not lapsed or matured, the association then maturing certificates by following its multiple 3. That is to say, assuming that the certificate numbered 1 is in force, that is paid first, followed by 3, if said certificate has not lapsed, then 9, then 27, until a multiple has been reached larger than the number of certificates sold and numbered by the association the month previous. When such a number is reached, it is not matured, but the series of certificates are redeemed, reverting, however, to 2 and its multiple by 3, 6-18, provided such numbers have not lapsed or been redeemed, and, if lapsed, the number next highest in its numerical order to such multiple is redeemed, with its multiple, and so continuing; the certificates, however, being sold in series of five hundred each. The maturity of certificates is controlled by and entirely dependent on, the action of certificate holders, in this: that the said certificates are matured by fixed numbers, that are not, and cannot be, varied, save only by the lapsing or forfeiting of certificates. And such maturing of certificates is not, therefore, dependent upon any chance, or allotment by chance, or by the manipulations, of any kind or character, by the officers of the association, or by any other outside or extraneous element,

the fixed mathematical certainty of maturity and payment of each certificate being varied only by the failure of a certificate holder to comply with his contract, lapsing or forfeiting the same, and which said lapsing or forfeiting working a forfeiture of the sums of money theretofore paid by such certificate holder to the association, constituting one of the elements of profits of the association, to the advantage of the remaining certificate holders, and to their advantage only. The \$5 paid by each certificate holder at the time of the issuance of the said certificate to him is employed by the association as a fund, under its by-laws, and by its contract with each certificate holder, in the employment of agents, the establishment of agencies, canvassing of territory, and the incidental expenses of soliciting, and extending the business of the association. The sum of \$1 for each month succeeding the first is paid into and retained in what is known as the 'Maturity Fund,' out of which the certificates maturing are paid. Twenty-five cents per month is paid into and devoted to the maintenance of the general expenses of the company, the remaining twenty-five cents per month paid by the certificate holders is paid into and retained in the reserve fund, which is put at interest, which interest is one of the profits of the association distributed to the certificate holders. After the 15th of each month, the dues upon the said certificates being due and payable upon the first of each month, certificates are matured and redeemed numerically, in the method heretofore set out; each certificate holder being paid the sum of money so paid in by him, with interest, and such sum added as is his proportionate share of the profits earned by the association; the amount so paid the holders of certificates in no event exceeding the amount then in the maturity fund, with the profits of the association added."

The prayer of the bill is that the defendant be enjoined from interfering with the said facilities of the complainant in the conduct of its business, which it alleges to be lawful and legitimate; that he be enjoined from withholding from it registered letters addressed to it, and from refusing to pay postal money orders payable by the Cincinnati postmaster to it,—and for general relief. The defendant, Zumstein, demurred upon several grounds, the third of which was as follows: "That it appears by said bill that the acts complained of as having been committed, and that are about to be committed, by this defendant, and against which the relief prayed for is sought, were committed by him by virtue of, and under the authority of, the postmaster general of the United States, and that said postmaster general, in the performance of said acts, was acting within discretion, as an executive officer of the government of the United States, according to law, and that said discretion is not reviewable by this court." This ground of demurrer was sustained, and the complainant's bill dismissed. 64 Fed. 837.

Michael G. Heintz (Charles W. Baker, of counsel), for appellant.

Harlan Cleveland, U. S. Atty., and Charles T. Greve, Asst. U. S. Atty., for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

After stating the facts as above, LURTON, Circuit Judge, delivered the opinion of the court.

The question for decision is as to the conclusiveness of the order of the postmaster general directing the postmaster at Cincinnati to return all registered letters which were directed to the complainant association, and forbidding the payment of money orders drawn to the order of said association. By section 3894, Rev. St., as amended by the act of 1890, the use of the mails for carrying or distributing letters or circulars concerning any lottery or similar enterprise is prohibited, and the depositing of such prohibited matter in the mail knowingly, and with the object that it shall be carried, is made criminal and punishable. To further accomplish the inhibi-



tion of the mails to those engaged in the vicious business described by the statute, it is provided by sections 3929, 4041, Rev. St., as amended by Act Sept. 19, 1890 (1 Supp. Rev. St. [2d Ed.] p. 803), as follows:

**Section 3929:** "The postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift-enterprise or scheme for the distribution of money or of any real or personal property, by lot, chance or drawing of any kind or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises instruct postmasters at any post-office at which registered letters arrive, directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual, or as a firm, bank, corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'fraudulent' plainly written or stamped upon the outside thereof, and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the postmaster general may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself."

**Section 4041:** "The postmaster general may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift-enterprise, or scheme for the distribution of money or of any real or personal property, by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money orders drawn to his or its order or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders. But this shall not authorize any person to open any letter not addressed to himself."

The order was one which the defendant was bound to obey, unless the postmaster general exceeded his authority in making it. From the order it distinctly appears that, in the judgment of the postmaster general, the Enterprise Savings Association was conducting a lottery, or other similar business, through the mails, in violation of section 3894, Rev. St., as amended, and that this fact had "been made to appear to the satisfaction of the postmaster general." This case is therefore not within the authority of *Commerford v. Thompson*, 1 Fed. 417, or *Bank v. Merchant*, 18 Fed. 841. In the case first cited the mail withheld by direction of the postmaster general was not registered mail at all. There was therefore no authority, under the statute, to direct the retention of such ordinary mail matter. In the case of *Bank v. Merchant*, cited above, the order of the postmaster general which found the fact of the unlawful use of the mails had been revoked, and the subsequent orders contained in the opinion of Judge Pardee an insufficient finding of fact.

It has been argued that any discrimination by which the use of the mails is permitted to one citizen, and denied to another, is unlawful, and that the defendant cannot justify a refusal to furnish to all equal facilities by an order of the postmaster general. This is begging the question. The power of the postmaster general to inhibit the use of the mails to any citizen must rest upon the power con-

ferred by congress in that regard. The duty of a postmaster to obey the valid order of the postmaster general is enjoined in the sections of the Revised Statutes we have heretofore set out, as well as by sections 396 and 3834, Rev. St. Congress has not undertaken to discriminate between citizens as to the provisions in question, but has undertaken to discriminate between what matter shall be mailable and what unmailable. The power vested by the constitution in congress "to establish post-offices and post-roads" has been construed universally as authorizing congress to prescribe what should be mailable matter. As said by Justice Field, in speaking for the court in *Ex parte Jackson*, 96 U. S. 732:

"The power possessed by congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

In *Re Rapier*, 143 U. S. 134, 12 Sup. Ct. 374, Chief Justice Fuller said, concerning the right of congress to exclude from the mails matter deemed vicious, that:

"The argument that there is a distinction between *mala prohibita* and *mala in se*, and that congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to congress, in the exercise of a sound discretion, to determine in what manner it will exercise the power it undoubtedly possesses. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question, nor are we able to see that congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged, within the intent and meaning of the constitutional provision, unless congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

It must follow from the exclusive and absolute power of congress over the whole subject of what may be carried, and what may be excluded from the mails, that it was entirely within its competency to confer authority upon the head of the postal department to direct a postmaster to refuse the delivery of registered letters addressed to a person or corporation which was engaged in conducting a lottery enterprise through the use of the registered letter department, or to forbid the payment of a postal money order drawn in favor of one engaged in conducting such a business by means of the assistance of that department of the postoffice, and that he might make such order upon evidence satisfactory to him. Neither the making of such an order, nor its enforcement, required or permitted the opening of any such registered letter, and the statute expressly prohibits the opening of any letter by the postmaster, not addressed to himself. Neither of those departments of the postal service are

essential to the ordinary use of the mails, and congress has reposed in the postmaster general an unlimited discretion as to when and where he would extend the facilities afforded by those departments. Rev. St. §§ 3929, 4027. We see no reason why congress may not confer on him authority to prevent the use of those facilities by any person engaged in using them for the propagation of a business deemed by it vicious, and not entitled to such special facilities in the extension and conduct of such schemes. The authority to inhibit the use of those postal facilities had to be vested somewhere. It was a matter pertaining to executive business, and was therefore imposed upon the executive head of the postal department. In the cases of *Commerford v. Thompson* and *Bank v. Merchant*, heretofore cited, the power of congress to vest such an authority in the postmaster general was not questioned, but admitted, by both Judges Brown and Pardee. The whole question was elaborately considered in *Dauphin v. Key*, 4 MacArthur, 203.

Complainant does not allege that the postmaster general has used his power either maliciously or fraudulently. Its contention simply amounts to this: that he erred in judgment, and that it is without remedy, unless the courts will take jurisdiction, reconsider the facts, and enjoin the defendant from obeying the order, and require him to extend to it the free and unlimited right to use the inhibited facilities in the conduct of its business. Have the courts of the United States jurisdiction to thus control the action of the executive department of the government? The answer must depend upon the question as to whether the refusal to deliver registered mail matter and to pay postal money orders is, under the statutes organizing the postal department, a purely ministerial duty, or does the postmaster general, under the power conferred upon him by congress concerning the circumstances under which he may direct the withholding of registered mail, or forbid the payment of a postal order, exercise judgment or discretion? We shall not undertake to analyze the elaborate and alluring plan under which an uncertain per cent. of the holders of the complainant's bonds may be redeemed at an early day in the progress of the business, and realize an enormous profit, at the expense of others enticed to invest by the prospect of an early and accidental redemption, but who, in weariness, have dropped out, and forfeited their payments. The boundary between such schemes and some of the insurance and investment methods which have managed to escape legal condemnation may be very dim. Judgment as to which side of the line complainant's device belongs would much depend upon what should be taken as the standard of a clearly legitimate enterprise. The honorable postmaster general, when called upon to pass judgment upon the business of this association, may have been somewhat perplexed as to how to deal with a scheme so elaborately arranged as to present, upon one view of it, a legitimate investment business, but which, when looked upon from the other side, seemed to show many of the features characteristic of lottery or other like schemes. The settlement of the question undoubtedly involved the exercise of judgment and discretion, and this very fact operates to

take his duty out of the mere ministerial class, and therefore beyond the control or review of the judicial department of government, by means of mandamus or injunction. In *Mississippi v. Johnson*, 4 Wall. 475, a ministerial duty was thus defined:

"A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted, or proved to exist, and imposed by law."

If the postmaster general could not have been compelled by judicial proceedings to have made an order inhibiting the use of the registry or postal money department by one at the suit of another, because the duty was not purely ministerial, but involved the exercise of judgment and discretion, it must follow that the bona fide exercise of such judgment and discretion under a statute expressly reposing the power would not justify the judicial department in reversing his action by the substitution of its judgment for that of the officer to whom congress had intrusted it. *Marbury v. Madison*, 1 Cranch, 137; *McIntire v. Wood*, 7 Cranch, 504; *Kendall v. U. S.*, 12 Pet. 527; *Decatur v. Paulding*, 14 Pet. 515; *Commissioner of Patents v. Whiteley*, 4 Wall. 534; *Gaines v. Thompson*, 7 Wall. 347; *U. S. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12; *U. S. v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197.

In *Decatur v. Paulding*, cited above, the relator, Mrs. Decatur, claimed a pension both under an act and a resolution of congress. The secretary of the navy was of opinion that congress did not intend that she should have a pension under the act, and another under the resolution, and required her to elect under which she would claim, as they were for different sums. This she refused to do, and applied for a writ of mandamus to compel him to pay her according to her contention. The court refused the writ, saying:

"If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by any head of a department; and, if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their construction of a law must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the act of congress in order to ascertain the rights of the parties in the cause before them. The court could not entertain an appeal from the decision of one of the secretaries, nor reverse his judgment, in any case where the law authorizes him to exercise discretion or judgment; nor can it, by mandamus, act directly upon the officer, and guide or control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. \* \* \* The interference of courts with the performance of the ordinary duties of the executive department of the government would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them." 14 Pet. 515.

The case of *Gaines v. Thompson*, 7 Wall. 347, is instructive. The secretary of the interior having instructed the commissioner of the land office to cancel an entry under which Gaines and others claimed certain lands, suit was brought, praying that the secretary and commissioner be enjoined from so canceling said entry. The defense was that the matter set up in the bill was within the exclusive control of the executive department of government, and that

the courts had no jurisdiction to interfere with the exercise of this power by injunction. The validity of the entry in question depends upon the construction of certain acts of congress, upon the meaning of which there had been different opinions entertained by different secretaries. The writ was refused. After a review of the earlier cases, Mr. Justice Miller said:

"It may, however, be suggested that the relief sought in all those cases was through the writ of mandamus, and that the decisions are based upon the special principles applicable to the use of that writ. This is only true so far as these principles assert the general doctrine that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers, and to them alone; and however the courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus. In the one case the officer is required to abandon his right to exercise his personal judgment, and to substitute that of the court, by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction."

Concerning the merits of the case, he said:

"The action of the officers of the land department, with which we are asked to interfere in this case, is clearly not of this character. The validity of plaintiff's entry, which is involved in their decision, is a question which requires the careful consideration and construction of more than one act of congress. It has been for a long time before the department, and has received the attention of successive secretaries of the interior, and has been found so difficult as to justify those officers in requiring the opinion of the attorney general. It is far from being a ministerial act, under any definition given by this court."

The act done, of which complainant complains, was done in the exercise of a discretion reposed in the postmaster general by express direction of congress, and it cannot be supervised or controlled by the courts. The decree dismissing the bill is therefore affirmed.

#### CALIFORNIA FIG SYRUP CO. v. STEARNS et al.

(Circuit Court, E. D. Michigan. April 1, 1895.)

##### 1. TRADE-MARK—DESCRIPTIVE NAME—"SYRUP OF FIGS."

The words "Syrup of Figs" or "Fig Syrup," being descriptive, cannot be sustained as a valid trade-mark or trade-name, as applied to a syrup one of the characteristic ingredients of which is the juice of the fig.

##### 2 SAME—DECEPTION.

The use of the name "Syrup of Figs," in connection with a description of the preparation as a "Fruit Remedy," "Nature's Pleasant Laxative," applied to a compound whose active ingredient is senna, and containing but a small proportion of fig juice, which has no considerable laxative properties, is deceptive, and deprives one so using it of any claim to equitable relief. *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. 296; on appeal, 4 C. C. A. 264, 54 Fed. 175,—distinguished.

This was a suit by the California Fig Syrup Company against Frederick Stearns & Co. to restrain the infringement of complainant's trade-mark. The cause was heard on the pleadings and proofs.

Paul Bakewell and R. A. Bakewell, for complainant.

George H. Lothrop, for defendants.

SWAN, District Judge. This is a bill in equity seeking to restrain the use by the defendant of the words "Fig Syrup," which it is claimed is an invasion of the right of the complainant, who is engaged in the manufacture and sale of a preparation which it denominates "Syrup of Figs. The California Liquid Fruit Remedy. Gentle and Effective." The label on each bottle of this preparation made and sold by complainant is thus inscribed, and above the words just quoted are the words, "Nature's Pleasant Laxative." On the sides of each bottle are blown the words, "Syrup of Figs," and, on the back, the words, "California Fig Syrup Co., San Francisco, Cal." The package inclosing the bottle has a picture of a branch of a fig tree, with fruit thereon, around which in a circle are the words, "California Fig Syrup, San Francisco, Cal.," and, below this, these words, in large type: "Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California;" and following and immediately below these, in much smaller type, the words: "Combined with the medicinal virtues of plants known to be most beneficial to the human system, forming an agreeable and effective laxative to permanently cure habitual constipation, and the many ills depending on a weak or inactive condition of the kidneys, liver, stomach, and bowels, and is perfectly safe in all cases, and therefore the best of family medicines." The complainant is a corporation organized under the laws of the state of Nevada, having its chief offices in New York, Louisville, San Francisco, and Reno. The defendant is a corporation organized under the laws of the state of Michigan, and has its office at Detroit.

The bill of complaint in substance states that the complainant is, and for many years has been, engaged in the preparation and sale of the liquid, laxative, medical preparation, which is an agreeable and effective remedy against constipation, and is recognized as such by the public and the medical profession; that complainant was the first to make this preparation, and from the first gave to it the name "Syrup of Figs," by which name it has always been called. This name is stamped upon all the bottles of complainant's preparation, and also upon the oblong pasteboard box in which the bottles are inclosed, and upon the box in which they are packed. The complainant alleges also that the words "Syrup of Figs" have come to be known as a trade-name of complainant's preparation. By reason of the premises, and the large investment in advertising and manufacture of the preparation, complainant has the exclusive right to the name "Syrup of Figs," in connection with the liquid, laxative preparation, which is called by the public, indifferently,

"Syrup of Figs" and "Fig Syrup." The charge against the defendant is that, taking advantage of the reputation of complainant's preparation, and with the fraudulent intent to sell its own preparation as that of complainant's, defendant is making and selling a liquid, laxative preparation, which it puts up in bottles and packages, prominently marked "Fig Syrup" in connection with the word "Laxative," and that defendant is thus selling its preparation as that of complainant, and deceiving the public, and trading upon the enterprise of the complainant and its investment, which have made this a popular remedy with the public. The answer of the defendant says, in substance: That from the name of complainant's article defendant is led to suppose that it is a syrup of the fig. The complainant's bottle is always inclosed in a pasteboard box, so that the bottle does not indicate to the customer the name of the manufacturer. That complainant was not the first to manufacture a syrup of figs, or to call a syrup by that name, or to discover or name the fig. That complainants are patent medicine men, and that such people spend large sums to create a demand at an exorbitant price by fictitious advertising. That there can be no exclusive right to the name "Syrup of Figs," which, if the article is a syrup made from figs, is a descriptive name, and, if not so made, is a deceptive name. That defendant makes and puts on the market a laxative fig syrup, which is actually a syrup made from figs, and is properly named "Fig Syrup," and is not so made by defendant for the purpose of taking advantage of the reputation of complainant's article. That defendant's packages are wholly unlike those of complainant. That defendant sells only to druggists, and at reasonable prices, and that the ingredients of defendant's fig syrup are fully set forth by defendant in its catalogue, so that physicians and druggists may know what it contains, and judge of its merits.

The case is unembarrassed by any charge of the simulation of complainant's packages or wrappers, for it is not claimed that defendant has imitated either, nor is there any resemblance between them, but rather a marked and studied dissimilarity in color, design, size, ornamentation, and descriptive statement, save only that defendant terms its preparation "Laxative Fig Syrup." The pith of the grievance alleged is the use by defendant on its bottles and packages of the name "Fig Syrup," or "Laxative Fig Syrup," which it is claimed is but a colorable imitation of the name "Syrup of Figs," given to complainant's manufacture, and which the latter claims has become the trade-name of its preparation. The two questions therefore are: (1) Are the words "Syrup of Figs" or "Fig Syrup" a valid trade-mark? (2) If they are a valid trade-mark, has the complainant, by misrepresentation and deceit, lost its right to protection for such trade-mark? More briefly yet, the questions may be stated thus, as well said upon the argument, and as pleaded in the answer of defendant: (1) Are the words "Syrup of Figs" or "Fig Syrup" a descriptive name? and (2) are they, under the proofs, deceptive?

1. It is well settled that words "which are merely descriptive of the character, qualities, or composition of an article" cannot be monopolized as a trade-mark. *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Corbin v. Gould*, 133 U. S. 308, 10 Sup. Ct. 312; *Goodyear's India-Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166; *Caswell v. Davis*, 58 N. Y. 223; *Canal Co. v. Clark*, 13 Wall. 311. In *Canal Co. v. Clark*, *supra*, the court lay down two negative essentials of a valid trade-mark, and it is there stated:

"No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed."

So, too, no one has a right to appropriate a sign or a symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. If, therefore, the words "Syrup of Figs" or "Fig Syrup" are truly descriptive of the manufacture of both complainant and defendant, they cannot be sustained as a valid trade-mark, for it is not claimed, of course, that complainant has the exclusive right to make syrup from figs. The word "syrup," which is claimed as an essential part of the alleged trade-mark, is defined by Webster as "a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar." The Standard Dictionary defines "syrup" generally as "a thick, sweet liquid," and "specifically, as a saturated solution of sugar in water, often combined with some medicinal substance, or flavored, as with the juice of fruits, for use in confections, cookery, or the preparation of beverages," and adds, "Syrups are commonly named from their source of flavoring." It is evident from these definitions that they afford a wide range of manufacture, and that the word "syrup" is necessarily qualified by that of the substance, or one or more of the substances, which distinguish it to the taste or in its medicinal property. The use of the word "syrup" thus characterized is evidenced by the large number of commercial syrups, each of which is named from that ingredient which gives it flavor or character. Similar instances of its use in connection with other ingredients from which a particular compound is named are rhubarb, maple, lemon, and other familiar preparations employed in cookery, medicine, and for other purposes. That the term "Fig Syrup" is descriptive is also apparent from the testimony of complainant's witnesses Pinniger, Underhill, and others, who substantially admit that it is intended to describe one of the constituents of the preparation. This appears also from the fact that on the bottle the article is termed a "fruit remedy," which is an unmistakable reference to the only fruit mentioned in the name of complainant's compound. The well-understood import of such names as "maple syrup," or the ordinary medicinal syrups, is that the prefix denominates the general term, points to the composition of the article, and indicates its principal or dominating ingredient, which either gives it flavor or medicinal quality. This nomenclature, so well known in pharmacy, if applied to complainant's preparation, can therefore have but one meaning,



and necessarily affirms that the base or essential principle of the article is figs. If the right to use the word "Syrup of Figs" or "Fig Syrup" is exclusive in the complaint, other persons cannot engage in making or selling such syrup, notwithstanding the fact that either of these names might with equal truth be employed by others whose manufactures may even excel complainant's in quality. If this be true, the public would be injured, for competition would be destroyed, and the quality of the article debased. It would also result that any other syrup, with any basal constituent, flavoring or medicinal, would come within the monopoly of the first appropriator of its name. This cannot be maintained. The names "Fig Syrup" and "Syrup of Figs" are not designed to indicate per se the owner or producer of the preparation, and distinguish it from like articles made by others, but were intended, and serve to indicate, even if truthfully used, its quality and composition, and fail to distinguish it from like articles made by others, and cannot be sustained as a valid trade-name. *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625; *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151; *Goodyear's India-Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166; *Caswell v. Davis*, 58 N. Y. 230; *Gilman v. Hunnewell*, 122 Mass. 148.

2. Is the name "Syrup of Figs," as used by complainant, deceptive? It was admitted upon the argument by complainant's counsel that pure fig syrup is not laxative, and that the active principle of complainant's preparation is not figs, but senna; and, further, that the laxative power of figs is mechanical, and lies in the action of the skin and seeds, which are not present in complainant's preparation. The testimony of Queen, who originated this compound, relative to its composition, is as follows:

"The juice of the fig enters into the combination, or rather so much of the soluble part, or so much as we obtain of the soluble part, of the figs, enters into the combination by our method of treating the same, in a largely diluted liquid form. Q. Then, when you state that you use a hundred pounds of figs to one thousand gallons of the mixture, you mean, I presume, the soluble portion produced from the one hundred pounds of figs? A. Yes, sir. Q. You don't mean to say that you utilize the entire one hundred pounds? A. No, sir. We get rid of the seed and rind, and possibly of some of the pulpy matter. Q. So that the mixture of one thousand gallons would have but one gallon of this substance from the fig? A. Yes, sir. I say one; it might possibly be two; but I don't think it would amount to more than that. Q. Might possibly be less than one gallon? A. Possibly. If the figs happen to be very dry and hard, and more of the seeds and less of the soluble matter than usual."

He further says: "I have made experiments at different times, so as to form some intelligent opinion as to the quantity of the soluble part of the fig obtained, but we consider the quantity of figs in the composition as unimportant, and consequently do not endeavor to get the exact amount every time," and that if he was "to make it exactly the same, without putting in any fig juice," it would still have the same purpose, effect, and flavor, and be of the same color and appearance, and be just as good a medicine, without as with the figs. He also testifies that when he first got up the combination, his idea was to make it pleasant to the taste, and for that purpose put in figs, but before concluding his experiments decided that he would have to make a remedy that would give entire satisfaction, regardless

of the quantity of figs used; "and, knowing that the figs had no medicinal virtue in medicinal doses, and intending that the laxative should act in doses of from one-half to one tablespoonful, I came to the conclusion that the figs were superfluous; but, as I had started in to make it that way, I continued to put in the figs." He adds, "We still continue to put in the fig juice, though we regard it as superfluous, excepting that we think that a certain amount of fig juice is not objectionable," and admits that he does not think a person would tell the fig juice by the taste or flavor, or that they would be sensible of any purgative effect from the figs, and that a syrup produced from figs would have no medicinal or commercial value; that the juice of that fruit is too uncertain in its action, and too weak in its effect, to be administered as a laxative. The deposition of Gardner, defendant's witness, shows that defendant's fig syrup contains nine-twentieths syrup of figs, ten-twentieths fluid extract of senna, and that the other one-twentieth is made up of Rochelle salts, aromatics, and water. It is apparent from these facts that if the equities of the parties are dependent upon the quantity of fig juice which enters into their respective preparations, they largely preponderate in favor of defendant. It is equally apparent that complainant makes and sells its wares to the public under the representation that the active and controlling ingredient is derived from the fig, while in fact, under its own proofs, the juice of that fruit has no medicinal value, and is lacking in the potency required for a laxative. The main objects sought to be secured by the protection of trade-marks are the protection of the public against the purchase of inferior articles in the belief that they are a product or manufacture of a maker or dealer in whom they repose confidence, and whose goods alone they desire to purchase; and, second, to secure to the person who has first adopted and used a particular trade-name, under which he has sold his wares, the profit he might make by the sale of the goods for which his skill and integrity have obtained a reputation. *Manufacturing Co. v. Trainer*, 101 U. S. 51. It is a condition, however, of equitable relief to one who applies for the protection of his trade-mark, that the complainant should come into court with clean hands. The case of *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523, states the principles upon which such relief is administered as follows:

"When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representations, for if the plaintiff himself makes false statements in connection with the property he seeks to protect, he loses, and very justly, his right to claim the assistance of a court of equity. Again, where a symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it, or in any other words; the right to the exclusive use of it cannot be maintained."

This case is freely quoted and approved in the case of *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436. The same doctrine is

tensely put in the quotation in the last-mentioned case from *Fetridge v. Wells*, 4 Abb. Pr. 144:

"Those who come into a court of equity seeking equity must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must themselves be free from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentations and falsehood, they cannot be listened to when they complain that by the fraudulent rivalry of others their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

The doctrine of these cases is of special application to the position of complainant, whose argument, *inter alia*, is that the preparation of defendant is not a syrup made from figs; that, were it such, it is in no sense a laxative medicine; and that its sale as a true syrup of the fig, and, as such, a liquid, laxative medicine when taken in medicinal doses, is a fraud upon the public, and an injury to the good will of complainant's business. Queen, whose testimony has already been referred to, in explaining the reason for the name given to complainant's compound, admits that in its selection "probably the wish to have the benefit of the popular impression that figs are laxative in large quantities, knowing that at the same time we can use the name in a fanciful sense, because of the fact that figs do not act as a laxative in medicinal doses, might have influenced me." To the same effect as to the popular impression created by a name is the testimony of Redington, Pinniger, Hummel, Love, and Fitch, who are each called by complainant. There can be no doubt, therefore, either that the complainant's preparation is not in fact compounded of the juice of the fig, but its principle is senna, or that its name was adopted and is used for the purpose of trading upon the popular fallacy that the juice of the fig in medicinal doses is an effectual remedy for constipation,—an impression which is admitted to be without foundation,—or that the ordinary purchaser buys the compound as and for the fruit remedy which it is advertised and asserted to be. The law applicable to this state of facts is as clear as their purpose and effect. It will not lend its aid to foster the delusion of the public or countenance the deceit. The authorities on this point are harmonious. In addition to those cited, the cases of *Burton v. Stratton*, 12 Fed. 699; *Krauss v. Peebles' Sons Co.*, 58 Fed. 585; *Syrup Co. v. Putnam* (U. S. Cir. Ct., D. Mass.; not yet officially reported) 66 Fed. 750,—collate the authorities with exhaustive research. The relief prayed by complainant is in truth the privilege of selling its preparation of senna under the name of "Fig Syrup." Whatever the virtues or popularity of the complainant's specific, there is no ground on which such relief can be granted.

The cases of *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. 296; on appeal, 4 C. C. A. 264, 54 Fed. 175,—take a different view of the character of complainant's trade-mark. The bill was demurred to. The basis of this suit, as stated by the court, "was the effort of respondent to imitate the trade-mark of complainant,

and to thereby represent to the public that its goods were those of complainant." The devices on the bottles, wrappers, and packages of complainant were closely, and for some time exactly, imitated by defendant, and, as said by the court, defendant's "first, and almost exact, imitation of complainant's packages and device showed not the advertisement of a new article with a reputation to make, but the counterfeiting of an old article with a reputation already made, and the change in the device was and is an attempt to preserve the deceit, and yet avoid a liability for it." Judge McKenna expressly stated, in reply to defendant's claim that complainant's trade-mark was descriptive and deceptive, that "the question is now, not whether complainant has the exclusive right to use the words 'Fig Syrup' or 'Syrup of Figs,' but it is whether respondent has by use of them and other words, and by the other imitations alleged and exhibited, so far imitated the form of complainant's device as to represent its goods as its [complainant's] goods, and appropriate its reputation and trade. \* \* \* The gravamen of the action is the simulation of complainant's devices and the deception of purchasers." The injunction was granted because of such imitations. On appeal from this order it was affirmed, the court of appeals, in the last paragraph of its opinion, saying: "As we construe this restraining order of the court below, it simply excludes the use by appellants of trade-marks, bottles, wrappers, and devices used in offering their preparation to the public similar to those applied by appellee to its preparation for a similar use and purpose." It is true that the court of appeals discuss at some length the character of complainant's trade-mark; yet, with all deference to the opinion of the learned court, it would seem from its concluding paragraph, quoted *supra*, that its expression upon this point was not necessary to the decision of the case presented, and that the true ground for the relief granted was the manifest equity of complainant to have the defendant restrained from unfair trade, independent of the question arising upon the validity of the trade-mark in controversy. *Goodyear's India-Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 604, 9 Sup. Ct. 166; *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625. However this may be, I am unable to accept its conclusions upon the character of complainant's trade-name. The bill of complaint is dismissed, with costs.

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## LAUFERTY v. KURSHEET MANUF'G CO.

(Circuit Court, S. D. New York. June 5, 1895.)

## 1. PATENTS—WHAT CONSTITUTES INVENTION.

There is no invention in substituting, for the solid needles of a braiding machine, tubular needles, for feeding the thread in making purl-edge braid, it being common to feed thread into braids by means of tubular needles.

## 2. SAME—BRAIDING MACHINES.

The Lauferty patent, No. 430,846, for an improvement in braiding machines, is void for want of invention.

This was a bill by Henry Lauferty against the Kursheet Manufacturing Company for alleged infringement of a patent relating to braiding machines.

F. R. Coudert and David Keane, for complainant.  
A. v. Briesen and M. A. Kursheet, for defendant.

COXE, District Judge. The complainant is the owner of letters patent No. 430,346, granted to him June 17, 1890, for an improvement in braiding machines. The bill is in the usual form and prays for an injunction and an accounting. The principal question is of invention. The claims relate to combinations each element of which is old, except the tubular or grooved needle which is substituted for the solid needle similarly mounted in the old machines. Tubular needles were also old and had been previously used to do similar, but, perhaps, not identical work. In other words, this patentee had before him an operative braiding machine precisely like the machine of the patent save that it was provided with a solid needle. He also had before him tubular needles used as thread guides in braiding machines. He took two of these needles out of interjacent circles and placed them in the terminal circles of the race plate. All this is conceded. Did it tax the inventive faculty to do this? Other threads had been fed into braid by hollow needles, did one who fed the "beazer" thread in this way become an inventor? The question cannot be more tersely stated than by the expert witness for the complainant. He says:

"The prior art relating to braiding machines shows that long prior to complainant's patent it was common to feed wires, threads and other bodies into braid by means of hollow tubes. I do not wish to be understood as saying that the combination recited in complainant's patent had ever been used, for such I do not find to be the case; but that, for instance, in making whips the core of the whip was fed through a hollow tube, or for making various kinds of braids, heavy and strong threads were fed through hollow tubes. Therefore it seems the most obvious thing in the world for a mechanic called upon to make a braiding-machine for making purl-edge braid to use hollow needles; but the fact is that prior to the date of complainant's patent they did not do it, which to my mind proves that it was not obvious then and to them, however obvious it now appears to me. \* \* \* Prior to complainant's patent solid needles were used in braiding machines to produce a purl-edge braid."

Assuming that the complainant was the first to use the combinations of the claims, the court cannot assent to the proposition that it involved invention, after the Benjamin machine, for instance, was adjusted to produce a flat braid, to place the feed tubes there shown in the terminal circles. If the complainant has done more than this the court fails to perceive it.

Conceding that the complainant's braid has a finish superior to that produced by the solid needles, and this is by no means clear from the testimony, still, no new result is produced. The complainant has changed the location of the old hollow needle in the old braiding machine. This was the work of the skilled artisan, not of the inventor. It would naturally occur to the former when adjusting the machine for a flat braid. Complainant invented

neither needle nor machine. At best he placed the old needle in a slightly changed position and thus did at the edge what others had done at the center of the braid, and elsewhere. Prior to October, 1889, the art was such that a manufacturer was at liberty to use a hollow needle to carry any thread he desired into the braid. The selection of a particular thread did not make him an inventor. The bill is dismissed.

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KILMER MANUF'G CO. v. GRISWOLD et al.

(Circuit Court of Appeals, Second Circuit. April 23, 1895.)

No. 93.

1. APPEALS FROM INTERLOCUTORY DECREE—CIRCUIT COURT OF APPEALS—PATENT CASES.

Where both parties appealed from an interlocutory decree finding that one claim of a patent was invalid, and that another claim was valid and infringed, and directing an injunction and accounting, *held*, that the only appeal which could be considered by the circuit court of appeals was from so much of the decree as granted an injunction.

2. PATENTS—INVENTION—INJUNCTION AGAINST INFRINGEMENT—BALE TIES.

The Kilmer patent, No. 372,375, for an improvement in adjustable bale ties, *held* to be apparently without invention, as to its second claim, in view of the Griswold patent, No. 322,442, and the prior Kilmer patent, No. 282,991; and *held*, therefore, that an interlocutory decree granting an injunction to restrain infringement thereof should be reversed. Shipman, Circuit Judge, dissenting. 62 Fed. 119, reversed.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a bill by the Kilmer Manufacturing Company against J. W. Griswold and F. B. Griswold for alleged infringement of patents Nos. 282,991 and 372,375, issued to Irving A. Kilmer August 14, 1883, and November 1, 1887, respectively, for improvements in adjustable bale ties. Upon the hearing, complainant's contention was confined to the second claim of each patent. The circuit court held that the second claim of No. 282,991 was invalid, and that the second claim of No. 372,375 was valid, and had been infringed by defendants, and decreed an accounting, and an injunction restraining them from future infringement. 62 Fed. 119. From this interlocutory decree both parties have appealed.

W. H. Singleton and S. A. Duncan, for complainant.

Edwin H. Brown, for defendants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Inasmuch as the decree of the circuit court is not final, the only appeal which can be considered is from so much of such decree as grants an injunction. The bale tie of No. 282,991, as complainant contends, possessed the following

characteristics: (1) A band made of wire. (2) A clasp made of wire, and of larger gauge than that of the band, and presenting a rounded bearing surface to the band wire. (3) A pinching angle in the wire clasp, formed by bending the wire composing the clasp into the form of a V, having an apex smaller than the diameter of the band wire. (4) Such a union between the band wire and the clasp that the pull upon the band arising from the expansive force of the bale will operate to hold the sides of the pinching angle from spreading under the wedging action of the free end of the band.

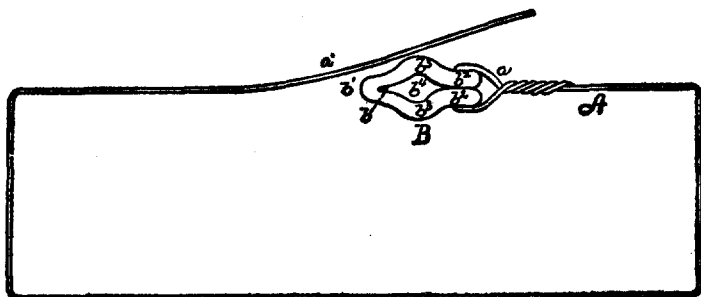


Fig. 1.

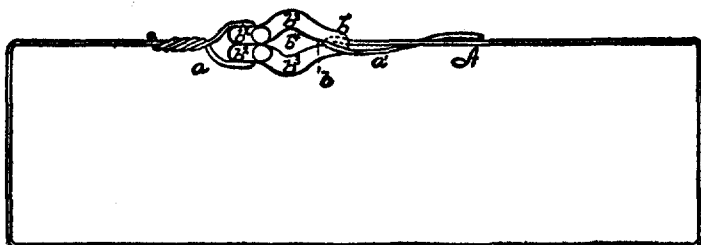


Fig 2

It is manifest that the tendency of a wire forced down into the angle of the V is to spread the arms of the V apart. This is overcome in the patent by prolonging the arms, and inclining them inward until they touch each other; thus forming, approximately, a diamond-shaped aperture, into one corner of which the loose end is forced, and then placing an eye or loop at the extremity of each arm, through which the clasp end of the wire is passed, and made fast. Whenever expansion of the bale forces the loose end of the wire deeper down into the angle, the same expansion draws the two eyes tighter together, and thus prevents any spreading of the arms of the V. The circumstance that the clasp is made of wire very much stouter and stronger than the band wire prevents the elongation of the diamond-shaped aperture, and any consequent drawing together of the sides which form the V-shaped angle. Patent No. 372,375 declares that:

"This invention is an improvement upon U. S. patent No. 282,991. In this patent [meaning No. 282,991] the band has a clasp made of wire much larger than that of which the band is made. This clasp has an angle in which the loose end of the wire of the band is caught and bound when the bale expands. In this patented device [still referring to No. 282,991] the ends of the clasp are close together where the clasp is secured to the band, and hence when the bale expands the clasp maintains its normal position."

Fig. 1.

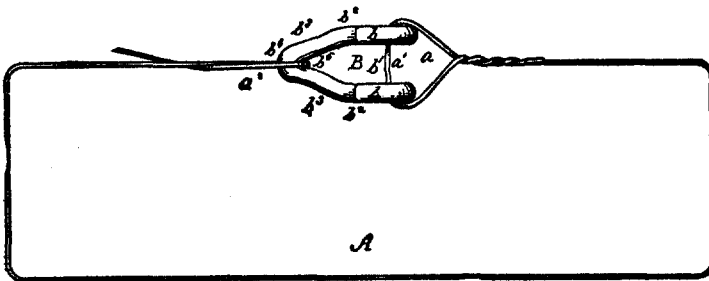
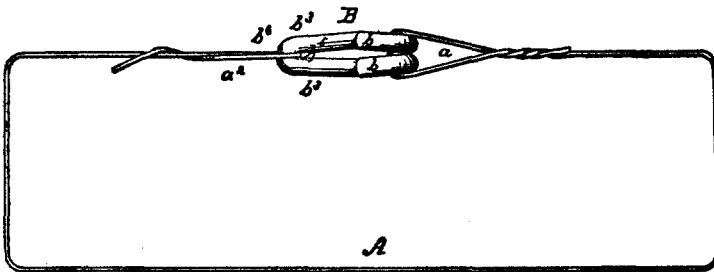


Fig. 2.



Then follows a description of the drawings, the essential feature of which is the clasp, B—

"Substantially a V-shaped piece of \* \* \* wire, the ends, b, of which surround the [loose end of the bale wire when placed in the angle of the V], and are spread some distance apart, \* \* \* and not in contact, as in the patent [No. 282,991] referred to."

The arms of the clasp form the angle  $b^5$ . The patent proceeds:

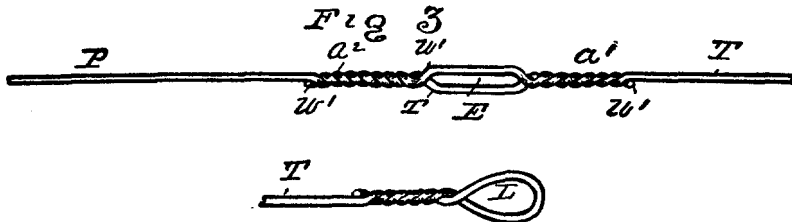
"In use, after the bale is compressed, the band is placed about it, and the loose end,  $a^2$ , is inserted into the angle,  $b^5$ , and twisted about itself. The bale, being released, expands, tightening on the band. This causes the sides,  $b^2$ , to come towards each other until the ends, b, contact. The result is that the wire, A, is not simply held in the angle by being pulled therein, as shown in the patent referred to [No. 282,991], but there is a positive action of the clasp, so that the wire is not only pulled into the angle, but also the clasp is jammed against the wire, thus forming a double security against the wire being pulled out."

The claim relied on is:

"(2) The band, A, having the clasp, B, with the angle,  $b^5$ , and its ends, b, apart, as set forth."



The extent of this improvement is quite clearly set forth. By reason of the circumstance that the prolongations of the arms of the V do not curve inward, and normally contact, the pressure exerted by the expansion of the bale operating to pull the wire which is rove through the eyes at the ends of the V arms, draws them together so that they nip the loose end of the band wire in the angle. Devices performing similar functions in a similar way were known in analogous arts. A sufficient illustration of these is found in the stocking supporter of the Phelps patent, No. 301,150. It is unnecessary to discuss the effect of such prior devices. The circuit court disregarded them, holding that the fundamental idea of this patent, 372,375, was new, as applied to bale ties, and that as Kilmer was the first to employ, in a bale tie, a clasp which added this gripping action to the wedging action of his earlier patent, his patent disclosed a meritorious invention, and should be sustained. The court, however, seems to have overlooked the patent to F. B. Griswold for a bale tie, No. 322,442, issued July 21, 1885, nearly two years before complainant's application. The clasp of this tie is best shown in Fig. 3 of that patent, as follows:



The end, P, is passed through a loop at the other extremity of the bale wire; is then turned backward, passed through the eye, E, and bent under the twisted wire shown between  $a^2$  and  $w^1$ . It rests then in the V-shaped angle formed by the arms,  $w^1$  and  $T^1$ . The pressure produced by the expansion of the bale operates to wedge the wire, P, into that angle; and at the same time the pull in the direction of the band wire, T, elongates the eye, E, and thus brings the sides of the V closer together, so as to nip the wire in the angle. Complainant's device is much simpler than this, and is applicable to all sizes of bale tie, while this Griswold device could probably be used to advantage only with what are known as "dimension" bale ties, which are used for bales of uniform circumference. Still, this Griswold device does show the addition of a gripping action to the wedging action, and that, too, in a clasp for bale ties. Moreover, this Griswold device is not open to the objection formulated in *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, viz. that, although it might be made to accomplish the function performed by the patent in question, "it was not designed by its maker, nor adapted, nor actually used, for the performance of such functions." The specification of the Griswold patent, No. 322,442, after describing the method of passing the end of the wire, P, through the loop and the eye, says:

"When the parts are thus connected, and any strain is brought upon the tie union, such strain tends to close in the sides of the eye, E, so as to more firmly hold the wire, P, in its clutch; and hence the latter need only be secured beyond the eye, E, by any means that will keep it where bent, towards the loop, so as to rest on the bale, or against itself."

With this patent in the prior art, it is difficult to see how there could be patentable invention merely in adding a gripping action to the wedging action in a clasp which, in all its other details, was covered by the first Kilmer patent, and that addition is all that is described or claimed in this second Kilmer patent. The decree of the circuit court is reversed, with costs, and cause remitted, with instructions to decree in conformity with this opinion.

SHIPMAN, Circuit Judge (dissenting). The reason of my dissent from the conclusions of the majority of the court is as follows: The improvement in No. 372,375 consisted in the substantial separation of the elastic ends of the clasp, so that, when pulled together by the expansion of the bale, they would give to the clamp a gripping action. I agree with Judge Coxe that the device of the Foote patent (No. 139,899), upon which, apparently, the most reliance was placed by the defendants' experts, was not an anticipation, and for the reasons which he states. The device of the F. B. Griswold patent, No. 322,442, dated July 21, 1885, is regarded by the majority of the court as embodying the idea of closing the sides of the clamp, and thereby gripping the tie wire in so substantial a manner as to preclude the existence of patentable invention in the device of the second claim of No. 372,375. As has been said, the improvement in this claim consisted in the separation at some distance from each other of the elastic ends of the clasp. The clamp of the F. B. Griswold patent was an eye formed by doubling the tie wire back upon itself, twisting the two parts together, leaving an untwisted place to form the eye, and then twisting the two parts together again. At each end of the eye the wires close together, and form an angle. It is true that by the strain of the expanding bale the sides of the eye are probably brought together so as to hold more firmly the wire in its clutch, and that thus Griswold had in his mind the idea of a gripping movement. Kilmer made this idea far more available by separating the sides of the clamp, giving them loose play at the end opposite the V-shaped angle, so that the gripping action, when they were pulled together, was powerful. In my opinion, Kilmer's departure from Griswold's attempt at a gripping action was sufficiently marked, substantial, and operative to constitute invention.

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GEO. L. THOMPSON MANUF'G CO. v. WALBRIDGE.

SAME v. HAFF et al.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

PATENTS—INVENTION—CURLING IRONS.

The Thompson patent, No. 460,709, for an improvement in curling irons, consisting essentially in the shape and location of the spring between the handles, is void for want of invention. 60 Fed. 91, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These were suits by the George L. Thompson Manufacturing Company against John H. Walbridge, and against Edward F. Haff and Louis S. Coe, respectively, for infringement of letters patent No. 460,709, granted October 6, 1891, to George L. Thompson, for an improvement in curling irons. The circuit court dismissed the bills. 60 Fed. 91. Complainant appeals.

C. Clarence Poole and Taylor E. Brown, for appellant.  
Esek Cowen, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This invention related to a curling iron of the class having two jaws, one of which is a solid mandrel, and the other is a clasp, pivoted thereto, and adapted to fit against the convex surface of the same; said jaws being each provided with a handle, and being closed and held together by the action of a spring, and opened by pressure of the hand upon the handles. The specification further says that the spring is placed "between the separated shanks of the mandrel and clasp, with its bent portion adjacent to their point of pivotal connection, and is attached at its ends to said shanks." One end of the spring is inserted into an inclined notch, cut in the inner side of the shank or handle part of the mandrel, and the other end is attached to the other shank by engagement at its end with a lip. In arranging the spring between the shanks the specification points out that:

"Care is taken, in bending and locating the same, that it will only touch the same shanks at the points where it is connected with them, which point is so remote from the jaws themselves, and so far back of the pivoted point, that heat is not likely to reach the spring through the shanks to an extent sufficient to impair the efficiency of the spring."

The first claim of the patent is as follows:

"(1) A curling iron, comprising a mandrel, a clasp, pivoted thereto, said mandrel and clasp being each provided with a relatively long outwardly deflected shank, a plate spring bent upon itself, and secured at its ends near the rear ends of said shanks, said spring being suitably bent so as to come into contact with the said shanks only at their points of connection with the same, and handles arranged upon said shanks, substantially as described."

The second claim is, in the same terms, except that it provides for wooden handles.

Judge Coxe dismissed the bills, upon the ground that, in view of letters patent to Mark Campbell, No. 294,309, dated February 26, 1884, and to Charles H. Bissell, No. 384,418, dated June 12, 1888, the patent in suit was void for lack of invention. The Campbell device is almost exactly like the invention of the patent, but differs from it in one particular, which the appellant deems important. The inner sides of the Campbell handles were provided with grooves for the reception of the sides of the spring, and the spring was removably retained in place by frictional contact with the parts against which it bears, whereas the spring of the Thompson device is secured at its ends near the rear ends of the shanks, and comes in contact with

them nowhere else, and it is said that its removal from contact with the jaws prevents the spring from becoming overheated. The spring of the patent in suit is a very familiar article. A U-shaped spring fastened to the inside of the handles of a pair of scissors or of shears, which did not touch the handles except at the point of contact, is well known, and is seen, though not as a novelty, in divers letters patent. If the defect in the spring of the Campbell device, or in any spring which was similarly fastened, consisted in the danger of injury to it by reason of its proximity to the heated shanks, an obvious remedy was to place the spring further from the sides of the shanks. The use of the Thompson spring, rather than of the spring of the Campbell iron, cannot rise to the dignity of invention. The decrees of the circuit court are affirmed, with costs.

END OF CASES IN VOL. 67.